Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Melbourne Banking Corporation, Limited v. *John Brougham, from the Supreme Court of the Colony of Victoria; delivered Saturday, 25th January* 1879.

Present:

Sir James W. Colville.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

This is an appeal from a Judgment of the Supreme Court of Victoria, affirming an Order of Mr. Justice Molesworth, which overruled a plea filed by the Appellant, the Melbourne Banking Company, in bar to a Bill brought against them, as mortgagees in possession of certain sheep runs and other property. The Bill prayed that an alleged sale by the Bank might be set aside, and also for an account of all moneys received under the mortgage upon sales or otherwise.

The facts alleged in the Bill, so far as they are material to the question in the appeal, may be shortly stated. The Plaintiff, John Brougham, on the 20th May 1867, conveyed the property to the Bank by way of mortgage, to secure the payment of certain moneys, with power to sell in case of default. The Bank, upon default being made, and under an arrangement with the mortgagor, entered into possession. Some time afterwards the estate of Brougham was placed under sequestration upon his own petition, and became vested in John Goodman as official assignee, by virtue of the Colonial "Insolvency Statute, 1865." The Bill sets out the title of Brougham derived from the official assignee (which it may be observed is subsequent in date to the release of the equity of redemption alleged in the plea); it states that, on the 13th December 1873, John Kennedy, as agent of Brougham, who had then received a certificate of conformity, purchased from Goodman, "for a valuable consideration," the whole of the right, title, and interest of Goodman as official

assignee in the sequestrated estate. The Bill further states that Goodman and John Kennedy having died, Jacomb, who had been appointed official assignee of Brougham's estate, and William Kennedy, the surviving executor under John Kennedy's will, joined in conveying to Brougham, by a deed of the 2nd March 1877, the whole of the sequestrated estate. The Bill charges that the Bank pretended that Goodman released the equity of redemption to it, and submits he had no power to make such a release, and prays for relief on the footing of the mortgage being still open.

It is to be observed that Brougham is suing not on his original right as mortgagor, but on a title derived by purchase from the official assignee.

The plea commences by setting out a verbal agreement between Goodman as official assignee and the manager of the Bank, who is alleged to be its duly authorized agent, as follows:—

"That after the sequestration of the estate of "the Plaintiff as in the Bill alleged, and on a day "the exact date whereof the Defendant is unable "to state, but shortly before the date of the in- "denture herein-after set out, it was verbally "agreed between this Defendant by Walter Robert "Johnson, its manager and duly authorized agent, "and John Goodman, in the Bill mentioned the "official assignee, in whom the estate of the "Plaintiff was then vested, that the said John "Goodman should execute to this Defendant a "release of the equity of redemption in the "property, subject to the security created by the "indenture of the 18th day of May 1867 in the Bill "mentioned, and that in consideration thereof this "Defendant should not prove any debt upon the "said estate." It then sets out a deed, dated the 30th May 1870 (which, it is alleged, was endorsed on the deed of mortgage), by which Goodman conveyed the equity of redemption, and all interest in the property, to the Bank. The plea states that in this deed it is recited "that there was due and owing to "this Defendant the sum of 18,900*l.*, or thereabouts, "on the security of the indenture of the 18th day "of May 1867, in the now stating indenture referred "to as the within written indenture, and that the "whole of the sheep runs or stations, chattels, and "premises, which were comprised in and described "in or subject to the within written indenture,

" were valued by this Defendant at the sum of " 15,000*l.*, or thereabouts, and that the said John " Goodman, being satisfied that the aforesaid sum " of 18,900, or thereabouts, was due and owing to " this Defendant, as aforesaid, and that the then " value of the property described and comprised in " or then subject to the within written indenture " did not exceed the sum of 15,000*l.*, had elected " and agreed to execute the assignment to this " Defendant which was therein-after contained."

It appears to their Lordships that the word "agreed" in the above recital may properly be held to refer to the antecedent agreement, if it was made as in the plea alleged. In the operative part of the deed the conveyance is expressed to be " in " pursuance of the said agreement and in consider- " ation of the premises, and of the sum of 18,900*l.*, " or thereabouts, so due and owing to the said " Corporation as aforesaid."

The plea then alleges that the Bank never proved, or attempted to prove, the mortgage debt under Brougham's sequestration.

An answer filed in support of the plea denies the pretences alleged in the Bill.

In discussing the validity of this plea, it must, their Lordships think, be assumed, and the grounds of the decisions in the Courts below do not seem to be inconsistent with such an assumption, that the agreement and release stated in the plea were the result of a fair and honest accounting and bargain, not impeachable on the grounds of mistake or flagrant error, or of fraud upon the official assignee, or collusion between him and the Bank to cheat the creditors. If these assumptions are not warranted by the facts of the case, they may be questioned by proceedings proper for that purpose.

The main ground on which the decisions below, and the arguments at their Lordships' bar in support of them, has been placed is, that, having reference to the provisions of the Colonial Insolvency Statute, the release of the equity of redemption was *ultra vires* of the official assignee.

On the other hand, the Counsel for the Bank contended that there was nothing in the statute to limit the power of the assignee to convey and release an equity of redemption; and that the 27th section of the statute contemplated the exercise of such power, and gave full protection to any person taking such a release from him.

That section is as follows :—

"All deeds which shall be executed by the official assignee for the time being of any insolvent estate, or by the assignee for the time being elected by the creditors and confirmed by the Court as aforesaid and by the official assignee for the time being, purporting to convey, assign, release, or assure any part of the real or personal property of an insolvent to any purchaser or purchasers, mortgagee or mortgagees, or other person or persons in fee simple, or for other less estate or interest, shall be from the time of the date or execution thereof valid and effectual, both at law and in equity, for conveying, assigning, releasing, and assuring such real and personal property in fee simple, or for other less estate and interest in such deed mentioned or expressed, to be conveyed, assigned, released, or assured to the purchaser or purchasers, mortgagee or mortgagees, or other person or persons; and such purchaser or purchasers, mortgagee or mortgagees, or other person or persons, and every person or persons, claiming under him or them, shall be relieved from inquiring or ascertaining whether the advertisements have been inserted, and meetings of creditors called, or direction of creditors obtained as in this Act provided, notwithstanding ths same shall not have been inserted, called, or obtained; and any person who shall deal or contract with, or take any conveyance or other assurance from, any assignee or assignees for the time being of any insolvent estate shall not be bound to inquire into or ascertain the power or authority of such assignee or assignees with respect to such dealing, contracting, conveyance, or assurance as aforessid; but such assignee or assignees shall for the purpose aforesaid, and as between him or them, and such person or persons, as aforesaid, be deemed and considered as beneficial owners of the real and personal property of the insolvent. But nothing in this part of this Act contained shall be construed to exonerate any such official assignee, confirmed assignee, or assignee for the time being, as aforesaid, from any liability for the non-observance or non-performance of his duty as such assignee as aforesaid."

It was contended by the learned Counsel for the Plaintiff that this section was not an enabling, but a protecting enactment. It is unnecessary in their Lordships' view to define its precise character. It, however, clearly contemplates that the official assignee may release the mortgaged property to the mortgagee. The right to do so would be vested in him by his general powers as assignee, unless controlled by some restraining provisions in the statute. In the absence of any such restriction there seems to be no reason why such a release should not be within his authority. Under former English Statutes of Bankruptcy it has been a recognized practice for assignees, when a foreclosure suit has been brought or threatened, and the equity of redemption was valueless, to disclaim any interest; and questions have arisen whether, when such a disclaimer has not been made before suit, but by answer, the assignee was entitled to his costs. If such a disclaimer may be made, there seems to be no reason why the assignee, in the case

of the equity being worthless, should not release it to the mortgagee before any costs are incurred. In one case where the assignees had not disclaimed until their answer, they put their application to be allowed their costs on the ground, "that they would "have released the equity of redemption if any "application for that purpose had been made to "them;" and no doubt seems to have been thrown on their power to make such a release. (Collins *v.* Shirley, 1 Russ and Mylne, 638).

The principal argument on the part of the Plaintiff was based on the contention that the Bank was bound to prove its debt, and value the mortgage security in the manner provided by Section 81 of the Insolvency Statute, and that no release of the equity of redemption could be made by the assignee until that had been done. Their Lordships, however, are of opinion that this section is applicable only to mortgagees who elect to come upon the general estate of the insolvent. A mortgagee may stand aloof, if he so pleases, and pursue his remedies under his mortgage. He is in no way bound to come upon the general estate, and his election to do so, in the case of a debt exceeding the value of the security, would of course be a burden on, and not a benefit to it. It is to be observed that the 81st section only requires the creditor to put a value on his security "upon oath" in case "any "dispute shall arise about the value of such "security," so that even under this section the assignee and the mortgagee might agree upon the value.

Mr. Benjamin sought support for his argument from the words of the 78th section:—"Every "creditor shall prove his debt by affidavit or other-"wise." But this again obviously means no more than that all creditors who come in shall prove in the prescribed manner. A creditor who abstains from proving his debt does so at the peril of losing it, and it is he, and not the estate, who suffers from his inaction.

It was further contended for the Plaintiff that the release was invalid, inasmuch as it did not appear upon the plea that it had been made by the direction of the creditors, and after notice in the Gazette as required by Section 71. This section enacts as follows:—"The assignee shall (subject "to the directions of the creditors given in the "manner herein provided) forthwith proceed to

" make sale of the property belonging to the estate, " real and personal, giving due notice thereof in " the Government Gazette, and also such other " notice as he shall think fit." This enactment no doubt requires that the directions of the creditors should be followed where such directions have been given; but it does not provide that in all cases such directions must be given. The words in the parenthesis of Section 71 seem to have reference to the provision in the 40th section relating to the business to be done at the first meeting of creditors wherein it is said, that the majority " shall also " give to the assignee such directions as to the " management of the estate as to them shall seem " meet." The creditors at their meeting may think fit to give no specific directions, and may leave the time and manner of dealing with the property to the assignee.

The enactment in Section 66 enabling the assignee to call a meeting of creditors, and to require their direction concerning the collection or sale of any part of the estate, has for its object to relieve the assignee from the responsibility of acting on his own judgment when he desires to be so relieved. However prudent and proper it may be for the assignee to obtain the sanction of the creditors, it does not seem to be made obligatory on him to call the meeting.

Moreover, their Lordships think that it ought not to be presumed that in releasing the equity the assignee acted in opposition to any directions given by the creditors, or without directions from them, if directions were necessary. The 27th section *prima facie* at least affords protection to the transaction.

With regard to the want of notice in the Gazette, their Lordships are disposed to think that a transaction of this kind is not such a sale as requires that notice. In one sense it may be regarded as a sale, but they are inclined to agree with the Counsel for the Plaintiff, who argued that it was not a sale in the proper sense of the term, and, therefore, that it is not within the scope and meaning of the section in question. Such a transaction as that in question could from its nature only take place between the assignee and the mortgagee, and be the subject of arrangement and bargain between them only. If, therefore, it was competent for the assignee in other respects to enter into it, their

Lordships are not prepared to hold that it could be successfully impeached for want of notice in the Gazette, even if it could be rightly presumed on these pleadings that no such notice was, in fact, given. But, however this may be, the 27th section would *primâ facie* protect the release against this objection.

Their Lordships, having dealt with the authority of the assignee to release the equity of redemption, will now proceed to consider the further objection that the release in question is on the face of the plea invalid for want of consideration.

It was not disputed at the bar that, assuming the statement in the recitals of the release, viz., that the amount of the debt was about 18,000*l.*, and the value of the mortgaged property about 15,000*l.*, to be correct, there would be sufficient consideration for the bargain, if the Bank had been bound not to prove the balance of the debt; but it was denied that the Bank was so bound.

It must be taken in considering this objection that the parties in good faith estimated the value of the security and the amount of the debt as stated in the recitals referred to. The question to be decided is, whether enough appears in the plea to show that the Bank is legally bound to perform its part of the bargain.

The agreement between the Bank and Goodman, stated in the plea, is to the effect that Goodman should execute to the Bank a release of the equity of redemption, and that, in consideration thereof, the Bank should not prove any debt upon the estate. The agreement is verbal, but is alleged to have been entered into on the part of the Bank by Johnson, who is stated to be "its manager and *duly* authorized agent." It must, therefore, be taken that Johnson was clothed with the proper and necessary authority from the Bank (whatever the form of it might be) to make the agreement on its behalf. This agreement having been made, Goodman performed his part of it by executing a conveyance and release of the property and the equity of redemption to the Bank, as stated in the plea. This release was endorsed on the original mortgage, which was presumably in the Bank's possession; and it is averred that the Bank never proved its debt upon he estate. If these averments be true, it cannot be doubted that both parties have, in point of fact, cted on and had the benefit of the agreement.

But it was objected that, the agreement not being under the seal of the Bank, it was not legally binding upon it. Assuming this might be so, whilst the agreement remained executory, it was contended in answer that after Goodman had performed his part of it by the conveyance and release of the property, the Bank was precluded from proving the balance of its debt, and therefore that the consideration had not failed. Their Lordships think that the authorities support this contention. If, when the other party had performed his part of the agreement, and the Corporation had taken the benefit, it should seek to repudiate its own part of the agreement, and to prove its debt, such attempted repudiation would amount to a fraud, which a court of equity would not suffer to prevail. (*See* Wilson *v.* the West Hartlepool Railway, 2 De Gex., Jones and Smith, 475. Crook *v.* Corporation of Seaford, L. R., 6 Ch., App. 551.)

In the case cited at the bar (the Mayor of Kidderminster *v.* Hardwick, L. R., 9 Ex. 13), where the Corporation sued the Defendant for refusing to take a lease of certain tolls under an agreement entered into with the Corporation, but not under its seal, Kelly, C. B., affirmed the principle of the above decisions. He said:—"I will observe that if it ap-"peared in the present case, as in that case (refer-"ring to Ecclesiastical Commissioners *v.* Merral, "4 Ex., 162), that the contract had been performed "and carried into effect by both parties, and that the "Plaintiff had had the benefit of that performance, "the Defendant would, no doubt, have been entitled to file his Bill for specific performance." The learned Chief Baron obviously could not have contemplated an entire performance by both parties, but a partial performance only, for otherwise no necessity for a Bill for specific performance could arise. But, whilst affirming the principle referred to, the Chief Baron held that, in the particular case, no part performance had been shown before the happening of the breach complained of. In the present case the official assignee had completely performed his part of the contract by executing the release. That conveyance vested the equitable property in the Bank, which not only did not repudiate the conveyance, but accepted it, by allowing it to be endorsed on the original mortgage, and abstaining from proving the balance of its debt, and is now estopped from

repudiating it by asserting a title under it on record. (*See* the Mayor of Thetford's case, 1 Salk., 192.)

The observations which have been already made meet most of the reasons advanced in the Judgments of the learned Judges below. It is true, as Mr. Justice Molesworth observes, that the deed contains no release or covenant not to prove the debt, but that was provided for in the previous agreement, and the combined effect of this agreement and the conveyance was, in their Lordships' view, under the circumstances already detailed, to preclude the Bank from proving.

The learned Chief Justice, in his judgment on appeal, remarks that, to constitute a valid sale, a price should be fixed by the parties, and that that condition was not complied with because the value of the equity of redemption is virtually made to depend on the amount of the dividend which may chance to be paid. This reasoning is scarcely applicable to the present case, because upon the figures on which the parties dealt, and which for the present purpose must be assumed to have been honestly arrived at, the equity of redemption was, *ex hypothesi*, of no value.

Their Lordships agree with what the Chief Justice has said respecting the protective effect of the 27th section, but they consider, for the reasons already given, that the release in question is not, *primâ facie*, beyond the scope of the assignee's authority.

Other points have been argued at the bar. On the part of the Bank it was contended that the Plaintiff could not disaffirm the transaction, even if the official assignee might have done so, and, further, that the transaction being at most voidable, some distinct act or proceedings should have been taken to impeach it. The decision, however, at which their Lordships have arrived renders it unnecessary at this stage of the suit to consider these points.

Their Lordships are fully sensible of the inconvenience of determining the rights of the parties upon a plea which is somewhat bare in its averments, and is itself supported by an answer. Possibly the conveyance and release may be affected by extraneous facts. Whilst, therefore, they are of opinion, for the reasons above given, that the plea ought not to be overruled, they think

the proper order to be made is, that the benefit of the plea be saved to the hearing of the cause, the parties being at liberty to make such additions to and amendments of their pleadings, not inconsistent with the rules and practice of the Court below, as they may be advised.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the Orders appealed from, and to direct that in lieu thereof an Order be made as above stated. They think that the costs occasioned by the hearing of the plea in the Courts below should be costs in the cause. The Appellant will have the costs of the appeal to Her Majesty.

I.O.—27/1/79.—(100).