[HIGH COURT OF AUSTRALIA.]

BARNS . . . . . APPELLANT;
PLAINTIFF,

AND

QUEENSLAND NATIONAL BANK LTD., AND FREDERICK LEWIS NOTT . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1906.

BRISBANE, *April* 19, 20, 23. *May* 14.

Griffith C.J., Barton and O'Connor JJ.

Mortgagor and mortgagee—Notice of demand for payment—Default—Waiver—Estoppel—Duty of mortgagee in exercise of his power of sale—Reckless sale—Sale at undervalue—Sale in bad faith—Measure of damages.

In the exercise of his power for sale under a mortgage, the mortgagee is under a duty towards the mortgagor to realize his security in good faith, and with reasonable precautions to obtain a proper price; he must not wilfully or recklessly deal with the property in such a manner that the interests of the mortgagor are sacrificed. A power of sale under a mortgage, like any other power, must be exercised honestly for the purposes of the power, not for the purpose of carrying out some sinister object—*i.e.* beyond the purpose and intent of the power.

Expressions of Lord *Westbury* in *Duke of Portland* v. *Topham* (11 H.L.C., 32, at p. 54), applied.

A mortgagee agreed with a mortgagor not to put into effect his power of sale for a certain time, but subsequently, in consequence of a quarrel with the mortgagor, he gave immediate notice of his intention to exercise the power, and sold the mortgaged properties at auction for the amount of the debt. There was evidence that the properties were worth considerably more, that the sale was insufficiently advertised, and the reserve price, at which the properties were knocked down, was disclosed before and at the auction. The jury found that the sale was not made *bonâ fide*, but recklessly, and without due regard for the interests of the mortgagor, and judgment was entered for

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

the mortgagor for the difference between the real value of the properties and the price realized at the auction. This judgment was reversed by the Full Court, on the ground that there was no evidence to support the finding of the jury.

Held : That the circumstances of the sale, and the possibility of obtaining a fair price, were matters peculiarly within the knowledge of the jury, and that there was evidence before them to warrant them in arriving at their findings.

It is a sufficient demand for payment under a mortgage, if the notice given sufficiently identifies the debt of which payment is demanded, notwithstanding any error or omission in description.

Semble—If the mortgagee capitalises a half-year's interest accrued due, he cannot afterwards treat the non-payment of the interest for that half-year as a default entitling him to exercise his power of sale.

Semble—Where a mortgagee with power to sell upon default has made demand for payment, the right to exercise the power of sale may, before or after the occurrence of default, be waived by an agreement with the mortgagor not to exercise it for a certain time : *Hughes* v. *Metropolitan Railway Co.* (2 App. Cas., 439), applied. A sufficient consideration to support such an agreement is supplied, if the mortgagor was thereby induced to abstain from taking steps to save the property from the consequences of default.

Semble—Where formal demand of payment, which is a necessary condition precedent to a power of sale, has been made, the mortgagee may, as well after as before the occurrence of actual default, by his conduct in negotiations with the mortgagor estop himself from alleging that the demand has ever been made ; in such a case a fresh demand must be made before the mortgagee can be heard to allege that default has been committed.

APPEAL from the Supreme Court of Queensland.

The defendant Nott, a trustee under the will of the late W. L. Barns, mortgaged several properties comprised in the trust estate to the defendant Bank. Default having been made in payment of principal and interest after demand, the Bank, in exercise of its power of sale under the mortgages, sold the properties in one lot by auction to other defendants, Minnagh and Naughton. The plaintiff, as beneficiary under the will, brought an action against the trustee, the Bank, and the purchasers, claiming to have the sale set aside, or for damages for wrongful and improper sale, or for an account of the sum which should, but for the wilful default or neglect of the defendants, have been realized for the properties sold. The suit failed as against the purchasers, who had bought for value

bonâ fide and without notice of any irregularities. Judgment was obtained against the defendant Bank for an amount representing the difference between the debt of the mortgagor to the Bank and the true value of the property. This judgment was set aside by the Full Court, who held that it was unreasonable to find that the Bank acted otherwise than *bonâ fide* and in the honest exercise of the power of sale.

The further material facts are stated in the judgment of the Court.

Lilley (with him *Fowles*), for the appellant. The case is one for damages for wrongful and reckless sale by the respondent mortgagees, and for sale at an under-value.

The Bank's right of sale never accrued. There never was a sufficient demand upon which default could be based; the demand of 5th May 1904, was waived by acceptance of the payment on 30th June of interest and rates to end of 1904. The demand of July 9th 1903, was insufficient, because it referred only to that mortgage which covered the small property; such a notice is invalid: *M'Donald* v. *Rowe* (1); *Powers on R. P. Statutes, Qd.*, pp. 82-3. It is also invalid because it demanded payment "immediately" instead of "within 24 hours:" *Massey* v. *Sladen* (2); *Toms* v. *Wilson* (3). Even if the July notice of demand was sufficient, the right to take advantage of default was waived in August, when the respondent's manager agreed, for ample consideration, to give time. If there was not consideration, still the Bank is estopped, by its conduct and negotiations, from setting up the lack of consideration: *Equitable Life Assurance Co.* v. *Bogie* (4); *Hughes* v. *Metropolitan Railway Co.* (5); *Albert* v. *Grosvenor Investment Co.* (6), queried in *Williams* v. *Stern* (7); *Longdon* v. *Sheffield Deposit Bank* (8). Till the time of the sale, there was never since July any demand made; the notice of 9th September 1903, was merely a notice of intention to sell, not a demand at all. If, at the date of the agreement to give time, the power to sell had accrued upon default, the right to exercise that

(1) 3 A.J.R., 90; 4 A.J.R., 134.
(2) L.R. 4 Ex., 13.
(3) 32 L.J.Q.B., 382.
(4) 3 C.L.R., 878.
(5) 2 App. Cas., 439.
(6) L.R. 3 Q.B., 123.
(7) 5 Q.B.D., 409.
(8) 24 Sol. J., 913.

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

power was waived until December; the consideration for waiver was the appellant's obligation to hold up his money and pay interest for the further period, and not to force redemption of the property or throw it upon the Bank's hands for realization, and its attendant risk and trouble: *Page* v. *Cowasjee Eduljee* (1); *Queensland Investment Co.* v. *Hart* (2).

[GRIFFITH C.J., referred to *City Bank* v. *Deane* (3); *Rouse* v. *Bradford Banking Co.* (4).]

This may not have been consideration of much "value," but it was "adequate" in law, and Murphy said "I am perfectly satisfied; I will wait." The demand was as effectively withdrawn as if Nott had been told by Murphy to tear it up: *Fullerton* v. *Provincial Bank of Ireland* (5). There was ample evidence to satisfy the jury that the sale was reckless and at an under-value: *Farrar* v. *Farrars Limited* (6). The mortgagee did not act *bonâ fide* or take reasonable precautions to get a fair price: *Kennedy* v. *De Trafford* (7). The whole of the circumstances of the sale were proper for the jury to consider, especially the disclosure of the reserve price; see the practice of the Court on sales, Or. LXVIII., r. 8 (Queensland Practice of Supreme Court, p. 285.)

[GRIFFITH C.J.—And in England: *Delves* v. *Delves* (8).]

Feez (*Shand* with him), for the respondent Bank. The Court should not be asked to hold that mortgagees, with the fullest discretionary powers of sale, who sell on the advice of competent advisers, shall be held liable to damages because a sympathetic jury believe that the sale was not quite regular and the property should have realized more.

[GRIFFITH C.J.—The question is: Did the mortgagees upon the facts commit a breach of duty?]

It would be very dangerous to put mortgagees at the absolute caprice of juries. There was a sufficient demand made for payment, upon which the mortgagor made default. The demand of 5th May was sufficient, and default was made.

(1) L.R. 1 P.C., 127, at p. 143.
(2) 6 Q.L.J., 186.
(3) (1904) 4 S.R. (N.S.W.), 182.
(4) (1894) A.C., 586.
(5) (1903) A.C., 309, at p. 313.
(6) 40 Ch. D., 395, at p. 410.
(7) (1897) A.C., 180, at pp. 184, 185.
(8) L.R. 20 Eq., 77.

[GRIFFITH C.J.—But the Bank got rid of that demand by accepting payment of arrears on 30th June.]

The demand of 9th July was sufficient, for it identified the debt to be paid; the other elements were immaterial. Further, the non-payment of half-yearly interest on 30th June was a breach of covenant upon which the mortgagees were entitled to sell under clause 10 of the mortgage deed.

[GRIFFITH C.J.—Did not the bank waive that by capitalizing the unpaid interest according to its usual course of dealing with the mortgagor?]

The agreement by Murphy to give time referred only to a withdrawal of his "notice to sell"; the demand for payment was not withdrawn, and the default thereon was immediately available at any time: *Williams* v. *Stern* (1), in which case *Albert* v. *Grosvenor Investment Co.* (2) was dissented from. There had been no default committed in *Hughes* v. *Metropolitan Railway Co.* (3). See also *Tommey* v. *White* (4); *Santley* v. *Wilde* (5).

Further, the demand of 9th September 1904, was a good demand; if it was not itself a complete formal demand, it yet revived the demand of 9th July, which was never withdrawn, and the default under which was still outstanding. If the old default was cancelled, a new default accrued within 24 hours from 9th September.

The alleged promise to give time till 31st December was not supported by any consideration; the mortgagee never altered his position in any way for the benefit of the Bank. The power of sale should not be affected because the Bank did the mortgagor a favor without any benefit in return: *McManus* v. *Bark* (6).

[GRIFFITH C.J.—Where the rights of parties under a deed depend upon a fact, such as notice, there seems to be no need of consideration for the valid withdrawal of the notice: *Lord Inchiquin* v. *Lyons* (7).]

But a default which has already arisen cannot be waived without consideration; withdrawal of a notice stands on a different footing from waiver of a default which has created new rights.

The sale was not reckless nor at such an undervalue as to entitle

(1) 5 Q.B.D., 409.
(2) L.R., 3 Q.B., 123.
(3) 2 App. Cas., 439.
(4) 3 H.L.C., 49.
(5) (1899) 1 Ch., 747.
(6) L.R., 5 Ex., 65.
(7) 20 L.R., Ir., 474.

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

the appellant to relief. The Courts never interfere with a sale unless the circumstances show that it was carried out with such recklessness or at such gross undervalue as to amount to a fraud. A sale, in order to be considered not *bonâ fide*, must go so far as collusion: *Warner* v. *Jacob* (1).

[GRIFFITH C.J.—The whole question is whether the sale was carried out *bonâ fide* and with reasonable precautions to get the best price. This is not now a suit by the mortgagor against a purchaser for rescission, but against the mortgagee vendor for damages.]

The Bank acted upon the fullest advice from competent advisers, and with the fullest publicity. The mortgagee is not a trustee for the mortgagor in the exercise of the power of sale: *Downes* v. *Grazebrook* (2); *Warner* v. *Jacob* (3); *Davey* v. *Durrant* (4); he cannot be charged with recklessness when he acts *bonâ fide* on skilled professional advice. Juries should not be allowed the decision in mere matters of opinion as to *bona fides*; this case turns upon a balance of opinion between experts as to the best methods of obtaining the best price. A mortgagee vendor should not be held answerable for anything short of collusion or gross neglect of reasonable precautions to obtain the best price: *Nash* v. *Eads* (5). There is no evidence to sustain a verdict that the Bank did not try to obtain a fair price; the jury's finding of reckless sale and undervalue was mere speculation. It does not matter what the fair price was, unless the undervalue is so gross as to amount to evidence of fraud or collusion; the whole question is—Did the Bank act on the advice of reasonably competent advisers? *Colson* v. *Williams* (6); *Kennedy* v. *De Trafford* (7); *Bettyes* v. *Maynard* (8). It would hopelessly impede mortgagees in the exercise of their power of sale, to leave the balance of conflicting opinions, which are not ordinary findings of fact, to the discrimination of a jury.

Lilley in reply. Notices may be withdrawn, waived or made the subject of estoppel: *Santley* v. *Wilde* (9); *Birmingham and Dis-*

(1) 20 Ch. D., 220.
(2) 3 Mer., 200.
(3) 20 Ch. D., 220, at pp. 223-4.
(4) 1 De G. & J., 535.
(5) 25 Sol. J., 95.
(6) 58 L.J., Ch., 539.
(7) (1896) 1 Ch., 762, at p. 773.
(8) 49 L.T.N.S., 389.
(9) (1899) 1 Ch., 747, at p. 763.

trict Land Co. v. *London and North Western Railway Co.* (1). Notice of demand can be waived by both parties consenting, and a new notice then becomes necessary, which in this case was never given. If consideration was needed to support the waiver, it was supplied by Nott, at Murphy's request, ceasing his negotiations with a prospective lender who would have enabled him to discharge the mortgage. If the sale was improper, because of the lack of a proper demand for payment, the measure of damages must be substantial: *Moore* v. *Shelley* (2).

Cur. adv. vult.

The judgment of the Court was read by

GRIFFITH C.J. This is an appeal from a decision of the Full Court, reversing a judgment of the Chief Justice given after trial with a jury in an action in which the appellant, a beneficiary interested in real property subject to mortgage, sought to set aside a sale made by the respondents as mortgagees, or in the alternative to recover damages for loss occasioned by the respondents' breach of duty in respect of the sale. The appellant having failed to establish any case against the purchasers, judgment was given in their favour, but the learned Chief Justice gave judgment for the appellant for £844 10s. 4d., being the difference between the value of the mortgaged property as found by the jury and the amount of the mortgage debt and interest up to the date of sale.

The statement of claim alleged that the sale of the lands in question was conducted in a negligent manner by the respondents, that the sale was insufficiently advertised, and a reasonable time was not allowed to elapse between the notice that the property would be sold by public auction and the sale thereof, and that as a consequence the lands realized much less than their real value, and much less than they would have realized had the sale been properly conducted. The respondents in their defence pleaded that default had been made in payment of interest under the mortgage securities; that they had on 9th July 1904, given due notice of demand of payment of the principal moneys due, and that default had been made by the mortgagor; that, if due notice

(1) 40 Ch. D., 268. (2) 8 App. Cas., 285.

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

was not given, it had been waived by the mortgagor; that the mortgagor acquiesced in and consented to the sale; and they denied the plaintiff's allegations as to the conduct of the sale. The appellant by her reply denied that default had been made in payment of interest, and set up an agreement between the mortgagor and the respondents that payment of principal and interest should be deferred until the mortgagor had completed certain negotiations then pending to obtain an advance on the security of the mortgaged lands, provided that such payment should be made before 31st December 1904.

At the trial the pleadings seem to have been to some extent disregarded, and the substantial case then made for the plaintiff was rested on two grounds:—(1) That at the time of the sale no default had been made of which the mortgagees were entitled to take advantage; and (2) That the sale was not made *bonâ fide* for the purpose of obtaining payment of the mortgage debt, but was made recklessly and with a deliberate disregard for the interests of the mortgagor.

The following questions were left to the jury by the learned Chief Justice, and answered as stated:—

2. Q. Was the sale made by the mortgagees (1) recklessly and without due regard to the interests of the owners; or (2) Was it made *bonâ fide* and with due regard to their interests?

Answers (1) Yes; (2) No.

4. Q. After July 9th did Murphy (the respondents' manager) agree to give Nott (the mortgagor and trustee for the plaintiff) further time for payment?

Answer: Yes.

If so, did he agree in August as alleged by Nott in his evidence? (This question related to the allegation that payment had been deferred by agreement.)

Answer: Yes.

5. Q. Was this agreement intended by Murphy and Nott to cancel the notice of July 9th?

Answer: Yes.

The jury also found that the actual value of the property in question was at the time of the sale £1,900, and that, if the property had been sold *bonâ fide* and with due regard to the

interests of the owners, it would in their opinion have realized £1,700. The actual price realized was £1,085.

On these findings the learned Chief Justice, as already stated, gave judgment for the appellant, but his decision was reversed by the Full Court, who were of opinion that there was no consideration for the agreement found by the jury in their answer to Question 4, and that, if there was, Murphy had no authority to make it, and further that there was no evidence to support the answer to Question 2. It becomes necessary, therefore, to examine the evidence with some care.

The property in question consisted of land in the town of Bundaberg, and was mortgaged to the respondents by two Bills of Mortgage Nos. 377,621 and 377,622, executed by F. L. Nott the registered proprietor under the Real Property Acts, and dated 20th April 1899, of which one was declared to be collateral to the other. One of the mortgages comprised two town allotments, unoccupied and of comparatively small value. The other mortgage comprised twelve contiguous allotments, situated at some distance from those comprised in the first mortgage, forming a block of about three acres in a good part of the principal street of Bundaberg, and having two residences erected upon it. The municipal valuation of this block for the year 1904 was £1,510. The valuations of the other allotments were £90 and £35 respectively. It should be stated that in Queensland municipal valuations are made upon the land alone, irrespective of improvements. The two mortgages were in similar terms. In consideration of the sum of £850 lent by the respondents the mortgagor covenanted:—(1) To repay that sum within twenty-four hours after demand in writing; (2) to pay interest on that sum at the usual rate charged by the bank on overdue accounts by equal payments on 30th June and 31st December in each year, or other balancing days; (3) within twenty-four hours after demand made in manner aforesaid to repay all further advances or other sums for which the mortgagor might become liable to the Bank severally or jointly, with interest at the same rate; (5) that interest should be deemed to accrue from day to day, and that on the half-yearly balancing days all interest then accrued due should be treated as if converted into principal, and should bear interest accordingly; (10) that

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

immediately upon default the mortgagees might sell the property without waiting a month as prescribed by sec. 57 of the *Real Property Act* 1861. In December 1903, the advance amounted to £1,000, the stipulated limit. During the first half of 1904, Murphy, the local bank manager, made requests for payment, and on 5th May he wrote to Nott the mortgagor as follows:—"In accordance with instructions received from my Head Office I hereby make demand upon you for repayment to the Bank of £1,033 13s. 4d. and interest since 1st January last now owing to the Bank." Other interviews took place, and on 20th May he wrote as follows:—"I have advised my general Manager that you informed me when last in this office that you expected shortly to obtain a loan elsewhere. He has pointed out to me that it is now over six months since you first advised the Bank that you were about to obtain a private loan, that interest and rates are now accumulating without any definite prospect of their being paid, and he instructs me to inform you that interest for last half-year and rates for 1903 must be paid not later than 31st of this month, failing which the Bank will be compelled to finally foreclose on the securities without further notice to you."

The interest and rates, which amounted to £76 16s. 11d., were not paid by the 31st of May, but the amount was paid into the Bank on 25th June. The learned Judges of the Full Court appear to have thought that the default made in compliance with the notice of 5th May still continued. We think, however, that the notice of 20th May should be taken as a conditional withdrawal of that notice, and that the condition that the interest and rates should be paid by 31st May was so far not of the essence of the offer that its exact performance was waived by the receipt of the amount on 25th June without objection, so far as it could be waived. How far a notice, non-compliance with which creates a default, can be waived or withdrawn, and what are the consequences of such a waiver or withdrawal, are matters which it will be necessary to consider more particularly when dealing with the transaction of August referred to in the answers of the jury. On 30th June a half year's interest fell due and was not paid, but was added in the Bank's books to the principal, then amounting to £1,000. In the meantime Nott had been endeavouring to obtain a loan on

mortgage of the property to pay off the Bank, and had obtained in March an offer which he did not accept, the interest asked being more than he wished to give. On 9th July Murphy, acting under instructions from his principals, made a formal demand upon Nott for payment of £1,038 4s. 5d., described as the amount then due on the security of mortgage No. 377,621, which comprised the two unoccupied pieces of land.

The letter of demand contained also a notice that unless the amount were immediately paid the Bank would proceed to exercise their power of sale under that mortgage. It was objected for the appellant that this demand was insufficient, inasmuch as it only referred to one of the mortgages. In our opinion, however, a demand is sufficient if it sufficiently identifies the debt of which payment is demanded, notwithstanding any error or omission in the description.

The amount not having been paid within twenty-four hours, default was thereupon committed within the terms of the mortgage, and the mortgagees' power of sale came into operation. The learned Judges were of opinion that, apart from the demand, a sufficient default was committed by non-payment of interest on 30th June in pursuance of the covenant, and that no demand of principal was necessary. We doubt whether the Bank's election to treat the interest as capitalized did not amount to a waiver of that default, if it could be waived, but we do not think it necessary to decide the point.

On 10th July Nott had an interview with Murphy, who said, amongst other things, that the demand was a mere matter of form. Nott then informed Murphy that he had made arrangements with a Mr. Nielson, a solicitor, to advance him the necessary amount from the trust estate of a deceased person of which he was trustee, but that the money would not be available for two or three months, probate of the will not having been yet granted. Murphy expressed his satisfaction with the security, which he said he valued at £1,600 or £1,700, and suggested that Nott should write him a letter which he could forward to the Head Office of the Bank, and should also get a letter from Nielson. On the following day Nott wrote to Murphy as follows :—" Re our conversation of Saturday I would ask you to kindly let the account run on for a

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

little while longer, say three months, as I have made arrangements for a loan of £1,200 on the property, but I cannot get the money until September or October next. In addition to the land mortgaged, you also hold £150 of shares in the foundry, shares in the Pastoral Finance Company of Sydney paid up to £65. There cannot be any doubt as to the security. As you know, my great objection to selling just now is that at present time property has to be sacrificed, but by holding for another twelve months I am satisfied I could realise 50 per cent. more, and this property is, as you know, not my property, but my sisters'. Hoping you will be able to help me this far, by so doing you will greatly oblige."

On 13th July, Nielson wrote to Murphy a letter as follows: "With reference to Mr. F. L. Nott's application for loan of £1100 on securities (town) which are at present I understand held by your Bank, I beg to inform you that the matter is at present before one of my clients, and it is possible that he will take up the loan. If not, then I have every reason to believe that I shall take up same as trustee of an estate, whereof I am now about to apply for probate. Of course the latter will take some weeks to complete, and until completion I can do nothing, as I cannot get the moneys into my hands before then."

On 20th July, Murphy forwarded these letters to the Head Office, and in reply received a letter, dated 21st July, as follows: "The matter of dealing with this account is left to your discretion, but I do not think we should lose the chance of selling."

Shortly afterwards Murphy showed this letter to Nott, when a conversation took place, of which Nott's version, which the jury believed, is as follows:—

"I saw Murphy about three weeks after this—after the show in Brisbane. I asked him if he had had a reply from the Head Office. I said 'I have had no reply from you.' He said 'I suppose you think no news is good news.' I said 'Yes.' He said 'I'll show you,' and opened a drawer and took out a letter. It was 'Re Nott—I leave this matter entirely to your discretion.' He said 'I am perfectly satisfied till Nielson gets the money, as long as its paid before the next balance (31 Dec.).' I said 'that is very satisfactory—there will be no more bother about it.' He said

'No, you needn't worry about it, you'll hear nothing further till Nielson pays the money in.'"

It did not appear whether after this conversation Nott took any further steps to raise the money. Probably, the proper inference is that he did nothing.

The learned Judges were of opinion that the answers of the jury on this point could not affect the rights of the parties unless construed as a finding of a binding agreement by the Bank to give Nott until 31st December for payment, and they thought that they could not be so construed, both by reason of the absence of consideration and of the want of authority on the part of Murphy to make such an agreement. So far as Murphy's authority is concerned, we think that under the Bank's letter of 21st July he had full authority to make any agreement that in his discretion he thought proper. On the other point the learned Judges referred to the case of *Williams* v. *Stern* (1). In that case the plaintiff, who had given a bill of sale to the defendant, had made default in payment under its terms, but the defendant had promised to wait for a week before making seizure. It seems to have been assumed that the default occurred before the promise. *Bramwell* L.J. was of opinion that there was no evidence of a waiver by the defendant and that no benefit accrued to him by his promise. *Brett* L.J. thought that there was no misstatement by the defendant as to existing facts, nor any misconduct on his part, but a mere naked promise not binding on him. *Cotton* L.J. said that the promise of the defendant was not founded upon any consideration, that he made no representation which operated to the plaintiff's disadvantage, but simply uttered his own private intentions, and gave no promise which was enforceable in law or equity. For the appellant the case of *Hughes* v. *Metropolitan Railway Co.* (2) was cited, and in particular the language of Lord *Cairns* L.C. (3). "It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the

(1) 5 Q.B.D., 409.

(2) 2 App. Cas., 439.

(3) 2 App. Cas., 439, at p. 448.

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." In that case the negotiations referred to had taken place after the giving of a notice requiring the doing of an act, but before the expiration of the period within which the act was required to be done. No actual default, therefore, had been then committed. The respondents contended that this doctrine has no application to a case where default has already been committed. The language of the Lord Chancellor is not in terms limited to the case where the negotiations precede default, but it must, no doubt, be read with reference to the facts with which he was dealing. This case was cited to the Court in *Williams* v. *Stern* (1), and it is to it, no doubt, that *Cotton* L.J. referred to in his judgment. In *Tommey* v. *White* (2), the assignees under a deed executed by a debtor in trust for his creditors were empowered to sell his house and business after three months' notice. Notice was given, but afterwards it was agreed at a meeting of the trustees and creditors that it should be considered as abandoned, and it was held that a sale in pursuance of it was unauthorized and unlawful. In this case the agreement was within the three months. We are by no means satisfied that the doctrine stated by Lord *Cairns* is limited to cases in which the so-called waiver takes place before the occurrence of actual default. In reason, the unfairness to the party who is induced to suppose that the strict rights of the other party will not be enforced is just as likely to occur in one case as in the other. In either case there must be something in the nature of what is called a consideration. As *Sir W. Grant* said in *Stackhouse* v. *Barnston* (3): "A waiver is nothing; unless it amount to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea."

(1) 5 Q.B.D., 409. (2) 3 H.L.C., 49. (3) 10 Ves., 453, at p. 466.

If the acts set up as showing waiver occur before actual default, the party is induced to abstain from taking steps to prevent the default from happening, which abstention, if the strict terms of the contract were adhered to, would or might operate to his prejudice. Regarding the case then as one in which some consideration must be shown, is there any such consideration in the present case? The suggested consideration is that Nott at the request of the mortgagees refrained from taking steps which might, and upon the evidence probably would, have resulted in his saving the property for his beneficiaries. We have some difficulty in saying that this is not a sufficient consideration to bring this case within the rule laid down in *Hughes* v. *Metropolitan Railway Co.* (1).

Again: We are reluctant to hold that a mortgagee, who has made a formal demand of payment which is a necessary condition precedent to the exercise of a power of sale, cannot by his conduct in negotiations with the mortgagor, as well after as before the existence of actual default, estop himself from alleging that the notice has been given. If it is arranged between them that their relations shall continue on the footing that the notice has not been given, and on the faith of that arrangement the mortgagor acts or refrains from acting, we are strongly disposed to think that the case should be considered not as a representation of intention, but as a representation of an existing fact on the basis of which both parties are to act, namely, that the demand is to be regarded as not having been made, so that a fresh demand must be made before the mortgagee can be heard to allege that default has been committed. Suppose, for instance, that at an interview between the mortgagor and mortgagee, after default in complying with a demand for payment, it is agreed that the demand shall be taken to have been withdrawn, and the document containing it is then and there torn up or cancelled, we can see no good reason why in such a case the mortgagee should not be held to have represented as a fact that the demand is no longer in existence, and that the condition upon which default depends has not been performed. It may well be that in such a case the mortgagor would have no defence to an immediate

(1) 2 App. Cas., 439.

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

action for the debt, but it does not follow that the right to exercise a power, the existence of which depends upon the performance of a condition precedent, would not be suspended. The facts as found by the jury do not materially differ from the supposed case. In this view it is not material whether the case is regarded on the footing that the mortgagees were estopped from alleging that the power of sale had come into existence, or on the footing of a a contract for valuable consideration not to exercise it for a period which had not elapsed when it was in fact exercised.

In *Davey* v. *Durrant* (1), which was a suit by a mortgagor against a mortgagee to set aside a sale under the mortgage, the case made by the bill, as stated by *Turner* L.J., was that the sale was upon terms not warranted by the power of sale; that the price was grossly inadequate, so much so as to amount to evidence of fraud; that the notice that was the necessary preliminary to the sale had become ineffectual and had been waived; and that proper steps had not been taken for securing an advantageous sale. The learned Lord Justice said that with many of these objections the purchaser from the mortgagee was not concerned. As to the point of waiver he appears to have treated the matter as one of fact, and not to have suggested that it was untenable in point of law as against the mortgagee.

In *Hughes* v. *Metropolitan Railway Co.*, when before the Court of Appeal (2), *Mellish* L.J. said : "I think that there is a clear difference between what would amount to a waiver and this equity." (The suggestion was that a waiver of a notice already given requiring the performance of an obligation to arise upon notice was a defence at law to an action for breach of the obligation.) "In the case of a waiver, the Court must see whether there was an intention to abandon the notice. The result of waiver is different, for the notice is gone at law." The passage in which the latter words occur was quoted by Lord *Blackburn* in the hearing of the appeal to the House of Lords and adopted as expressing what he believed to be the right law (3). Neither of these cases can be regarded as a decision on the point, but *obiter dicta* by such eminent Judges on questions with

(1) 1 De G. & J., 535; 26 L.J. Ch., 830.

(2) 1 C.P.D., 120, at p. 135.

(3) 2 App. Cas., 439, at p. 452.

which they were specially familiar are not without considerable weight.

On 9th September Murphy, under circumstances to which we will more particularly refer in dealing with the other branch of the case, gave written notice to Nott that the Bank intended to proceed forthwith with the sale of the mortgaged properties under the demand of 9th July. This notice did not contain a formal demand of payment, and we much doubt whether it could be relied upon as such, so as to create a new default, assuming that the Bank could not take advantage of that which had once existed.

In the view which we take of the other part of the case, it is not necessary to decide what were the rights of the parties under the agreement or arrangement of August, as found by the jury, but there can be no doubt that that transaction had an important bearing upon the question of the *bona fides* of Murphy in the exercise of the power of sale, which he almost immediately proceeded to exercise under circumstances to which we will now refer.

On Thursday, 8th September, according to the evidence of Nott, which the jury probably believed, he and Murphy met at a general meeting of the members of a company of which both were members, and Murphy asked Nott to second his nomination as a director of the company. Nott refused to do so, giving his reasons for supporting another candidate, whereupon Murphy said : " Look here, Nott, if you don't second my nomination to-day, I'll make it damned hot for you. I'll do my best to ruin you." Nott asked him to repeat that statement before the directors, and invited them to enter the room, whereupon Murphy left the room repeating the words, "I'll make it damned hot for you." On the following day, the 9th, the notice just mentioned was given, and on the 10th Murphy instructed Mr. Curtis, an auctioneer, to sell the mortgaged properties by auction. On Monday the 12th the sale was advertised in a local newspaper for the following Saturday, the 17th. The advertisement was repeated in one local paper every day during the week, but was not published in any other town. Curtis also sent circulars to persons whom he thought possible buyers, in which it was stated that the auction reserve for the whole of the properties was £1,090, and that the municipal

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

valuation (*i.e.* of the unimproved value) was £1,400. At the time appointed for the sale several persons attended. The auctioneer announced the reserve. The properties were then offered in lots, without eliciting any bids. The whole three properties were then offered in one lot, when £1,085 was bid by a gentleman who had some time previously expressed his willingness to buy the larger block by private contract.

There was a conflict of evidence as to the value of the property, the price which it would probably have realized at a sale conducted in a reasonably careful manner, and the notice of sale which should have been given under the circumstances. It was proved, *inter alia*, that in the preceding March the auctioneer by whom the sale was conducted had recommended the properties as good security for an advance of £1,100. The jury found that the sale was not made *bonâ fide*, but recklessly and without due regard for the interests of the mortgagors. No objection was made to the Judge's direction. The learned Judges of the Full Court were of opinion that there was no evidence to support these findings.

The principles to be applied in determining this question are thus stated by *Lindley* L.J. in the case of *Farrar* v. *Farrar's Ltd.* (1) "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in the exercise of his power he acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed: *Cholmondeley* v. *Clinton* (2); *Warner* v. *Jacob* (3)." In *Kennedy* v. *De Trafford* (4), Lord *Herschell* L.C. said: "My Lords, I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his

(1) 40 Ch. D., 395, at pp. 410, 411.
(2) 2 Jac. & W., 1, 182.
(3) 20 Ch. D., 220.
(4) (1897) A.C., 180, at p. 185.

mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. *Lindley* L.J. in the Court below says that 'it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor.' Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith."

The motive of the mortgagee, as distinguished from his intention, is not material. A lawful act does not become unlawful merely because the doer was actuated in doing it by an evil motive. But if a mortgagee exercises a power of sale, not for the purpose of obtaining payment of the mortgage debt (although that is a necessary consequence in whole or part), but for the purpose of depriving the mortgagor of the opportunity of retaining the property by redemption, and, to use the words of Lord *Herschell*, "if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed," we should say that he had not been exercising his power of sale in good faith. It was not contested that a power of sale under a mortgage, like any other power, must be exercised honestly for the purposes of the power, or, as expressed by Lord *Westbury* in *Duke of Portland* v. *Topham* (1) "that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object; (I mean sinister in the sense of its being beyond the purpose and intent of the power which he may desire to effect in the exercise of the power)." In the same

(1) 11 H.L.C., 32, at p. 54.

H. C. OF A. 1906.

BARNS v. QUEENSLAND NATIONAL BANK LTD.

case Lord *St. Leonards* said (1): "A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly." Was there then evidence upon which the jury might find that the defendants by their agent had been guilty of a breach of their duty to the mortgagor? The sufficiency of the notice of sale, having regard to the nature of the property, its situation in the town of Bundaberg, the size and population of that town, and the possibility of a fair price being realized under the actual circumstances, were matters peculiarly within the knowledge of the jury. The divulging of the reserved price was an unusual circumstance. There was evidence that a similar course had been adopted in the case of some other sales of mortgaged properties by mortgagees at Bundaberg. But the circumstances in all those cases were explained, and were very different from those of the present case. Reference was made by the appellant's counsel to the practice of the Court relating to the sale of land by auction by direction of the Court, under which the reserved bidding is kept secret. No case was cited in which a sale by the Court has been set aside on the ground of the divulging of the reserved bidding, but the case of *Delves* v. *Delves* (2) was cited, in which *Malins* V.C., a judge of great experience in the administrative jurisdiction of the Court of Chancery, indicated plainly his opinion as to the impropriety of such a course. He said (3): "If I can suppose a thing so dishonourable to Mr. Streatfield" (the successful bidder at the reserved bidding) "or to Mr. Delves" (a person who had taken an active part in the conduct of the sale) "which I do not, and that Mr. Delves had whispered to Mr. Streatfield not to go any higher, or that he had bid up to the reserved bidding, the case would have been very different. But that is impossible, because they neither of them knew the reserved bidding."

In our opinion the jury were warranted, having regard to all the evidence before them, in answering the fourth question in the

(1) 11 H.L.C., 32, at p. 55.
(2) L.R. 20 Eq., 77.
(3) L.R. 20 Eq., 70, at p. 82.

way in which they did answer it, and upon that finding the appellant was entitled to judgment.

It remains to consider the measure of damages. In the case of the improper exercise of a power of disposition of property, the appropriate remedy, if available, is to set the transaction aside, and to restore the property to the person from whom it has been improperly divested. If the purchaser had notice of the facts which render the exercise of the power improper, this remedy is available. But if he is a *bonâ fide* purchaser for value without notice of the facts, and has already acquired the legal estate, this remedy is not available as against him. That is the present case. But we do not think that these circumstances should make any difference as between the person wrongfully deprived of the property and the wrongdoer. The former should be restored to the same position as if the wrong had not been done. We think therefore that, as the property cannot be restored to the beneficiaries, they are entitled to recover the value of their interest in it. This was the opinion of the learned Chief Justice, in which we concur. If the matters complained of were mere irregularities in the exercise of the power the measure of damages might be different. The question of acquiescence of the mortgagor in the sale was not left to the jury, and was not seriously argued before us. We do not think that there is anything in this defence. We are therefore of opinion that the judgment of the learned Chief Justice was correct, and that the order of the Full Court setting it aside was erroneous and should be discharged.

Appeal allowed. Order appealed from discharged, and motion to set aside judgment dismissed with costs. Judgment of Cooper C.J. restored. Respondents to pay costs of appeal.

Solicitors, for appellant, *Morris & Fletcher*, agents for *Hamilton & Nielson*, Bundaberg.

Solicitors, for respondents, the Queensland National Bank Ltd., *Flower & Hart.*

N. G. P.