

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of George Henry Taylor and another v. The Bank of New South Wales, from the Supreme Court of New South Wales; delivered 25th June 1886.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

The Appellants are sureties, under a cash credit bond, dated the 5th September 1878, for advances to be made by the Respondent Bank in account current with Alfred Nugent Taylor, the principal debtor in the bond. The liability of the sureties is limited to 2,500*l.* sterling, with a sum equal to one year's interest thereon, and the cost of recovering payment.

Of the same date with the bond, the principal debtor mortgaged to the Bank, as a collateral security for such advances, the stock of sheep then amounting to about 6,500, upon a run of 4,000 acres, at Frampton, in the parish of Cootamundra and colony of New South Wales, and all the increase, progeny, wool, skins, and tallow, and other produce of the same. The deed of mortgage provides that it shall be lawful for the mortgagor peaceably to retain and have the possession and management of the mortgaged property until default is made in payment of the moneys thereby secured.

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It also provides that the Bank shall have power to enter into possession, and to sell the mortgaged property, by public auction or private contract, for such prices and with such credit to the purchasers as they may think fit, "if default shall be made by the said mortgagor, "his executors, administrators, or assigns, in payment on demand, as provided by said bond, "of any sum or sums of money secured by the "said bond, and collaterally by these presents, "contrary to the tenor and effect, true intent, "and meaning of the said bond; or in case of "the breach of any of the covenants on the "part of the said mortgagor herein contained; "or in case any circumstances whatsoever shall "arise which, in the opinion of the Board of "Directors of said Bank, shall render it necessary for the safety or security of the said Bank "so to do, although no such default shall have "been made."

In December 1878, at a time when no default had been made, and the mortgagor was still in possession, he thought it expedient to sell 2,500 of the mortgaged sheep; and he accordingly, with the assent of the local manager of the Bank at Cootamundra, sent them to a station called Forbes for sale. On the 19th January 1879 the mortgagor, with the assent of the Respondent's manager at Forbes, sold the sheep at 6s. 3d. per head, on six months' credit, to Wilton R. Suttor, who gave his promissory note for 810/., payable six months after date. The note was indorsed to the Bank by the mortgagor, and credited to him in account; and the amount was shortly after drawn out by his cheques. At maturity the note was dishonoured, in consequence of the insolvency of Suttor, and no part of its contents has as yet been recovered. No notice of the sale of these 2,500 sheep was given to either of the Appellants.

In the year 1880, default having been made

in payment of the sums due under the cash credit bond, the Bank brought a common law action against the Appellant, the Rev. Herbert Edward Taylor, for a balance of 947*l.* 13*s.* 3*d.*, alleged to be due by him as surety, according to an account stated in terms of the bond. In that account the said Appellant was debited with the sum of 810*l.* "to overdue bill, Suttor " to A. N. Taylor, discounted 25th January " 1879, dishonoured 20th July 1879," and but for that item of charge, and interest thereon, the balance would have been in favour of the said Appellant. At the trial of the cause, the jury found a verdict for the Bank, and the Court, upon the 16th June 1881, discharged a rule for a new trial, and entered judgement against the said Appellant for the sum of 947*l.* 13*s.* 3*d.*, with costs.

The Appellants, on the 27th July 1881, brought a suit in equity, in which the present appeal is taken, for the purpose of obtaining a declaration that they are released from all liability to the Bank as sureties under the cash credit bond, or otherwise of having an account taken of the true balance due by them under the bond, and for an injunction to restrain the Bank from proceeding with their action at law against the Appellant, the Rev. Herbert Edward Taylor. The Bank lodged a defence, and also a counter claim, in which, upon a restatement of the items in account between themselves and the sureties, they brought out a balance of 1,250*l.* as due by the Appellants, after crediting them with the sum of 810*l.*, on the footing that it had been actually paid to the Bank by Suttor when his acceptance became due. The Primary Judge (Sir W. M. Manning), after evidence was adduced by both parties, gave judgement on the 13th November 1882, declaring that the Respondents were released from all

liability to the Bank as sureties under the cash credit bond, granting an injunction as craved, and dismissing the Bank's counter claim. On appeal by the Bank to the Supreme Court of New South Wales, the Court, consisting of Chief Justice Sir James Martin and Mr. Justice Windeyer (Faucett, J., dissenting), reversed the order of the Primary Judge, except in regard to the counter claim, and condemned the Appellants in costs.

The Appellants maintain that the conduct of the Bank in selling or permitting these 2,500 sheep to be sold, in January 1879, was unwarranted by the terms of the deed of mortgage, and deprived them of the benefit of a security upon which they were entitled to rely for their protection; and, consequently, that they are discharged from all liability, or at least that they are released from liability to the extent of 810%.

It is not disputed that the Appellants became parties to the cash credit bond, on the faith of the mortgage; and that the Bank, in realizing the mortgaged property, was bound, as in a question with them, to strict compliance with the provisions of the mortgage. The transaction with Suttor was not, in the opinion of their Lordships, a sale by the Bank in terms of the proviso in that deed. There had been no default, no breach of the covenants of the mortgage, and it is obvious that the sheep were not sold because, in the opinion of the Directors, a sale was necessary for the safety or security of the Bank. It is therefore unnecessary to express any opinion upon the question, which was very fully discussed at the bar, whether the third alternative of the proviso requires that the opinion of the Directors shall be deliberately formed at a meeting of the Board, and entered in their minutes, or whether it is sufficient that the manager of the Bank shall act upon his

Bank in terms of the cash credit bond, upon cheques drawn by the principal debtor. Their Lordships could not have introduced that sum of 810*l.* as an item of credit, without giving the Bank an opportunity of restating the account; and that is a result which was not desired by the Appellants.

Their Lordships will accordingly humbly advise Her Majesty that the judgement appealed from ought to be affirmed. The Appellants must pay to the Respondents the costs of this appeal.

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