

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of George William Dumbell and Lewis Geneste Howard, carrying on business under the firm of "Dumbell, Son, and Howard," and The Isle of Man Railway Company, Limited, John Watson and John Bevan Smith, trading as "Watson and Smith," and John Pender, from the Court of Chancery in the Isle of Man; delivered April 22nd, 1880.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

IN this case George William Dumbell and Lewis Geneste Howard, carrying on business under the firm of Dumbell, Son, and Howard, recovered a decree on the 17th February 1875 against Messrs. Watson and Smith for the sum of 3,413*l.* 15*s.* 6*d.* On the 3rd March 1875 they proceeded to execute the decree, and the Coroner took pawn of or attached a sum of money alleged to be due by the Isle of Man Railway Company to the said Messrs. Watson and Smith. Messrs. Dumbell, Son, and Howard and the Coroner thereupon presented a petition to the Court of Chancery in the Isle of Man, setting forth the above-mentioned facts, and also stating that they were informed and believed that it was matter of dispute between the railway company and the said Watson and Smith as to whether any, and, if any, what, sums of money were payable by the former to the latter, and they prayed that an account should be taken of what was due

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from the railway company to Watson and Smith, and that the railway company should be ordered to pay over to the Coroner the amount, if any, which the company might be found liable to pay to the said Watson and Smith, or a sufficient portion thereof, to be applied by the said Coroner towards the discharge of the said decree. Mr. Pender appeared and made a claim to any sum which might be due from the railway company to Watson and Smith.

It is now admitted that a sum of about 5,000*l.* was due from the railway company to Watson and Smith, and the question is whether the Appellants were entitled to attach that amount. That depends upon whether Mr. Pender, who claimed under an equitable assignment of the 13th February 1873 and certain letters which will be presently noticed, was entitled to the amount due from the company. The assignment was by a deed set out at page 17 of the Record, by which the said Watson and Smith, in consideration of the sum of 5,000*l.* advanced by Pender to them, assigned to Pender, amongst other things, all moneys, debentures, and fully paid-up shares to which Watson and Smith might on and after the 19th day of May 1873 be or become entitled from the said railway company, whether under a certain recited agreement of the 17th day of May 1872 or under any other contract or agreement that might be then existing between the said Watson and Smith and the said railway company; to have, hold, receive, and take the said moneys, shares, and debentures, and other the premises thereby assigned or intended so to be unto and by the said John Pender, upon trust to secure the due payment of the sum of 5,000*l.* advanced by the said John Pender as in the said deed mentioned,—and also of all other sums which might thereafter become due from Watson and Smith to the said John Pender,

whether in respect of principal, interest, discount, commissions, or otherwise howsoever. The 5,000*l.* mentioned in the deed was paid off; but subsequently Watson and Smith requested Pender to become security for them for moneys to be advanced to them by the Consolidated Bank. Pender accordingly became security for them, and he afterwards, in consequence of his guarantee, had to pay the amount; at least it is a question how much he paid under it, but he claimed to have paid the sum of 5,000*l.* The question is whether by virtue of the assignment he had an equitable interest in the debt due from the railway company to Watson and Smith as a security for the money which he paid by virtue of his guarantee.

It is said in the first place that the words "all other sums of money which may hereafter become due from the contractors to the said John Pender," &c. do not include the payment made by Pender under his guarantee; and that, the assignment having been given originally for an advance, those general words were intended to apply only to any future advances which Pender himself might make to Watson and Smith. But their Lordships are of opinion that the general words "or otherwise howsoever" included not merely advances which Pender might make to Watson and Smith, but also moneys which he became liable to pay for Watson and Smith in consequence of his having guaranteed to others the repayment of money which they advanced to Watson and Smith. There was very little difference, as regards the interest of Watson and Smith, whether Pender advanced the money himself or had to pay under his guarantee moneys advanced by the Consolidated Bank. Their Lordships are of opinion that the deed of the 13th February 1873 constituted an equitable assignment to Mr. Pender of the moneys due by the railway company for the amount paid under his

guarantee. It is not disputed that Pender gave notice of that assignment to the railway company. It is not necessary, therefore, to consider whether by virtue of the law in the Isle of Man a judgment creditor can, as it has been contended in argument on the part of the Appellants, seize in execution property belonging to another which is left with the consent of the true owner in the order and disposition of the judgment debtor, because it is clear that the debt due from the railway company did not remain in the order and disposition of Watson and Smith after notice had been given to the railway company of the equitable assignment to Mr. Pender.

It was contended on the part of the Appellants that the guarantee by Pender was given on the faith of certain other securities which were given to him, and not on the faith of the equitable assignment of the 13th of February 1873. The first of those securities is at page 20 of the Record, and is dated the 17th July 1873. It is a letter written by Watson and Smith to the solicitor of Mr. Pender, and was in the words following: "Dear Sir,—In consideration of Mr. Pender's guaranteeing a loan to us of 5,000*l.* by the Consolidated Bank, we hereby undertake to execute any agreement you may require to give him as security upon the Porto Alegre shares we have transferred to him, and upon any moneys, shares, or debentures we may be entitled to receive from the Isle of Man Railway Company under our contract with that company, we, of course, agreeing to pay all charges in the matter." Then again, on the 9th January 1874, in a letter to Mr. Pender himself, they say: "In consideration of your guaranteeing the renewal for three months of the loan to us of 5,000*l.*, we hereby agree that you shall hold the 6,000*l.* in fully paid-

“ up 6 per cent. preference shares of the Porto
“ Alegre Railway Company, now standing in
“ your name, as security for the due payment
“ of said loan at maturity. We also agree,
“ by way of further security, to assign you, in
“ such manner as may be approved by your
“ solicitor, any moneys receivable by us from
“ the Isle of Man Railway Company, Limited.”

By this letter Messrs. Watson and Smith gave to Mr. Pender an actual equitable assignment of the railway shares, and also agreed, by way of further security, to assign to him, in such manner as might be approved by his solicitor, any moneys receivable by them from the railway company. It is said that that was not an actual assignment, but merely an agreement to assign if an assignment should be required. But whether the letter amounted to an agreement to assign or to an actual assignment, it appears to their Lordships that that did not abrogate or supersede the equitable assignment of the 13th of February 1873.

Mr. Pender did not, by becoming surety to the Consolidated Bank under the request contained in the letters, give up the security of the first equitable assignment. He might well have regarded the letters as merely offering additional security. At any rate he gave the guarantee without requiring any further assignment of the moneys due from the railway company than that which he then held. Surely he was not bound to say to Messrs. Watson and Smith, “ I will give the guarantee, but I cannot consent to do so unless you will strike out of your letter all those words by which you say you will give me, as a further security, such an assignment of the moneys already assigned as I or my solicitor may require.” The same reasoning applies to the subsequent letter of the 14th April 1874.

It appears to their Lordships, then, that by virtue of the deed of the 13th February 1873

Mr. Pender had an equitable assignment of the debt due from the railway company to Messrs. Watson and Smith, and that that assignment was not abrogated or superseded by the subsequent letters.

The Court was right, therefore, in referring it to the Master to ascertain and report what amount was due to Mr. Pender by virtue of the assignment of the 13th of February 1873. The Order, however, of the learned Judge who decided the case refers to the letters of the 17th July 1873, 9th January 1874, and 14th April 1874 as also creating an equitable assignment.

In the view which their Lordships take of the case it is unnecessary to decide whether the subsequent letters created an equitable interest, or whether, without notice of those letters to the railway company, Mr. Pender would by virtue of them have had an interest in the debt due from the railway company which he could enforce in preference to the decree holders.

Their Lordships think it right to amend the Order in point of form by limiting the creation of the lien to the deed of the 13th February 1873.

They, therefore, will humbly advise Her Majesty that the decree made in this case be altered and varied in form by declaring that the said Messrs. Watson and Smith, by the agreement of the 13th February 1873, created an equitable assignment in favour of Pender as a security for the sum therein mentioned, and for such further sums as might thereafter become due to him from the said Messrs. Watson and Smith; and that such security covers and includes the amount which Mr. Pender paid under the guarantees mentioned in the letters of the 17th July 1873, 9th January 1874, and the 14th April in the same year.

Their Lordships also order that the Appellants do pay the costs of this Appeal.