

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Stanford
v. Brunette and others, from the Cape of Good
Hope; delivered 26th June, 1860.*

Present :

LORD KINGSDOWN.

JUDGE OF THE HIGH COURT OF ADMIRALTY.

SIR EDWARD RYAN.

SIR JOHN TAYLOR COLERIDGE.

THIS is an Appeal from a Judgment of the Supreme Court of the Cape of Good Hope, in a suit instituted by the Appellant against the Respondents for the purpose of setting aside a Deed of Assignment dated the 3rd of December, 1854, under the circumstances stated in the evidence.

That the Deed which is now sought to be invalidated is in entire accordance with that which was intended is matter which can admit of no doubt whatever. It is stated that the intention of this deed—or the intention, rather, of Sir Robert Stanford—was merely this: he was to assign his personal estate to Trustees, who were to sell it; and with respect to the real estates, they were not to be sold, but were to be retained unsold.

Now let us see what took place immediately after the execution of the Deed, and just before Sir Robert himself is stated to have left the Cape of Good Hope.

On the 24th of January, 1855, on the execution of this Deed, the two Trustees, Captain Hope and Mr. Brunette, gave their bills to the amount of 2,500*l.* in part security of a debt; and on the 24th of January, 1855, Sir Robert Stanford left the Colony. He writes this letter:—

“Gentlemen,

“Cape Town, January 24, 1855.

“Mr. Brunette having always led me to understand that I would get credit for about 3,000*l.* for twelve months, or until I remitted the amount from London, last evening I learned from

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him that I can neither get this nor the 500*l.* which was promised me by all parties, unless I make a sacrifice of 'Gustrouw,' the projected village, &c., which I would have done before and prevented the sale of stock at Kleyn river, had I known it would have come to this. It being my desire neither to sacrifice 'Gustrouw' nor the projected village, and there being now about 3,500*l.* still to pay (not speaking of first mortgages), I now propose and hope you will think favourably of it; that as 'Bloem Fontein' and 'Uintjes Kraal' are to be sold on the 1st March, to sell 'Kogel Bay,' the house at Gustrouw, and 500 acres of ground near the house, not including the wood, as also the estate at Hang-lip, if confirmed, which will reduce my liabilities to very little.

"You are aware that Lady Stanford holds a mortgage on Kleyn River for 7,250*l.*; she also has the power of anticipating half the expectant of each of her children, for their preferment, advancement, or benefit. It is my intention on returning here to raise 3,000*l.* or 4,000*l.* on Kleyn River, by making Lady Stanford's a second mortgage, which will be quite the same to her, or if there is any difficulty in that, to get her to anticipate; but the former having been already offered if the property were worth it, I can now inclose many certificates to prove that it is worth very much more. My object is to pay off every one, and give my children a fair start; whereas, if Gustrouw and Kleyn River are sold, I cannot do so.

"I do not propose to take from you any of the security you now hold, unless a party undertakes to pay the whole off. I only require a little time to enable me to remit from England; security there is enough.

"I am, &c.

"R. STANFORD.

"To J. Hope, G. D. Brunette, and
J. G. Steytler, Esqs."

This, therefore, is a letter written by him immediately before he left the Cape, in which he refers to those Trustees as having power of sale, as Trustees for the sale, and recommends the mode in which the sale is to be carried out.

On the 12th of February, 1855, it appears this gentleman was unfortunately in a very indifferent state of health, which prevented him attending to much business, and Lady Stanford appears to have acted on his behalf, and to have corresponded on this subject.

On that day Mr. Brunette writes to Lady Stanford in these terms:—

"Cape Town,

"My dear Lady Stanford,

"February 12, 1855.

"The 'Cape of Good Hope,' steamer, being about to sail for England, and as she will make a quick passage, and arrive, perhaps, before the sailing-vessel 'Cressy,' in which Sir Robert took his departure on the 20th of last month, I avail myself of the opportunity thus afforded me to advise you thereof, and

sincerely trust that on receipt of this, or shortly after, Sir Robert will have arrived, and that he is much better, both in mind and body. The annoyances he had to suffer were sufficient to upset any person of the best health possible.

“As you will naturally be anxious to hear how matters have gone on since I wrote last, and as I conceive it to be my duty not to hide anything from you, but to inform you of all and every particular, although what I may now write may seem to you very bad, yet, my dear Lady Stanford, don't let it grieve you; the worst is now past, the tide is at its lowest ebb, and I can see my way clearly to make all right again. Sir Robert will, of course, inform you of particulars; suffice it for me to say, that in execution of certain Judgments of the Supreme Court of this Colony, all the moveable effects belonging to Sir Robert in Cape Town and at Klein River were sold off by the Sheriff. Captain Hope and myself passed bills for the amount of 2,500*l.* to satisfy the Judgments, and *gave three months' credit* at sales, to prevent the stock at Klein River being sold for cash, in which case it would have been *sacrificed*. Thus all the moveable effects at Cape Town, Klein River, and Gustrouw, *have been sold*, and I should think when the proceeds come in there will be *sufficient*, or nearly so, to repay the 2,500*l.*

“There are yet debts to the amount of 4,000*l.*, more or less, to be met. To meet these debts, we have to sell the farms—‘Bloom Fontein,’ ‘Uintjes Kraal,’ ‘Kogel Bay,’ and ‘Gustrouw,’ and as landed property has risen very considerably in the locality of said farms, I anticipate that they will sell for an amount considerably beyond the mortgages thereon, so that by the time said farms are disposed of, I should think the debts will be reduced to about 1,500*l.* or 2,000*l.* Previous to Sir Robert's departure he assigned his estate to Captain Hope, myself, and Mr. Steytler (this latter gentleman *we could not keep out*, he being a creditor for *about 1,700*l.**, and by having him in the assignment, he is obliged *to wait* until we get funds by sale of property).

“The house in town is considered to be mortgaged to its full value; but there is a small property at Hottentot's Holland, bought from a Mr. Tesselaaar, which I think will add a few pounds to our funds, say 200*l.*, more or less. You will perceive that I have not said anything about Klein River, because Sir Robert has at last decided to keep the farm, in preference to Gustrouw. Much, very much, of his difficulties have arisen from an over-anxiety to keep this latter farm, for the purpose of establishing a village thereon; the plan was a good one, but impossible to carry out without capital, and certainly not in Sir Robert's case. If he retained Gustrouw, then Klein River should be sold, and, as far as my judgment goes, the two places could not be compared. We have promised, that after the farms before-mentioned are sold, that we shall wait eight months before advertising any part of Klein River, to enable Sir Robert to make remittance of any balance of debt there may be, if indeed there should be any; and should all turn up as I anticipate, there will be sufficient *to pay all without selling an acre of Klein River*. Poor Edward is delighted that *Klein River is safe*. I have purchased for him about 800 sheep, some oxen, waggon, ploughs, &c., &c., in all to the amount of somewhat more than 400*l.*; this will

keep him employed. He feels quite proud of his stock, and will take good care of them. I also purchased all the household furniture, not an *article* of which *left the place*, and I bought much *below the value*, as when the farmers in the neighbourhood became aware of the fact that I was purchasing for Edward, they would not bid against me, thus the articles were sold to me for *less than half value*; this was against my own interest, as I have *advanced considerably* for Sir Robert, but I could not stand by and see the old place stripped of everything. My means are small, as you well know, and the amount which must be paid in two months from hence will press hard on me, yet with assistance I can manage to pay, giving my bill at six months from date for the amount.

“If there are funds from which Edward can repay me in eight months from this time, all will be right, if not please inform me, so that I can make other arrangements with Edward, either on shares or otherwise. Besides the purchase of furniture, stock, &c., I have advanced Edward *cash*, but this I expect to be repaid from *Sir Robert's estate*. Robert is at Klein River with Edward; Arthur is at present at Gustrouw, where I wish him to remain in charge for a short time. All are well and in good spirits. Thus I have given you all the information that occurs to me. Sir Robert can explain any part of it you may not understand. But make your mind quite easy respecting your sons. Believe me they shall *not want for anything*, as long as I have the means to supply them.

“I remain, &c.

“GEO. D. BRUNETTE.”

Nothing, therefore, can be more clear than that Sir Robert, at the time he executed this Deed, knew that the effect of the Deed was to vest the property in the Trustees for the purpose of sale, and that, as soon as this letter of the 12th of February, 1855, would reach England (very soon after his own arrival), he would know what had been done and what was proposed to be done for carrying into effect this trust for the sale of the property.

It appears that, in January 1855, Lady Stanford, by the desire of Sir Robert, went to the Cape, and upon that occasion a power of attorney was executed, which seems to have been sent after her. It is stated that she sailed in July 1855, and the power of attorney is dated August 1855; and by the power of attorney she is authorized, not only to act for her husband generally regarding the sale of the property, but to act generally on his behalf. Being armed with this power of attorney, she came to the Cape, and on the 4th of October, 1855, being at that time the attorney lawfully authorized for her husband to appear for him, having that full knowledge which had been conveyed in the letter of Mr. Brunette

of what had been done and was doing in the execution of the trust, what is the course, under legal advice, acting by her attorney, she pursues in the Colony? Does she protest, on behalf of Sir Robert, "Why, this Deed is a mere nullity. There never was an intention to sell an acre of this land. This is a gross perversion of the trust, which you have endeavoured by deed to execute." She does no such thing; she writes a letter which a person knowing the contents of that Deed, and knowing that the Trustees were bound faithfully to execute it, would write. Mr. Hutchinson, on her behalf, desires to have the account of the trusts furnished, in pursuance of what they had done from the first.

The letter is in these terms :—

"To G. D. Brunette, Esq., Captain Hope, and J. G. Steytler, Esq., Trustees of the Assigned Estate of Sir Robert Stanford.

"Gentlemen,

"Cape Town, October 4, 1855.

"I am instructed by Lady Stanford to obtain from you a statement showing—

"1st. The claims against the estate, and to what extent the same have been settled by you.

"2nd. All assets of the estate, including all the immoveable and moveable estate, or the proceeds of such part as may have been sold.

"Lady Stanford is anxious to obtain such statement with as little delay as possible.

"I am, &c.

"ALEX. HUTCHINSON."

Why, here is a distinct reference to the lands conveyed to those gentlemen for the purpose of sale; no pretence against the execution of that trust, no pretence, no objection that Sir Robert has been in the least degree misled in the execution of that instrument, or as to the contents of that instrument, but desiring to have the accounts furnished of what has been done under it.

Now, what was done? In consequence of this letter of the 4th of October, on the 12th of October those accounts were actually furnished. Mr. Hutchinson is examined in the suit, and he says, "I am an attorney of this Court; I am not engaged in this suit." This is the gentleman who is produced by Sir Robert Stanford. "In October or November 1855, Lady Stanford came to me. She probably showed me the power of attorney of the 17th of August, 1855. I wrote to Mr. Brunette at her

request, asking for the state of his accounts. I got an immediate reply, with an account."

Well, after this Sir Robert himself returns to the Cape, and it appears at that time, in 1856, he desired to have a further account rendered to him; and Mr. Hutchinson, in his examination, states:—

"I do not think there was a more perfect account than this. I know Beach. He was with me about Sir Robert Stanford's account. Sir Robert came to me a year after, and I demanded from Mr. Brunette a detailed account of their whole proceedings in connection with the administration of Sir Robert's estate. After that Beach came with me, and Mr. Brunette said he would rather not meet Sir Robert. I said I thought he should give up that idea. He said, if you think so I will. I asked him to send an account with vouchers, and Beach afterwards called with an account and vouchers, and I had commenced looking at them when Sir Robert and Lady Stanford came in, as I thought very opportunely, and I said, Now sit down and go into this account, and go over the vouchers. He said, I object to these accounts being examined, because the assignees are the parties to account, and not Mr. Brunette alone. I was remonstrating, when he drew out a letter and handed it across to me; this was debarring me from going into the account at all. I said, 'Very well, Sir Robert;' I was willing. I think this was in November 1856. I could do nothing further."

Can anything be a more distinct recognition than this? First, through Lady Stanford, and again, personally, when Sir Robert returns to the Colony, he makes no complaint whatever of any fraud in the execution of this Deed, or any inconsistency between the Deed itself and the intention which the Deed was designed to carry out; but he desired to have the accounts. Lady Stanford had three accounts rendered to her, and he had afterwards an account rendered to him.

On the 13th of November, 1856, he writes to Mr. Hutchinson; at this time he has no solicitor. He writes as follows:—

"My dear Sir, "Cape Town, November 13, 1856.

"I have not as yet got my letter of instructions to the assignees, although I was promised it at the time of my embarkation, and my wife has expressed a wish for it to be shown to her since her arrival in this country. I have been, since my return, promised by Captain Hope to be furnished with a copy of it, but for some unaccountable reason I have not been furnished with it.

"As Captain Hope informed me that he was not in any way responsible for Mr. Brunette's acts, or for any money received by him in my affairs, as he had never signed a power for Mr. B. to act for him, I must decline taking over any bills or documents which are not submitted by the joint assignees and according to

my letter of instructions. Mr. Brunette has received a much larger sum than stated in his memorandum to Captain Hope. I conceive that a great part of my property has been sacrificed and sold illegally, as my letter of instructions attached to the assignment will show.

"I remain, &c.

"R. STANFORD.

"A. Hutchinson, Esq., Attorney-at-law."

It is impossible after this to say that this gentleman merely intended to assign over his personal estate for the purpose of conversion into money, and the landed estate, which was all he really had available for the payment of the debts, was to be retained unsold in the hands of the assignees.

On the 13th of December, 1856, the Trustees wrote a letter to Sir Robert Stanford as follows:—

"Sir,

"Cape Town, December 13, 1856.

"Previous to your departure for England in 1855, you repeatedly assured us, and others of your creditors, that Lady Stanford had from time to time been in the habit of granting receipts (as an act of formality) for interest on your bonds, in favour of the late General Boardman, and being aware that General Boardman had invested the money upon mortgage of 'Klein River,' for the sole benefit of his daughter (now Lady Stanford), we considered it possible that such might be the fact; now, however, that these bonds have been forwarded to Messrs. Thomson, Watson and Co. for payment, a claim has been made of ten years' interest, being from the death of the late General Boardman. This unexpected claim has the effect, notwithstanding the large sum for which 'Klein River' was sold, to make your estate insolvent, by a deficiency of 2,000*l.*, more or less, the claim of interest being over 4,000*l.*; and instead of having, as we fully expected we should have, to hand you over by way of reversion a few thousand pounds, we shall be obliged, unless this matter of interest be finally settled, to hand over your estate into the hands of the Master of the Supreme Court, as insolvent.

"We deem it our duty to inform you of the foregoing, from which you can form your own conclusions, it being unnecessary for us to point out the additional heavy expenses which would attend such a proceeding, besides the length of time required to bring the estate to a final settlement, more especially as we are informed that Lady Stanford has the power to prevent such additional and heavy expenses, by releasing or discharging Mr. Sandiman (General Boardman's executor) from all responsibility in respect of such interest, by which means a considerable * would remain, which could be received here, either by Lady Stanford as interest on said bonds, or by yourself as a reversion, after payment of your creditors in full.

"We have, &c.

"F. HOPE,

"GEO. D. BRUNETTE,

"Trustees of the Assigned Estate of

Sir Robert Stanford.

"Sir Robert Stanford, Kt., Cape Town."

Now at this time, in December 1856, the year that the property at the Klein River had been actually sold, and this gentleman at the time he is informed of what has thus been done, and during the whole of these proceedings from beginning to end, we can find nowhere any statement that this gentleman objected to the trust itself, or objected to the contents and purport of the Deed, however he may have objected to the manner in which the Trustees executed the trust.

Well, further letters pass between the Trustees on the subject of this, the trust, to the year 1857, and although it is said that proceedings were taken against one of the purchasers under the Deed at some period previous to 1858, it is not until the 10th of July, 1858, that the present suit was instituted.

After the statement of the facts which I have detailed it seems to their Lordships to be impossible for any human being to doubt that the suggestion, which was the main suggestion in the case, that the Deed does not contain the intention of the party who executed it is unfounded; there is not the smallest foundation for that suggestion.

With respect to the objection that the creditors have not come in, it does not appear that any of the creditors have acted in contravention of the Deed executed by Sir Robert; and if there had been anything in the observations which have been made relative to the Deed, it must be prior to the 31st of January, 1855, for it is clear that objection, whatever weight it might have had (and we think it would have been very little), is entirely remedied by the conduct of Sir Robert Stanford since.

Well then, we come to the objection that this Deed has been mutilated, interlined, falsified, and so on. When once we have arrived at this conclusion, to be perfectly satisfied that this Deed does contain the intention of the party in its main points, the question is different from that which we should have to consider if upon that point we should have entertained the least doubt. The Deed may be, and undoubtedly according to our notions is, exceedingly informal in the mode in which it is executed, the interlineations that are found in it, and several other particulars; but with respect to the document sent over, as far as it can be relied on, it appears, in

the opinion of the Court at the Cape, they had the very best possible evidence they could reasonably expect of the genuineness of the instrument, and that the instrument itself corresponded with the original. The interlineations are numerous, but the only one of the least importance, if it be of importance, has reference to a letter which it is said ought to be annexed to the Deed, and is not, and in which the date is directed to be, as much as may be, in accordance with the wishes expressed in a certain letter of the 22nd of December, directed by Sir Robert to the assignees, and hereunto annexed. That letter is not annexed, and the question is, supposing that letter had been annexed to the Deed, in what way can we collect from the evidence in this case it would in the least degree have altered the judgment of the Court in this case? We have evidence of the letter itself not being produced, and not being produceable. The parties in this case having distinctly sworn, and there being no evidence whatever to the contrary, that the letter is not in their possession, the Court below being satisfied, indeed, that the loss of it had been clearly proved, received secondary evidence of what the contents of the letter were; and what the contents of the letter were is stated in one of the documents which was read by Mr. Bushby at the close of his argument, a letter by Mr. Brunette of the 6th of February, 1857, to Mr. Berrange, who was at that time attorney for Sir Robert Stanford :—

“ Dear Sir, “ Cape Town, February 6, 1857.

“ The purport of the letter dated December, 1854, referred to in Sir R. Stanford’s Deed of Assignment, was simply to lay a statement of the position of his affairs before his creditors. It was written by me, but he refused to sign it at the first meeting of his creditors. It was, as well as I recollect, at the third meeting of creditors, and at the time of reading the Assignment over to him by the notary, that he made reference to this letter; whether he signed it then, I am not prepared to say.

“ In this letter he gave his creditors to understand that the value of stock on farms, &c., was of a large amount—I think, about 5,000*l.* or 6,000*l.*; that as the said stock was under seizure by the sheriff, it would not realize near its value, the sheriff’s sale being for cash. He begged his creditors to interfere and prevent this great sacrifice, and asked for 500*l.* to enable him to go to England, when he would remit funds to pay off all claims. He then proposed to assign all his estate to any three of his creditors in trust for the whole, but expressed a wish that his several farms should be sold in a certain order, beginning with the places ‘Bloem Fontein’ and ‘Uintjes Kraal,’ and ending with either

'Gustrouw' or 'Klein River,' I think the former; but subsequently it was agreed that 'Klein River' should not be sold for six or eight months, to allow sufficient time for him to reach England and remit money, as he was desirous of keeping 'Klein River' for his children.

"This is the whole substance of said letter, as near as I recollect. There were none of his proposals agreed to, with the exception of the last—I mean, the order or rotation in which the farms should be sold, as all creditors were of opinion that the valuation of stock was absurdly overstated; that the 'lung-sickness' had attacked his cattle; that if they accepted the Assignment it should be unconditional; and it was on these terms, and those only, that Captain Hope accepted drafts to the amount of 2,500*l.* in part payment of Mr. Steytler's claims, and to enable the sheriff to give four months' credit on sale of stock, with a view that it should fetch its proper value in the market.

"This is my recollection of the letter, and if Mr. Hull has it not, and I cannot find it, then the probability is, Sir Robert himself has it, as he has a habit of snatching up papers and putting them in his coat-pocket.

"I am, &c.

"GEO. D. BRUNETTE."

"To J. C. Berrange, Esq., Attorney-at-law."

He gives the same account of the letter given in his examination. The object of the letter was to point out the order in which he wished the estate to be sold, and expressing a desire that the last lot set up for sale should be the Klein River Estate, which he was anxious, if possible, to preserve for the benefit of his family.

With respect to the alterations and interlineations in the Deed, it was proved that all those alterations were made before the Deed itself was executed; that they were made principally at the instance of Sir Robert himself, and it appears to their Lordships there is no ground whatever to doubt that statement; and it is confirmed and distinctly proved that this document now sent over has been compared with the original document in the presence of the Court, and has been found in every respect accurate.

It appears, therefore, to their Lordships there is really no ground of complaint which has been brought forward in this case.

The most serious imputations have been made on the parties who have been concerned in this matter. It must always be in the discretion of Counsel to judge how far these observations are justified by the case, or by the instructions they have received. But it is not less the duty of their Lordships, and I consider it to be one of the most important duties

of a Judge when an imputation has been cast on parties or on officers which appear to be wholly without foundation, entirely to exculpate those individuals, and to state it does not appear to their Lordships that there is the slightest ground for imputation in this case, either upon Mr. Brunette, or Captain Hope, or upon Mr. Hull, or upon any of the parties who have been engaged in this transaction. Their Lordships will therefore recommend that the Appeal should be dismissed, with costs.

Mr. Palmer.—Will that include the Respondent's costs in the petition?

Lord Kingsdown.—That will be included.
