

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Marshall and another v. McClure and another, from the Supreme Court of Victoria; delivered 17th March 1885.

Present :

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

In order to make this case intelligible the following facts require to be stated.

Messrs. Maclure and Valentine (the Plaintiffs), a firm carrying on business at Melbourne, being indebted to (among others) four other firms, viz.,—

Marshall and Anderson,
Lorimer and Rome,
Martin and McComas,
The Oriental Bank,

executed, on the 13th April 1878, a mortgage to Marshall (the Defendant) of certain land, for securing payment of 10,000*l.* on the 1st of May 1878. Marshall, on the same day, executed a deed poll whereby he declared that one fourth of that sum was the proper money of his firm, the remaining three fourths of the other firms above mentioned respectively, and declared himself a trustee for the four firms, and further declared that he would not assign or otherwise vacate the said mortgage, or release the moneys secured

until the four firms should be fully paid and satisfied their respective shares.

On the same day, the four firms executed an indenture confirming this arrangement.

On the 12th of February 1879, the following letter was written by Martin to Marshall :—

“ We beg to request that you will hold, on account of the Oriental Bank, our interest in the mortgage on Messrs. M'Clure, Valentine, & Co.'s store, which was made in your favour in trust for your firm and Messrs. Lorimer, Rome, & Co. and ourselves, the said Bank being holders of promissory notes given by Messrs. M'Clure & Co. to us.

“ Yours truly,
“ GEO. MARTIN & Co.”

On the 20th of February Marshall received the following letter from the Oriental Bank :—

“ Dear Sir,
“ Oriental Bank Corporation, Melbourne,
20th February 1879.

“ Referring to the mortgage and other documents relating to Messrs. M'Clure, Valentine, & Co.'s store, which have been in possession of the Bank since their execution, I have to inform you that the Bank claims, as equitable mortgages, Messrs. George Martin & Co.'s interest therein, and that the Bank have in their possession a request to you from Messrs. George Martin & Co. to hold their interest in the said mortgage and other documents on account of the Bank.

“ Yours faithfully,
“ G. HAMILTON TRAILL, Manager.

“ John Marshall, Esq., 1, Queen Street.”

Martin became insolvent in March 1879, and trustees of his estate were appointed. He says that he believes his partner's affairs were liquidated, by arrangement, in London, where that partner resided.

On the 14th of February 1879 the estate of M'Clure & Co. was placed under sequestration, and on the 24th of February Andrew Lyell and William Couche were elected trustees of their estate under the Bankruptcy Law.

After meetings of creditors had been held, with a view to the arrangement of a dividend, the following document was executed by Anderson and Marshall, Lorimer, Rome, & Co., and a

number of other creditors, on the 17th February 1879:—

“ We, the undersigned creditors, hereby agree to accept a composition of 9s. 6d. in the pound, on the account of our respective debts, payable by acceptance at two, four, and six months’ date, respectively guaranteed to the approval of the trustees and committee of inspection, and we hereby agree to execute a release, when called upon, for the amount of our debts.”

The following document was executed on the 27th February:—

“ In the Insolvent Estate of McClure, Valentine, & Co., Melbourne.

“ Memorandum of agreement, made the 27th February 1879, by and between the trustees of the above estate of the first part, John Leslie McClure and David Hood Valentine, trading as McClure, Valentine, & Co., of the second part, and Messrs. Lorimer, Rome & Co., and Anderson and Marshall, both of Melbourne, of the third part.

“ 1. The trustees agree to sell, and the said McClure, Valentine, & Co. agree to purchase, all the assets in the above estate for such sum as will pay a dividend of nine shillings and sixpence (9s. 6d.) per pound on all claims provable on the said estate, together with all costs, preferential claims and trustees’ commission, at the rate of 1¼ per cent. upon the total dividends, say 48,000*l.*

“ 2. The dividend to be payable by the joint and several promissory notes of the parties hereto of the third part to the order of the said McClure, Valentine, & Co., and endorsed to each creditor at two, four, and six months from 1st March 1879.

“ JOHN LESLIE MCCLURE.

“ DAVID H. VALANTINE.

“ ANDREW LYELL, } Trustees in
“ W. W. COUCHE, } the estate.

“ G. GEO. CRISPIN,
“ J. F. RICHARDSON, } Approved by the Committee
“ G. HAMILTON TRAIL, } of Inspection in the within-
“ W. R. VIRGOE, } named estate.
“ A. W. FRASER. }

“ LORIMER, ROME, & Co., } Guarantors.”
“ ANDERSON and MARSHALL. }

The following document, on which the questions in the cause depend, was executed on the 3rd of March 1879:—

“ Memorandum of agreement, made by and between John Leslie McClure and David Hood Valentine, trading as McClure, Valentine, & Co., wholesale grocers, of the first

part; Lorimer, Rome, & Co., merchants, of the second part; Anderson and Marshall, merchants, of the third part; Lyell and Gowan, accountants, of the fourth part; and John Marshall, merchant, of the fifth part. Whereas the parties hereto of the first part have arranged to repurchase from the trustees the whole of the assets in their estate for such sum as shall pay dividends of 9s. 6d. per pound on the debts provable upon the estate, together with all expenses. And whereas the other parties hereto have agreed to associate themselves together in guaranteeing to the creditors the said dividends. And whereas it is desirable that the terms, stipulations, and conditions under which the whole transaction is proposed to be completed should be defined, the parties hereto hereby covenant and agree with each other, as follows, namely:—

“1. That the said McClure, Valantine, & Co. shall repurchase the whole assets in their estate for such sums as may be required to pay dividends of 9s. 6d. per pound to each creditor on their estate, together with all expenses, costs, trustees’ commission, and preferential claims, the dividends to be payable by the joint and several promissory notes of the parties hereto of the second and third parts to the order of the said McClure, Valantine, & Co., at 2, 4, and 6 months from 1st March 1879.

	£	s.	d.	
“ Debt - - -	11,000	0	0	“ 2. That the amount to be ranked by or on behalf of the said Lorimer, Rome, & Co. shall be 16,050 <i>l.</i> 1 <i>s.</i> 2 <i>d.</i>
“ Extra bills - -	3,750	0	0	
“ Trade claims - -	1,300	1	2	
	<u>£16,050</u>	<u>1</u>	<u>2</u>	
“ Debt - - -	9,500	0	0	“ 3. That the amount to be ranked by or on behalf of the said Anderson and Marshall shall be 14,446 <i>l.</i> 4 <i>s.</i> 3 <i>d.</i>
“ Extra bills - -	4,750	0	0	
“ Trade account - -	196	4	3	
	<u>£15,446</u>	<u>4</u>	<u>3</u>	

“ 4. The said Lorimer, Rome, & Co. shall be entitled to charge a sum of 525*l.* for their guarantee.

“ 5. In consideration of Anderson and Marshall ranking the full amount of the extra bills in which they are interested, the said John Marshall agrees to surrender to the said McClure, Valantine, & Co. his share in the mortgage held by him as trustee for his firm, Messrs. Lorimer, Rome, & Co., George Martin & Co., and the Oriental Bank.

“ 6. The said Lyell and Gowan agree to hold the said Anderson and Marshall indemnified from all risk they might incur by signing the promissory notes for the dividends, so that they, the said Lyell and Gowan, will stand in all respects in the same position as if they, and not the said Anderson and Marshall, had originally signed the said promissory notes.

“ 7. In consideration of the said Lyell and Gowan indemnifying the said Anderson and Marshall, the said John Marshall hereby agrees to share with the said Lyell and Gowan, equally, all risk incurred by them under the foregoing

clause, so that he will stand in all respects in the same position as if he had originally guaranteed $\frac{1}{4}$ (one-fourth) of the whole risk in conjunction with the said Lorimer, Rome, & Co., and Lyell and Gowan.

"8. The said Lyell and Gowan will be entitled to receive from the said McClure, Valantine, & Co., a sum of 500*l.* for sharing the risk in manner aforesaid.

"9. The said McClure, Valantine, & Co. agree to liquidate the present business under such conditions as the said Lyell and Gowan and Lorimer, Rome, & Co. may decide to impose, and in such manner as may be best calculated to provide funds to meet the dividends when due, and nothing herein contained shall render it incumbent on the said guarantors, or either of them, to make any advances or continue any guarantees for any term beyond 1st September 1879.

"Melbourne, 3rd March 1879."

On the same 3rd of March a release was executed by the creditors—among them—by Anderson and Marshall, by John Marshall, by Lorimer & Co., and the trustees of Martin under his insolvency. McClure and Valantine received their discharge on the 30th of August 1879. On the 2nd November 1881 Marshall received the following letter:—

"Notice.

"Melbourne, 2nd November 1881.

"John Marshall, Esq., Melbourne.

"Dear Sir,—The Oriental Bank Corporation have sold to Mr. James Lorimer all its right, title, and interest in the properties situate in A'Beckett and Little Latrobe Streets, described in a mortgage from John Leslie McClure and David Hood Valantine to you, and entered in the Register Book No. 28,958, a declaration of trust in respect whereof was executed by you; and I have to request that you will hold on account of Mr. Lorimer the bank's interest in the mortgage, or transfer such interest to him.

"Yours truly,

"G. HAMILTON TRAILL."

And the following on the 25th July 1882:—

"Melbourne, 25th July 1882.

"John Marshall, Esq., Melbourne.

"We hereby give you notice that we have disposed of and transferred all our right, title, and interest in the properties in A'Beckett Street and Little Latrobe Street, described in a mortgage from John Leslie McClure and David Hood Valantine to John Marshall, and entered in the Register Book No. 28,958, to John Leslie McClure and David Hood Valantine; and we

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have also transferred to them our right, title, and interest in the moneys secured by the said mortgage; and we request that you will hold, on account of John Leslie McClure and David Hood Valentine, our interest in the mortgage or transfer or release such interest to them as they may desire.

“Yours truly,
“LORIMER, ROME, & Co.”

On the 29th of July 1882, the trustees Lyell and Couche, who had become the registered proprietors of the lands, transferred them to the Plaintiffs.

The Plaintiffs claiming that, by virtue of the agreement of the 3rd March 1879, they were entitled to the share of Anderson and Marshall in one fourth of the mortgage of the 13th of April 1878, and that, by the subsequent transactions which have been stated, they had acquired the remaining three fourths, applied to Marshall to discharge the mortgage at their expense, and tendered to him a proper memorandum of discharge under the Land Transfer Statute, but he refused to transfer more than his own beneficial interest, as distinguished from that of his firm. He contended that, by the 5th clause of the agreement of the 3rd of March 1879, he had agreed only to surrender his individual share. Whereupon the Plaintiffs brought the present suit, in which they pray,—

That it may be declared that, by the mutual mistake of the Defendant John Marshall, and of the other parties to the agreement of the third day of March 1879, in the bill set out, the fifth clause of the said agreement was expressed to stipulate for the surrender of the share of the Defendant John Marshall, instead of the share of the firm of Anderson and Marshall in the said clause mentioned.

That the Defendant John Marshall may be decreed to execute, at the Plaintiffs' expense, a proper memorandum of discharge of the mortgage to him of the 13th day of April 1878, in the bill

mentioned, and to do such other acts, under the Transfer of Land Statute, as may be required for discharging the said mortgage.”

Mr. Justice Molesworth, before whom the case came as the Primary Judge, dismissed the suit, on the ground that no case had been made out for reforming the agreement in the sense contended for by the Plaintiffs.

The Full Court, sitting *in banco* for the hearing of equity appeals, gave judgement for the Plaintiffs, ordering Marshall to execute a proper memorandum of discharge, on the ground that, by the true construction of the fifth clause of the agreement, the share of Marshall and Anderson in the mortgage had been agreed to be surrendered.

Their Lordships are of opinion that no case has been made out for reforming the document, and will address themselves solely to its construction. It will therefore be unnecessary to refer to the evidence, except so far as it explains the position of the parties when the document was executed.

The expression “extra bills” in paragraphs 2 and 3 requires explanation.

It appears that Lorimer & Co. and Anderson & Co. had, in consideration of guaranteeing advances from the Bank, received promissory notes (called “extra bills”) from McClure & Co., being in amount 50*l.* per cent. above the debts guaranteed by them respectively. Thus, the debt of Lorimer & Co. being 11,000*l.*, their “extra bills” amounted to 5,500*l.*; the debt of Anderson and Marshall being 9,500*l.*, their “extra bills” amounted to 4,750*l.* The trustees of the insolvent raised a question (and not unnaturally) on the right of the firms to prove for these “extra bills,” whereupon Lorimer & Co. gave up their claim to prove on 1,750*l.* worth of their bills, whereas Anderson and Marshall proved on the whole

of theirs. It had been argued that this, which appears on the face of the documents, raises some presumption that Anderson and Marshall, being admitted to rank for the whole of their claim, intended to relinquish their share of the mortgage, which turns out to have been a second mortgage, and worth less than half the sum it was intended to secure. It has been further argued that if the document admits of two constructions that should be adopted which is in consonance with rather than in opposition to the bankruptcy law of the colony, and indeed to the general principle of bankruptcy law, viz., that a secured creditor should either deduct the value of his security, and prove for the remainder of his debt, or if he proves for his whole debt, should give up his security.

The further question arises, What was Marshall's "share in the mortgage" as distinguished from that of his firm? It was not a definite or immediately ascertainable quantity, but only what might be coming to him upon the partnership being wound up and its accounts taken. It seems improbable that the parties should have contemplated dealing with so uncertain an interest. But it is said that, by Section 7, Marshall alone shared the risk with Lyell and Gowan, and agreed to stand in the same position as if he had guaranteed a quarter of the whole risk, in conjunction with Lorimer & Co. and Lyell and Gowan, from which it is inferred that Section 5 is to be construed with the same limitations as Section 7.

The answer to this is that the guarantee is a separate transaction, and that Clause 7 is expressed unambiguously. Marshall filled three characters :—

- 1st. That of sole mortgagee and legal owner.
- 2nd. Of a member of a firm for which he was a trustee.
- 3rd. A guarantor.

In that portion of the deed which relates to the dividend and to the proof of debts, it is clear he is acting for his firm. In para. 7, where he indemnifies Lyall and Gowan, it is clear that he is acting for himself. In para. 5, which is the one in dispute, it must be confessed that the wording gives rise to doubt; but their Lordships agree with the Court of Appeal in holding that in this part of the deed also Marshall was acting for his firm, for the following reasons:— First, the expression “share” is more suitable to that definite share in the mortgage which Marshall held on behalf of his firm, than to the indefinite and fluctuating interest which was all that he personally could have in a partnership asset; secondly, the expressed consideration for the surrender of the share was one moving to the firm and not to Marshall separately; thirdly, it is very unlikely that the parties should have intended to leave a fragment of the security outstanding as the separate property of a person who was only a creditor in respect of a joint debt; fourthly, the basis of the transaction was that a certain dividend might be paid “on the debts proveable upon the estate,” and it is more likely that parties contracting on such a basis should follow methods in harmony with the general principles on which insolvent estates are administered.

It has been further contended on behalf of the Defendant that it does not sufficiently appear that the share of Martin and M'Comas had been paid or satisfied in accordance with the last clause of the mortgage, and that the whole interest in it had passed to the Plaintiffs so as to entitle them to require Marshall to discharge it. The letter of Martin to Marshall of the 12th February 1879, written on behalf of his firm before he became insolvent (he denies that his firm ever became insolvent), directing Marshall to hold the

interest of the firm in the mortgage on behalf of the Oriental Bank, together with the notice of the Bank to him that they so held it, have been referred to. Martin deposes that neither he nor his firm claimed any interest in the mortgage. No claim of any sort has been preferred by his trustees, who executed the release of the 27th of February 1879, and it has been shown how Martin & Co.'s interest passed to the Plaintiffs. Their Lordships are not disposed to reverse the judgement on the mere suggestion that by some remote possibility Martin, or Martin & Co., or his trustees (if his estate is still vested in them), might have some claim to an equity of redemption.

For these reasons their Lordships will humbly advise Her Majesty that the judgement appealed against should be affirmed, and the appeal dismissed. The Appellants will pay the costs of the appeal.
