

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commercial Bank of Tasmania v. Jones and another from the Supreme Court of Tasmania, delivered 13th May 1893.

Present :

LORD WATSON.

LORD MORRIS.

SIR RICHARD COUCH.

HON. GEORGE DENMAN.

[*Delivered by Lord Morris.*]

This case comes on appeal from an order of the Supreme Court of Tasmania made on the 22nd August 1891. The Appellants sued the Respondents, as executors of James Bonney deceased, to recover a sum of 600*l.* under a guarantee dated the 15th September 1884 from James Bonney to the Appellants, whereby in consideration of advances to be made from time to time by the Appellants to George Andrews Wakeham, James Bonney guaranteed to the Appellants the payment on demand of all such advances not exceeding the sum of 500*l.*, together with bank interest, and it was thereby provided that the said guarantee was to be a continuing and existing one for the amount from time to time due to the Appellants from George Andrews Wakeham directly or indirectly, irrespective of any moneys which might at any time

or times be paid into the Bank to the account of George Andrews Wakeham, or of any settlement of accounts, or of any advances beyond the moneys thereby secured, and that the guarantees might be determined by notice as therein stated, and that the Appellants might at any time with or without the consent of James Bonney and notwithstanding his dissent compound with George Andrews Wakeham or any of the parties to any negociable security received by the Appellants from or on account of George Andrews Wakeham for the whole or any part of his or their liabilities to the Appellants, or might give time for discharging the same or any part thereof as the Appellants might deem proper, and might take security from George Andrews Wakeham and release or discharge him or any of the parties to any bills or notes discounted by them, and might enter into arrangements with the said George Andrews Wakeham or with any other person or persons in relation thereto as the Appellants might think expedient, and that no such composition, granting of time, taking of security, release, discharge, or arrangement, should have the effect of releasing or in anywise affecting James Bonney's liability under the guarantee.

By indentures of mortgage, dated respectively the 31st March 1885, the 1st February 1887, and the 21st August 1888, Wakeham conveyed to the Appellants certain properties by way of security for the advances to him. In the year 1889 Wakeham was indebted to the Appellants to the amount of about 2,400 \pounds ., and being so indebted he entered into an agreement with one Alfred John Marshall for a nominal consideration to convey to him the properties comprised in the said indentures of mortgage subject to the said mortgages. Wakeham and Marshall waited on Allonby, the manager of the Appellant Bank,

who consented that Wakeham's liability to the Bank should be transferred to Marshall. This arrangement so made between Wakeham and Marshall was not carried out as agreed between them, and instead thereof it was arranged between Wakeham, Marshall, and Allonby, that the Bank should accept Marshall as its debtor in room and stead of Wakeham, and should, with that view, re-convey to Wakeham the properties mortgaged by him; that Wakeham should convey the properties to Marshall; and that Marshall should thereupon mortgage the same to the Bank for the amount due.

Accordingly, by three several indentures, dated respectively the 6th February 1890, and made between the Appellants of the one part and Wakeham of the other part, the Appellants, in consideration of all moneys secured having been in each case paid, re-conveyed the properties comprised in the three several indentures of mortgage of the 31st March 1885, the 1st February 1887, and the 21st August 1888, discharged from all principal moneys and interest secured by the same, and from all claims and demands thereunder. By three several indentures of equal date, and made between Wakeham of the one part and Marshall of the other part, Wakeham conveyed the said properties to Marshall in fee simple.

By an indenture of the same date, and made between Marshall of the one part and the Appellants of the other part, Marshall conveyed the said properties to the Appellants by way of mortgage to secure the payment to the Appellants of the said sum of 2,400*l.*, and any further sum which might become due by Marshall to the Appellants.

James Bonney died on the 12th April 1890, without giving any guarantee to the Appellants in respect of Marshall, although he had, according

to evidence of the Bank manager, agreed to do so, and that his guarantee for Wakeham should continue until he did so. The Appellants, after the death of Bonney, demanded from the Respondents, as his executors, payment of the sum of 600*l.* with interest, as secured by the said guarantee of the 15th September 1884. The Respondents refused payment, whereupon the Appellants brought their action to recover the amount. The case came on for trial before Mr. Justice Dodds and a jury. A verdict was given for the Appellants, but leave was reserved to the Respondents to move to set aside the verdict. The rule came on for hearing before the Supreme Court, consisting of the Chief Justice, Mr. Justice Adams, and Mr. Justice Dodds, whereupon the Court set aside the verdict and ordered a verdict to be entered for the Respondents.

Their Lordships concur in that judgment. It may be taken as settled law that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone. Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, when that intention appears, leaving such debtor open to any claims of relief at the instance of his sureties. But a covenant not to sue the principal debtor, is a partial discharge only; and, although expressly stipulated, is ineffectual, if the discharge given is in reality absolute. In this case, the acceptance of Marshall as full debtor, in room and stead of Wakeham, which constituted a complete novation of the debt, necessarily operated as an absolute release of Wakeham, and it is therefore in vain to contend that such novation

merely amounted to a covenant not to sue the debtor for whom the Respondent was surety.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The Appellants must pay the costs of the appeal.

