

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John Shaw and Richard Jeffery v. James Jeffery, from a Judgment of the Court of Queen's Bench for Lower Canada (Appeal side); delivered on the 30th July, 1860.

Present :

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

LORD JUSTICE TURNER.

SIR JOHN T. COLERIDGE.

THIS was an appeal from the Court of Queen's Bench for Lower Canada, on the Appeal side ; in which Court, the Judges being equally divided, a judgment of the Superior Court of Lower Canada in favour of the Respondent was affirmed.

The Plaintiffs, by their declaration, sought an account from the Defendant of the value of two vessels, the "Eliza" and "Kate," built, as they alleged, by them at Quebec, and sold by the Defendant in England, and of the freight earned by them in a voyage to the same country ; and whether they are entitled to this account will depend on the conclusion to be drawn from the following facts :—

The Defendant had been, for some years, a ship builder at Quebec, and the occupier of a ship-building yard there. In August 1847 he was desirous of retiring from business, and leased the yard to the Plaintiffs, who had become partners in the trade, for two years and nine months, and he sold them all his stock and materials, at the same time, for 1,500*l.*

The Plaintiffs forthwith commenced building the two ships in question, and, in the progress of the

work, purchased large quantities of timber and materials from the Defendant and from other persons; but, in the month of November 1847, they found themselves unable to continue their business, from inability to raise more money in the then state of the money-market. This led to an arrangement with the Defendant, which was embodied and carried into effect by as many as six instruments, all of the same date, 9th December, 1847; and the question in the case mainly depends on the true effect of these instruments, which are to be found at length in the Respondent's case, pp. 2—7.

The number of these instruments has not unnaturally given rise to much observation in the Appeal Court below, and has been attributed by the Judges who were for reversing the judgment of the Superior Court, to fraud and collusion between the parties. Indeed, the whole transaction has been characterized as a mere attempt between them to protect the property from the just claims of third persons. Their Lordships are not prepared to adopt this opinion, but the present inquiry is only between the parties to the instruments. Where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding according to the true construction of its language as between themselves. It has not been, and could not well be, argued here, that the instruments were to have no operation; but the supposed fraudulent intention as to third persons has been used for the purpose of determining which of several supposed constructions they were to have between the parties. This is not allowable. The instruments, therefore, must be examined in the usual way, to collect from their language, as accurately as may be, the rights which they conferred on the Plaintiffs and Defendant respectively.

By the first of these, the Plaintiffs, reciting that they are the owners of timber in the ship-yard, specified in Schedules attached to the instrument, and are indebted for the purchase-money thereof to different persons named, among whom is the Defendant, and that they had offered to sell, assign, and transfer to him the timber before-mentioned, and the frames of two ships, which offer he had accepted, do, in consideration of 3,671*l.* 6*s.* 11*d.*

currency, to be paid in certain specified proportions and modes, bargain, sell, and assign the articles aforesaid to the Defendant. The words of conveyance are most ample, and unequivocal in their meaning; they profess to give the most complete and exclusive title, with a large warranty against all other persons. The second instrument professes to convey the hulls, frames, and bodies of the two ships for a consideration of 5s. This also is absolute and unequivocal in its language. Why it was executed at all does not appear; but that it was intended or calculated to favour any fraudulent purpose, their Lordships fail to perceive. The fourth instrument cancels the lease of the ship-yard, restores the possession of it to the Defendant, and makes the lease as if it had never been granted. The fifth instrument is between one of the Plaintiffs only, John Shaw, and the Defendant, and by it John Shaw, for the consideration of 1000*l.*, acknowledged to have been paid to him by the Defendant, transfers and assigns to him two debts of 600*l.* and 400*l.* stated to be owing to John Shaw by Richard John Shaw and Samuel John Shaw respectively, which were to be paid by certain specified instalments. And the sixth instrument is between the Plaintiffs and Defendant, and is both an obligation for the payment of 650*l.* acknowledged to have been lent to them by him in the May preceding, and also a mortgage of certain specified lots of ground and beach, which, in the same month of May, it is stated had been purchased in part with the money so lent.

These three last instruments throw very little, if any, light upon the construction of the two first. They seem to have helped in raising the doubt, which their Lordships have noticed, on the honesty of the whole transaction, as regards third persons; but they furnish nothing on which, as we think, any theory can judicially be raised for the interpretation of the two first as between the parties, and since the two instruments speak themselves an unequivocal language, there would be no sustainable argument in the case but for the remaining instrument (the third), which has not yet been noticed. And this must now be examined at some length, for, no doubt, when the same parties execute contemporaneously several instruments relating to different

parts of the same transaction, all must be considered together—all must be examined in order to understand each; apparent inconsistencies are to be reconciled; and where there are real inconsistencies, the governing intention of the parties is still to be collected from a consideration of the language of all the instruments, and effect given to it.

The instrument No. 3 must now be stated. Its recitals go back to the first assignment from the Defendant to the Plaintiffs, their operations as ship-builders, and the different loans they had contracted, their declared inability to complete the two ships, their offer to assign to the Defendant the whole of the purchased timber and materials on condition of the defendant making the payments enumerated in No. 1, and also the frames of the two vessels, and to cancel the lease of the ship-yard "in order that the Defendant, as it is said, may be enabled to cause the said vessels to be completed and finished for sea himself." The agreement to mortgage the beach and premises at Point Levy is also mentioned, and also the agreement by John Shaw to assign to the Defendant the 1,000*l.* mentioned in No. 5. After these recitals, and before we notice those which follow, it is not immaterial to observe that their subject matter does not appear in the operative part of the instrument, which contains no conveyance of anything conveyed, no doing over again of anything done, by either of the other instruments. The title of the Defendant as owner of the ships does not rest on this instrument any more than the title of the Defendant as mortgagee of the beach and premises at Point Levy, or as occupier of the ship-yard. All these are mentioned in the recital as having been agreed to be done; they are not, however, done in this instrument, obviously because they had been by the separate instruments already stated. But it will be seen that the effectual operation of those instruments is assumed in the operative clauses now to be stated; and it is made the basis of the stipulations of this instrument, that under the others the present interest has passed to the Defendant. For the recital goes on to state that he will reassign, transfer, and make over to the Plaintiffs the ships and all other the premises assigned to him on condition "that they reimburse him all moneys that he hath

already, or may hereafter lay out in finishing the ships, and in relation to the premises aforesaid with interest, and the usual commission of $3\frac{1}{2}$ per cent. upon all disbursements paid, and agreed to be paid, as aforesaid." And they agree that they will accept the said assignment, and that they will pay the stipulated sums with interest and commission on or before the sailing of the ships from Quebec, and in the meantime they agree that they will give their personal attendance in the finishing of the ships until they are safely launched, ready for sea, and loaded, without any charge to the Defendant.

Then come the operative parts of the instrument:—First, on the part of the Plaintiffs that they will give their personal attendance in the building, finishing, and completing the ships, until they are ready for sea, loaded, and completed under the direction of the Defendant, with stipulation for the providing of sails and all other necessaries to make them seaworthy, of the best quality, at his expense. Secondly, they engage that the ships shall be ready for sea and loaded, with crew, provisions, and outfit, on or before the 15th of June then next, for a sum not exceeding 10,000*l.*, which sum is made up of those already advanced, and a residue of 4,642*l.* 4*s.* 8*d.*, to be further supplied by the Defendant. Then follows a stipulation on the part of the Defendant, who agrees that upon the Plaintiffs paying, or securing to him, the moneys paid or agreed to be paid for the building and completing of the vessels, and all disbursements paid and to be paid on account of them, the materials, workmen, and other things whatsoever, together with interest upon the actual disbursements, and commission of $3\frac{1}{2}$ per cent., he will assign and make over to them the two vessels in the usual manner, provided they well and truly pay the same previous to the sailing of the vessels from Quebec. Thirdly follows an engagement by the Plaintiffs that as the consideration for such sale and assignment they will make the payments last specified, and to avoid any question the sums already paid, or agreed to be paid, in discharge of their engagements to third parties, are mentioned as being included therein. Then follows a clause for referring the settlement of accounts in the event of any difficulty arising, and so the instrument ends. But it should seem by a memo-

randum added below the signatures of the parties, that the Plaintiffs having declared that they considered the finishing the vessels would require an additional 1,000*l.*, the Defendant agrees to apply the 1,000*l.* which John Shaw had assigned to him by the instrument No. 5, on its payment to him, to that purpose.

The instruments have now been stated, and it appears to their Lordships that the meaning of them is clear, and that they present a very intelligible, and consistent, and probable case. The Defendant having been a ship-builder and desiring to retire from that business, and the Plaintiffs, one of them his brother, who had been in his employ in a prominent capacity in that business, having formed a partnership, the former is content to let and the latter to take the ship-yard for a short term, and the former sells and the latter purchase the materials therein. They commence the business, but obviously with insufficient capital; the Defendant assists them in the purchase of more materials, and two ships are begun; the money-market turns against them, and they are, in a short time, in difficulties, which they cannot surmount. They desire to retire from the business. The Defendant, who has strong motives to secure the advances already made, and not improbably actuated by personal regard, comes to an arrangement with them; he agrees to take the vessels as they are and the materials in consideration of those advances, and the taking on himself their liabilities to certain trade creditors and releasing them from their lease of the ship-yard, and here the arrangement might have ended. If it had stopped here, it is probable that some more minute examination would have been made as to the respective values on either side; the unfinished vessels and materials on the one hand, the advances and liabilities on the other: whether that would have made any considerable difference is not clear, nor is it important to inquire. Because the arrangement did not end here, the Defendant, on his part, had, probably, no desire to resume, permanently, the business which he had only just withdrawn from, and they who alleged that their present inability to go on arose from the temporary state of the money market, were obviously desirous of resuming it at a future or more favourable period. They therefore

agree to give their personal attendance gratuitously in the completing the vessels, and bind him to spend to the extent, first of 10,000*l.*, and subsequently, in a certain event, to apply an additional 1,000*l.* to that purpose. Thus they secure the completion of the vessels; and though they were not their vessels, and they might seem at first to have no interest in what became of them, yet they acquire a contingent interest by the stipulation following, that when finished the Defendant shall reassign the vessels to them. To this the Defendant agrees, but, as might be expected, he stipulates not only for repayment of his loans, advances, and liabilities by a condition precedent to the assignment, but also that the repayment shall be made before the ships sail; in substance he agrees to resell on payment, in which case he is to be considered as having advanced the money, and requires interest and commission as on an advance; but he does not agree to do this indefinitely—a time is fixed, the sailing of the vessels, which, after their crews, outfit, and cargoes on board, cannot in usual course be any longer delayed: the payment is to be made before that, or the right to a reconveyance will be gone.

Upon the plain language of the instruments, and on consideration of the circumstances existing at the time of their execution, their Lordships think it clear that this was nothing like a mortgage, but was an absolute sale, to which was attached a conditional right of repurchase, to be exercised, if at all, on the happening of a certain event, the period for the happening of which was fully and equally within the knowledge of both parties. Nor does the agreement to refer to arbitration the settlement of the accounts raise any difficulty. This must not be construed so as to defeat an essential object of one of the contracting parties. The Plaintiffs knew well that expenses would be incurred from day to day, down to the very sailing of the vessels: they must have known that to delay the sailing after they were completely ready for sea could never have been contemplated; and yet they have in effect contended that by creating, or asserting the existence of a difficulty, and insisting on a reference in which many days might be consumed, they could acquire a right to delay their time of repayment and the sailing of the vessels indefinitely. This seems an

unreasonable construction of the clause; but the facts of the case make the construction of it unnecessary, as will be seen in the sequel.

This being their Lordships' opinion, founded on the instruments themselves, it is scarcely necessary to observe that a mere suspicion of a fraudulent intention to protect the property against the just claims of other persons will not suffice to show that the transaction was wholly colourable as between the Plaintiffs and Defendant themselves, nor if the transaction is to be treated as a real transaction, such as it appears on the surface, as between themselves, which their Lordships consider it ought to be, will it be vitiated, and rendered of no avail, because it may have the effect of defeating the claims of other creditors of the Plaintiffs.

It remains, then, to consider the subsequent conduct of the parties. Now it appears that the vessels were completed as the instrument would have led one to expect, the Plaintiffs continuing to act in the yard as before, and the Defendant interfering from time to time, giving directions, finding money for the wages, and occasionally paying the men; the Defendant's name or sign being put up over the gate of the yard, and the vessels registered in his name. All this, it is true, might be consistent with what the Plaintiffs contend for: it is also perfectly consistent with the view which their Lordships take. They do not rely on it as substantive proof; it is enough that it is not inconsistent with what the instruments on their face import.

The vessels were in all respects ready for sea towards the end of July, and on the 13th July the Plaintiffs were served with a notice that they would be ready for sea on the 20th, and they were called on to repay the moneys due under the agreement on or before that day. At this time it would seem that the Plaintiffs were at variance with each other: one of them, Richard Jeffery, admitted the inability of the firm to pay the demand, and that in consequence the Defendant must sail the vessels on his own account; the other, Shaw, made difficulties, first in respect of the accounts, and latterly relied on the arbitration clause. Their Lordships are clearly of opinion on the evidence that this defence is not available to the Plaintiffs: they have no doubt that it was resorted to for the mere

purpose of delay, that the Plaintiffs had not the means of paying the demands however modified, that the sums actually expended by the Defendant, and not brought into the accounts rendered, would have far exceeded any reduction which would have been made in the course of arbitration, and lastly that the accounts rendered were, before the sailing, gone through by a clerk of the Defendant, and the Plaintiff Jeffery, and, with the exception of a single article questioned, admitted to be correct. They are not satisfied, therefore, that the case has arisen which makes the submission to arbitration imperative, and they have already stated their opinion that the clause of reference is not to be so construed as to defeat the main object of the instrument in which it is found.

Their Lordships, therefore, are of opinion that upon the facts, and without reference to the difficulties which arise upon their own pleadings in the way of the Plaintiffs, their case fails. In the learned argument for them it was repeatedly asked, if this was a sale of the vessels, what was the price? To this question the answer is easy; the vessels were sold in their unfinished state, but not alone; the materials in the yard were sold with them, and the price for both was the money already advanced, and the assumption of the liabilities already incurred. But this answer, though true, is an answer to a captious question, which separates one part of the whole transaction from the rest; for it was a sale with the additional right of re-purchase attached to it, and that right with all the stipulations on both sides dependent on it must be taken into the account, if the considerations on both sides are to be fairly judged.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Courts below should be affirmed, and that the Respondent should receive the costs of this appeal. But they do this without prejudice to any claims which may arise in respect of the instruments Nos. 5 and 6. On these, as not arising strictly on the present pleadings, and not having been distinctly brought before their Lordships, they do not express any opinion.
