

*Judgement of the Lords of the Judicial Committee  
of the Privy Council on the appeal of Plomley  
and Others v. Felton and Others from the  
Supreme Court of New South Wales; delivered  
December 5th, 1888.*

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Present :

LORD FITZGERALD.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

MR. STEPHEN WOULFE FLANAGAN.

[*Delivered by Lord Macnaghten.*]

THEIR Lordships understand that there is, or may be, a question with regard to costs on which they will hear the parties if they desire to say anything when judgement has been given.

On the merits their Lordships do not think it necessary to call upon you, Mr. Rigby.

The case has been argued very elaborately, but it lies in a narrow compass.

The real question depends on the true construction and effect of one instrument—a deed of mortgage in which Maria Macdonell, a married woman, joined, for the purpose of securing a debt of her father by vesting in the mortgagee the inheritance, in fee simple, in certain property of which her father was tenant for life. In the Supreme Court it was held that the operation of the deed was practically confined to that purpose. The learned Counsel for the Appellant maintained that it had a further purpose, or at any rate a further operation. They contended that the estates and limitations which were barred and destroyed in order to give effect to the mortgage were not revived or restored in the equity of redemption, and they argued that

in coming to a different conclusion, the learned judges of the Supreme Court misconceived or misapplied the authorities to which they referred.

Their Lordships think that, in a case like the present, very little assistance is to be derived from reported decisions. Sometimes it has been said that where there is a mortgage there is a presumption against any alteration being intended in the title to the equity of redemption. But then the strength or weakness of that presumption must depend upon the particular circumstances of the case; and the question remains, Is the deed to be regarded as a mere mortgage, a mere charge; or is it a mortgage, and a new settlement, or new disposition combined? It has also been said that slight and trivial alterations in the reservation of the equity of redemption are not sufficient to show an intention to alter pre-existing limitations. But that is little better than a truism. If the alterations are really slight and trivial, it certainly would be unreasonable to attach any importance to them. Again, it cannot be disputed that cases where a wife's estate is mortgaged to secure the debt of her husband stand in a peculiar position. And then special considerations are suggested where the doctrines of equity relating to the execution of powers are applicable.

In the result their Lordships think that the only safe rule, the only rule of any practical value, to be deduced from the authorities is this: that each case must depend on its particular circumstances; that in each case the intention must be collected from the instrument which has given rise to the question; and that that instrument must be interpreted according to the ordinary rules of interpretation.

The deed of mortgage in the present case was duly executed by Mrs. Macdonell in accordance with the requirements of Section 16 of the

Registration Act, 7 Victoria, No. 16, which enables married women to dispose of real estate, whether held in fee or in tail, but which does not contain provisions corresponding with those in section 21 of the Fines and Recoveries Act, a section introduced into the English Act, as Lord St. Leonards observes, for the purpose of putting an end to such questions as arose in *Innes v. Jackson*, Sug. Real prop. Stat. p. 200.

The deed of mortgage is dated 28th February 1859. It was made between Thomas Underwood the father of the first part; Randall Macdonell, described as a schoolmaster, and Maria, his wife, formerly Maria Underwood, spinster, daughter of Thomas Underwood, of the second part, and John Savery Rodd the mortgagee of the third part. It recites that Thomas Underwood was under and by virtue of the will of his father possessed of an estate for his own life in the whole of the hereditaments described in the first schedule, and in one fifth of the hereditaments described in the second schedule, and that the remainder dependent upon the life estate of the said Thomas Underwood was, by virtue of the said will, vested in the children of Thomas Underwood as tenants in common in tail general. It then states that Thomas Underwood had seven children, all of whom were infants except Maria Macdonell, who had just attained the age of 21. It recites a previous mortgage by Thomas Underwood for 800*l.*, and states that he required a further advance of 500*l.*, making altogether 1,300*l.*; and that he proposed to secure that sum by adding to the security already held by the mortgagee certain parcels of land described in the third schedule, “and by  
 “ inducing the said Randal Macdonell and  
 “ Maria, his wife, to bar the estate tail in  
 “ remainder vested in her and in him, in her  
 “ right, in the lands and hereditaments com-

“ prised in the first and second schedules hereto,  
 “ and to convey the same to the said John  
 “ Savery Rodd in the manner hereby intended  
 “ to be effected.” Then follows this recital:—  
 “ And whereas the said Randall Macdonell, and  
 “ Maria his wife, have agreed to join in these  
 “ presents for the purposes aforesaid.” Now,  
 perhaps it would be going too far to say that  
 that recital confines the operation of the deed to  
 its declared purposes. But certainly it shows no  
 indication of any ulterior purpose. The deed  
 then conveys the property to the mortgagee in  
 fee. And the equity of redemption is limited  
 in these terms:—if the money is paid then the  
 deed declares that “the said mortgagee will at  
 “ the request and costs of the mortgagors, re-  
 “ convey the said hereditaments unto the said  
 “ mortgagors respectively, or as they shall re-  
 “ spectively appoint, according to their original  
 “ respective estates and interest therein.” The  
 expression “mortgagors” had been defined in an  
 earlier part of the deed to mean Thomas Under-  
 wood and Randall Macdonell. Whether the  
 property be re-conveyed to them or to their  
 nominees the original estates are to be restored.

Now what is the meaning of the expression  
 “original” as applied to the estates referred to?  
 The learned Counsel for the Appellants while  
 admitting, as they were compelled to admit,  
 that Thomas Underwood’s original estate was  
 the estate which he took under the will, con-  
 tended that Mrs. Macdonell’s original estate  
 was the estate enlarged by the conveyance in  
 the mortgage—the estate which owed its form,  
 and in a sense owed its existence, to the mortgage  
 deed itself. Their Lordships think that that  
 would be an unnatural meaning to attach to  
 the language used. They also think that it  
 would be too narrow a construction to hold that  
 the only estate intended to be restored was

Mrs. Macdonell's immediate estate tail. They think the proviso for redemption refers back to the will as the origin of the title and necessarily brings in the whole series of limitations contained in the will, including the reciprocal limitations between the beneficiaries as tenants in common in tail *inter se* which are commonly known as cross remainders.

There was one argument advanced by the learned Counsel for the Appellants which deserves notice. They said that according to their construction Mrs. Macdonell was not parting with any portion of her estate; she was merely taking a more beneficial interest in her own estate; and they claimed to be the champions of Mrs. Macdonell's rights. At first sight that argument appears to be plausible; and it would have had very great weight if the estate had been limited in such a manner that Mrs. Macdonell could have dealt with it by will, or disposed of it without the cumbrous formalities which the statute has provided for the protection of married women. But the equity of redemption was not limited to Mrs. Macdonell's separate use. So long as the marriage existed, apparently it would have been necessary for Mrs. Macdonell to have gone through all these formalities again if she had desired to dispose of the estate in favour of her husband or anybody else.

Their Lordships think that it is unnecessary to refer to the terms of the power of sale. It was not contended that the language of the power of sale could control the meaning of the proviso for redemption if the proviso for redemption is clear.

Their Lordships therefore agree with the learned judges of the Supreme Court as to the effect of this deed.

On the second point it is only necessary to say a very few words. That branch of the argument

was scarcely pressed seriously. On this point also they agree with the Supreme Court. The Underwood Estate Act was not apparently intended to alter the rights of the beneficiaries under Mr. Underwood's will. It supplies machinery wanting in the will. But it does not in their Lordships' opinion effect an immediate or imperative conversion of the estate.

Their Lordships will therefore humbly advise Her Majesty to dismiss the Appeal and affirm the judgement of the Supreme Court.

Counsel for all parties having addressed their Lordships on the question of costs, Counsel were directed to withdraw, and their Lordships deliberated.

Counsel having been re-admitted:—

*Lord Macnaghten*:—The Appeal will be dismissed with costs, but there will be only one set of costs allowed to the Respondents, and there will be no costs of John Lisson's application to appoint a guardian ad litem.