Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Melbourne Banking Corporation, Limited, v. *Brougham, from the Supreme Court of the Colony of Victoria; delivered* 11*th March*, 1882.

Present:

THE LORD CHANCELLOR.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS is an appeal from a decree of the Supreme Court of Victoria, setting aside a deed of release of the equity of redemption of a sheep station called "Alma" in that colony, which was mortgaged by the Respondent, John Brougham, to the Appellants, on the 18th of May 1867, to secure a loan of 8,349*l.* 15*s.* then made to him, with interest and future advances. The Appellants were in possession from April 1868, and executed fencing works and other improvements on the station. Brougham became bankrupt on the 26th of January 1870; and one John Goodman was appointed official assignee of his estate under the insolvent law of the colony. The release of the equity of redemption, set aside by the Court below, was executed by Goodman to the Appellants on the 30th of May 1870, in consideration of the full amount of the debt then claimed by the Appellants as due on their security, which is stated in the deed at 18,900*l.* or thereabouts.

R 1163. 100.—3/82 Wt. 5818. E. & S.

The Respondent obtained his certificate three days after the date of this deed. On the 28th of May 1871, the Appellants sold the station to one Thomas James, for 21,000*l*., payable by instalments extending over three years. On the 13th of December 1873, the Respondent, according to his own statement, became aware of the release of the equity of redemption executed by Goodman to the Appellants; and he then contracted with Goodman to purchase all the interest in his own estate, then remaining vested in Goodman, for 20*l*. Nothing was done, on the footing of this contract, till March 1877. In the meantime (on the 16th of April 1874) Goodman died; and it is stated in the judgment appealed from that in May 1876 the station was resold by James and one Johnson (whom he had associated with himself as a partner) for 80,000*l*. On the 28th February 1877, a person named Jacomb was appointed official assignee in place of Goodman; and he, two days afterwards, in fulfilment of Goodman's contract with the Respondent, conveyed to the Respondent all the estate then vested in him under the insolvency.

It was contended at the bar, that this conveyance was not sufficient to enable the Respondent to institute a suit to set aside the release of May 1870 from Goodman to the Appellants; but, if that release was voidable in equity, it is clear, both on principle and on authority, that there was an equitable interest in the Alma station, which, in 1877, continued to be part of the estate vested in the official assignee, and that the deed executed by Jacomb was sufficient to pass that interest. Their Lordships therefore do not doubt that the Respondent, when he instituted this suit, had the same *locus standi in curiâ* which Jacomb would have had if the deed of the 2nd March 1877 had not been executed; and they regard the time at which,

and the circumstances under which, the Respondent took this conveyance from Jacomb as material only to the burden of proof, properly incumbent upon the Respondent, as Plaintiff in a suit by which a deed, duly executed for valuable consideration, is sought to be impeached on equitable grounds. At the best, the Respondent can only stand in the shoes of Goodman, and he must have knowledge of the release which he seeks to set aside imputed to him, at least from the time when he admits that he acquired it.

This suit was instituted on the 22nd June 1877, by a bill which prayed for accounts against the Appellants as mortgagees in possession; objecting to the sale to James, and seeking (in effect) to have the benefit of the subsequent resale. The release of May 1870, was not mentioned in the bill, as originally framed, except as a defence expected to be set up by the Appellants; and nothing was then alleged to impeach it, beyond a suggestion that Goodman, as official asignee, had no power or authority to execute such a release, and that it was void and of no effect as against the Plaintiff.

To this bill the Defendants pleaded the release of the 30th May 1870; but that plea was overruled by the colonial courts, on the ground that it was *ultra vires* of the official assignee to execute any such release. The orders overruling the plea were reversed, on appeal, by Her Majesty in Council, their Lordships giving the parties liberty to make such additions to and amendments of their pleadings as they might be advised; and intimating that if the agreement and release, stated in the plea, were not the result of a fair and honest accounting and bargain, or were impeachable on the grounds of mistake or flagrant error, or of fraud upon the official assignee, or collusion between him and the bank to cheat the creditors, they might be questioned

by proceedings proper for that purpose (L.R. App. Cases, vol. 14, p. 164).

The Respondent thereupon amended his bill, charging that the debt due by the Plaintiff to the Defendants on the 30th of May 1870 did not amount to the sum of 18,900*l.* or thereabouts, but to a much smaller sum, and that the value of the station property at that time was at least 25,000*l.* or thereabouts, and that the deed of the 30th May 1870 was not the result of, or made and executed in pursuance of, any fair and honest accounting or bargaining between the Appellants and Goodman, but that, on the contrary, Goodman was induced to make and execute that deed by the misrepresentations of the Appellants and the other Defendant Johnson (their manager), as to the amount of the debt then alleged to be due and owing by the Plaintiff to the Appellants, and as to the value of the station property; and that Goodman made and executed the deed relying on those misrepresentations, and not otherwise, and under mistake, believing the false representations so alleged to be made to be true; and that, if the Appellants believed their own representations to be true, the deed was executed under a mutual mistake, and, if they did not, was obtained by fraud and misrepresentation on the part of the Appellants. These were the grounds suggested in the amended bill for setting aside that deed. An answer to the bill, as so amended, was put in by the Appellants on the 25th April 1880, in which all these allegations were denied, and which concluded by submitting to the Court that the Plaintiff was not entitled to have any account taken of the mortgage debt due to the Appellant on the 30th May 1870, as all accounts of the Appellants in relation thereto had on that date been stated and settled between the Appellants and Goodman; and the Appellants thereby claimed the benefit of the deed of the 30th May

1870 as a settled account, as if it had been pleaded as such to the relief sought by the amended bill.

Evidence was taken on both sides; and on the 25th February 1881 Mr. Justice Molesworth made a decree in the Respondent's favour: declaring that the equity of redemption of the mortgage of the 18th May 1867 was not barred by the release of the 30th May 1870; and directing, against the Appellants, as mortgagees in possession, the accounts which that learned Judge thought properly consequential, under the circumstances, on that declaration. The present Appeal is from that decree. The learned Judge, in the reasons given by him for this decree, stated his opinion to be, that Goodman acted upon misrepresentations of the debt, and of the value of the property, made to him on behalf of the Appellants, and that the release ought to be treated as without consideration, and made in mistake. It is, therefore, necessary first to consider what the alleged representions were, and what evidence there is that they were not true in fact.

It was not, and it is not, alleged, that any other representations were made than those which are contained in a letter from Messrs. Nutt and Murphy (the Appellants' solicitors) to Goodman, dated the 26th May 1870, in the following words:—

"The Melbourne Banking Corporation, Limited, are mortgagees from John Brougham of his Alma and Hartwood stations, and sheep thereon, now numbering about 20,000.

"The debt now due to the Bank, under the mortgage, is about 18,900*l.*, and the bank values its security at 15,000*l.*

"We are instructed to ask you, as assignee of the estate, if you are prepared to take over the security at that value; or whether you will release the equity of redemption in the property

mortgaged to the bank; and what evidence you would require of the amount of debt and value of the security.

"Requesting your early reply,

"We are, &c.,

"NUTT & MURPHY."

To this letter Goodman replied on the same day in the following words:—

"I will convey the equity of redemption of this insolvent's estate to the bank at a valuation of 15,000*l*. If the bank requires to prove for the deficiency, this proceeding will have to be done at a meeting."

The Appellants did not require to prove for the deficiency; and the deed itself, which bears date four days afterwards (the 30th May 1870), is sufficient primâ facie evidence that they agreed, as is stated in their pleading, and also by their chairman, Sir Charles MacMahon, in his evidence, to waive all right of proof in consideration of the release of the equity of redemption. It proceeds upon the following recitals:—

"And whereas there is now due and owing to the said corporation the sum of 18,900*l*. or thereabouts, on the security of the within-written indenture; and whereas the whole of the sheep runs or stations, chattels, and premises which are comprised and described in or are now subject to the within-written indenture are valued by the said corporation at the sum of 15,000*l*. or thereabout; and whereas the said John Goodman, being satisfied that the aforesaid sum of 18,900*l*. or thereabout is so due and owing to the said corporation as aforesaid, and that the present value of the property described and comprised in or now subject to the within-written indenture does not exceed the said sum of 15,000*l*., has elected and agreed to execute the assignment to the said corporation which is herein-after contained;"

and it purports to be executed in pursuance of that agreement, and in consideration of the sum of 18,900*l*. or thereabouts, so due and owing to the Appellants.

Their Lordships are of opinion that, if the recitals in this deed were not true, it was for the

Respondent, who is primâ facie bound by the admissions under seal of Goodman, from whom his title is derived, to prove their falsehood, and not for the Appellants to establish their truth by affirmative evidence. The learned Judge in the Court below seems to have taken a different view, and to have held that it was the duty of the Appellants to prove in detail by proper vouchers the correctness of the account, making out the debt of 18,900*l.* or thereabouts mentioned in the deed; and it appears to their Lordships, that, so far at all events as the question of debt is concerned, this inversion of the *onus probandi* was the foundation of the decree. It does not clearly appear whether this opinion of the learned Judge was based upon any general assumption as to the burden of proof in all cases of this kind, or upon the special circumstances of this particular case. If he intended to affirm the general proposition, that, whenever a release by a mortgagor to a mortgagee of an equity of redemption, in consideration merely of the amount of the debt, is impeached, the burden of justifying it rests upon the mortgagee, that doctrine would be opposed to the judgment of Lord Cottenham in Knight *v.* Marjoribanks (2 Mac. & Gor., p. 10). That was a case of a release, for no other consideration than the amount of the mortgage debt, of the equity of redemption of stations and stock in Van Dieman's Land, by one partner to others; and Lord Cottenham held, in conformity with the opinion of Lord St. Leonards in his Treatise on Vendors and Purchasers, that mortgagor and mortgagee were to be regarded, under such circumstances, until the contrary was shown by the party impeaching the deed, as on the ordinary footing of vendor and purchaser. If, on the other hand, the learned Judge in the present case considered that the burden of proof was changed

by the particular circumstances appearing in evidence, their Lordships are unable to agree with him in that opinion.

The suit was instituted seven years after the date of the transaction, and between four and five years after the time when, according to his own admission, it was known to the Respondent. Goodman, who knew all the circumstances, was dead; and Johnson, who was then the Appellant's manager, died while the evidence was being taken. The property which was the subject of the release was of a kind as to which courts of equity expect reasonable promptitude of action from those who seek to disturb legal titles; and it had passed for more than six years out of the Appellant's hands. The Appellants, in the first schedule to their answer (filed on the 12th November 1877), set forth fully the particulars of all costs, charges, expenses, and payments which they claimed a right to charge (if the release should be set aside) under the mortgage; and their chairman, Sir Charles MacMahon, verified (as to his belief) the correctness of that account. No attempt was made by the Respondent, in any part of the evidence, to show that, in the account so stated, there was any fraud, overcharge, or error; and there was only one item pointed out by the learned Judge in the Court below, or by the Respondent's Counsel at their Lordships' bar, as in appearance suspicious; viz., a sum of 5*l*. 5*s*., charged as paid to "Goodman" on the 28th May 1870, two days before the deed of release. It is impossible for their Lordships (even if they ought to presume this to have been a payment to the official assignee) to assume, in the absence of evidence, that it might not have been satisfactorily explained if it had been challenged, which it was not. Besides the account thus set forth (as required by the bill) by way of schedule to the answer, the books of the Appellants were

produced by their present manager, Mr. Barlow, who was called as a witness by the Respondent; and all such extracts from them as were thought material were put in as part of the Respondent's evidence. Their Lordships do not say that these extracts ought on that account to be taken as establishing affirmatively the correctness of all entries contained in them; but no evidence whatever was offered to discredit them; and one of them (the exhibit W) shows in what manner the Appellants arrived at the amount of their claim, as stated in the deed of release. That exhibit contains, not a personal account as between mortgagor and mortgagee, but an account between the Appellants and the station, headed "Alma station (late Toms Lake)"; and it is continued without break down to the time when the Appellants ceased to have any interest in the station, by the completion of James's purchase. Mr. Justice Molesworth observed upon that fact; and it was also insisted upon at the bar, as if some inference adverse to the good faith of the transaction of May 1870 ought to be drawn from it. But it appears to their Lordships that, in a business like that of the Appellants, such an impersonal account would naturally and properly be continued as long as they had the station on their hands, whether by a redeemable title, or by one which was not redeemable.

In that account (which was made up at varying rates of interest, generally much lower than 15 per cent., the rate secured by the mortgage deed, and with rests) the same items of charge (apart from interest) appear as in the first schedule to the Appellants' answer; and the result is, that on the 21st April 1870, 18,820*l.* 17*s.* 6*d.* is there shown as due from the mortgaged estate to the Appellants, and on the 30th May 1870 19,294*l.* 14*s.* 9*d.* The account so made out was more favourable to

the Respondent's estate than if it had been stated according to the strict terms of the mortgage deed, with 15 per cent. interest throughout; and it is evident to their Lordships, that it was from this account that the amount of "18,900*l.* or thereabouts," stated in the deed of release, was derived. It seems not improbable, that this particular figure may have been arrived at sometime before, and that it was not thought necessary to make up the account more exactly. If there was any error, it was (according to these books) rather in understating than in overstating the amount actually due.

It appears by the evidence, that Goodman was a man very well acquainted with business. He was trustee and inspector for the Australian Trust and Agency Company, the business of which consisted in lending money on station property. He was accustomed, as inspector for that company, to visit country stations, and to report what might be prudently advanced upon them; and he discharged this duty to their satisfaction from 1863 till the time of his death. Sir Charles MacMahon met him shortly before the date of the deed of release (whether before or after the 26th of May 1870 is not clear) outside the Appellants' bank, and was then told by him that he had been "looking through Brougham's "accounts, and that the bank stood likely to "make a loss"—a statement, quite in accordance with the recitals of the deed.

It was strongly urged by the Respondent's Counsel at the bar that Goodman, as a trustee for Brougham and his creditors, did not properly discharge his duty; that he ought to have done something more than look through the accounts in the bank books, and to have taken some steps which (so far as appears) he did not take, to ascertain, by a personal inspection of the station or otherwise, the value of the

mortgaged property; and that, from the fact that the release was executed only four days after Messrs. Nutt and Murphy's letter of the 26th May, and that in his own reply to that letter (on the very day when he received it) he expressed his readiness "to convey the equity of redemption at a valuation of 15,000*l.*," the Appellants must be deemed to have had notice that he, being a trustee, neglected his duty. Their Lordships think, that if the Respondent had intended to rely upon a breach of trust by Goodman, with notice of it to the Appellants, that case ought to have been made by his bill; which it is not. But, even if such a case were open upon the Respondent's pleading, their Lordships find no evidence, either of any breach of trust, in fact, or of any notice of it to the Appellants. It was certainly not for the Appellants to presume that Goodman did or would neglect his duty. What steps he may actually have taken to satisfy himself on the points mentioned in the recitals of the deed, or when exactly he took them, it was impossible, when he was no longer living, to ascertain. It by no means follows, because the letter of Messrs. Nutt and Murphy and his reply were written on the 26th of May 1870, that he had previously no information on the subject. The contrary is probable, this station being the only large asset mentioned in the Respondent's schedule, filed four months before. Goodman had been with the Respondent's witness, Patrick William Brougham, at Tom's Lake, adjoining the Alma station, in February 1869, and he had then "crossed about four miles of Alma station." Mr. Justice Molesworth himself thought that "he "might have obtained sufficient information "without leaving Melbourne." There is, therefore, in their Lordships' opinion, no reason for drawing any inference unfavourable to

Goodman's conduct, either from the terms of the letters, or from the date of the deed; and the result is, that there is, in their judgment, no ground for relieving the Respondent from the burden of proving the misrepresentations alleged in his amended bill, which, so far as relates to the amount of the mortgage debt, he has not even attempted to do.

There remains only the other alleged misrepresentation, as to value; and this might be very shortly disposed of by the mere fact that no representation on this subject was ever made by the Appellants, except that they themselves "valued their security at 15,000*l*." This is not a representation by which anybody could possibly be misled or deceived; and even if evidence were given tending to show that 15,000*l*. was less than the true value of the property, mere undervalue would not alone be a sufficient ground (as Lord Cottenham said in Knight *v.* Marjoribanks) for impeaching the transaction. Their Lordships however are of opinion, not only that the Respondent's evidence fails to throw any real doubt upon the good faith of the estimate of value stated in Messrs. Nutt and Murphy's letter, but that, if on that point the burden of proof had rested upon the Appellants, they would have satisfied it. Sir Charles MacMahon (whom Mr. Justice Molesworth exonerates from all intentional deceit) swore that he thought 15,000*l* was a fair value for the station at the time of the dealing with Goodman, and that the Appellants would have sold it for that price. The consideration for the release was not 18,000*l*., the amount of that estimate. but was the whole amount of the mortgage debt, then stated at 18,900*l*., and really standing in the books of the bank at more than 19,000*l*. The Appellants had offered to sell the property to Goodman for the amount they put upon it, 15,000*l*., which offer he declined; and their

Lordships cannot admit the force of the argument that he could not have found the means of paying such a sum, whatever might be the true value of the property. He was a man of business; and if the value to sell had been anything like the amount alleged by the Respondent and some of his witnesses, their Lordships see no reason to doubt that an advance of the necessary funds might have been obtained; especially as it is not shown that the Appellants would have refused to allow reasonable time for that purpose. The witness Richardson proves that Johnson, the Appellants' manager, (at a time not accurately fixed,) mentioned the property to him as for sale at 15,000*l.*, but Richardson was not then disposed to buy. In March 1871, when the account against the station still stood in the bank books at more than 18,000*l.*, the Appellants offered it to one Chirnside for that sum; that offer remained for some time open, but it was eventually declined. The sale eventually made to James, on the 28th May 1871, was on terms not much (if at all) more favourable, considering the length of credit allowed; and the debt then stood in the bank books at 21,050*l.* 18*s.* 9*d.* In the value of a speculative property of this kind, every year may make a very material difference. Against these facts the Respondent has offered no evidence except the opinions of certain stock and station managers, opposed to other opinions as to value adduced on the Appellants' part; all which their Lordships think it their duty to disregard, as immaterial to the true issue in the case, which is one of misrepresentation, mistake, or fraud. Great stress was laid in the judgment below, and in the argument for the Respondent, upon the evidence of one particular witness, named Atkins, who took delivery of the station for the Appellants in April 1868, and who said, that

he valued for the bank when he took delivery at 1*l.* per head (which was equal to 20,000*l.*), and so informed the manager; and it was urged that the value must have increased, partly by reason of the Appellants' improvements, and partly because this station did not suffer, like others near it, from drought, between April 1868 and the 30th of May 1870. Atkins, however, remained in the Appellants' service for little more than one month; and there is no proof, either that his estimate in April 1868 was really trustworthy and correct, or that the Appellants so regarded it. On the contrary, there is the evidence of Mr. Peck, a stock and station agent, who in 1869 offered the Alma station for sale, advertising it on the 27th August 1869. It was put up in the usual way, but was not sold, no offer being made for it; and he says, that before 1870 station property in the Alma district "was almost unsaleable." A bank like the Appellants' not only may, but in the proper course of their business must, endeavour to realise property on which they have advanced money, without any burdensome delay; and their Lordships see no sufficient ground for believing that the Appellants could have practically realised in May 1870 more than the amount at which they then estimated the Alma station; still less more than the true amount of their debt then due upon it, which was the actual consideration for the release.

Their Lordships will therefore humbly advise Her Majesty that the decree of Mr. Justice Molesworth ought to be reversed, and the Respondent's bill dismissed with costs; and the Respondent must pay the costs of the Appeal.