

1868. Assuming that to be the right principle, the plaintiff could
 MEHERVA'NJI only recover what is the real amount of damage (which in
 MANCHARJI this case is ascertained), minus the amount already paid,
 v.
 PUNJA' VELJI,

Aug. 30.

Original Suit No. 461 of 1867.

BEATTIE *et al.* *Plaintiffs.*
 JETHA' DUNGARSI..... *Defendant.*

Mortgage—Right of Mortgagee to withhold production of Mortgage Deed or Title-deeds—Declaratory Decree—Consequential Relief—Civ. Proc. Code, Sec. 15.

B. mortgaged by deed certain premises to J. D., and at the same time delivered to him title-deeds comprising the said premises, and also other immoveable property of B. B. subsequently became embarrassed, and assigned all his immoveable estate to trustees for his creditors.

The trustees sued J. D., and, alleging that he had refused to permit the sale by them of the said immoveable property, including the mortgaged premises (they offering to apply the proceeds of the latter in satisfaction of J. D.'s claim) and to hand over to them the said title-deeds, prayed for a declaration that the said immoveable property other than the mortgaged premises was vested in them free from any lien of the defendant.

J. D., in his written statement claimed a lien on all the title-deeds, and submitted that he was not bound (until his claim was satisfied) to hand them over to the plaintiffs, or to produce the same or his deed of mortgage.

Seemle, that, on the authorities, J. D. was not bound to produce the title-deeds before satisfaction of his claim.

Quere whether before such satisfaction he was bound to produce even his deed of mortgage?

Held that J. D. not having made any attempt or taken any active measures to enforce his lien, and no foundation having been laid by the plaintiffs upon which consequential relief could be granted by the Court, the latter were not, under Sec. 15 of the Civil Procedure Code, entitled to a declaratory decree.

THIS case, the facts of which appear from the judgment of the Court, was tried before WESTROPP, J., in a Division Court, June 25 and 27, 1867.

Howard, for the plaintiffs, insisted that the defendant ought to be now ordered to produce his deed of mortgage and title-deeds; that his written statement was evasive; and that, under Sec. 15 of Act VIII. of 1859, the plaintiffs were entitled to the declaratory decree prayed by the plaintiff.

White, for the defendant: The Court will not compel the production of documents: 2 Spence Eq. Jur. 670, *Addison*

v. *Walker (a)*, *Crisp v. Platel (b)*, *Brown v. Lockhart (c)*; nor will it, in such a case as the present, make a declaratory decree : *Jackson v. Turnley (d)*, *Greenwood v. Sutherland (e)*, *Fletcher v. Rogers (f)*, *Garlick v. Lawson (g)*, *Fyffe v. Arbuthnot (h)*, *Drew v. O'Hara (i)*, *Rooke v. Lord Kensington (j)*, *Lord Langdale v. Briggs (k)*.

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Cur. adv. vult.

WESTROPP, J. :—The plaint states that, by an indenture of the 23rd of June 1866, Bomanji Framji Camá mortgaged, to Jethá Dungarsi, the defendant, four dwelling-houses and premises situate at Malabar Hill, in this island, to secure the repayment with interest to the defendant of two lakhs of rupees lent by him to Bomanji Framji Camá, and that, at the same time “the said B. F. Camá handed to the defendant certain title-deeds which comprised the said mortgaged premises, and also other adjoining immoveable property of the said B. F. Camá,” and that Camá subsequently became embarrassed, and, by private arrangement with his creditors, executed, on the 6th of August 1866, a deed of assignment of all his real, leasehold, and copyhold estates to the plaintiffs, in trust for the benefit of his creditors. The plaint then proceeds thus: “The plaintiffs, as such trustees, proceeded to realise the said estate, and applied to the defendant to permit the sale of the immoveable property, including the mortgaged premises comprised in the said title-deeds, proposing to pay over to the defendant the proceeds of the said mortgaged premises, and to apply the residue to the general purposes of the said trust; but the defendant declined to give such permission, and pretended that he had a lien on the whole of the said immoveable property comprised in the said title-deeds, but the plaintiffs charge that the defendant has no lien except on the premises comprised in the said mortgage.” It then prayed for a

(a) 4 Y. & C. 447. (b) 8 Beav. 62. (c) 10 Sim. 421.

(d) 22 L. J. Ch. 949; S. C. 17 Jur. 643; 1 Drewry 617.

(e) 10 Hare Appx., p. xii. (f) *Ibid.* xiii. (g) *Ibid.* xiv.

(h) 1 De Gex & Jones 406. (i) 2 Ball & B. 562, note b.

(j) 2 Kay & J. 753; S. C. 2 Jur. N. S. 755; 25 L. J. Ch. 795.

(k) 2 Jur. N. S. 982.

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declaration by the Court that the immoveable property comprised in the title-deeds deposited by B. F. Cãmá, with the exception of the mortgaged premises, is vested in the plaintiffs "as such trustees, as aforesaid, free from any lien or claim whatsoever, whether at law or equity, of the defendant, and that they may have such further or other relief in the premises as may seem just."

The defendant filed a written statement, whereby he claimed a lien on all the deeds deposited with him by Cãmá for two lakhs of rupees, principal advanced by the defendant, and Rs. 30,000 for interest, and stated that he was ready and willing to hand over all of those deeds to the plaintiffs on being paid the principal and interest due to him on the mortgage; and finally submitted that he is not bound to produce those deeds to the plaintiffs in the mean time, and adds that he has not consented to produce them.

The issue settled was, whether the plaintiffs are entitled to the declaration prayed. No evidence has been given. The execution of the mortgage was admitted, and also the deposit of several title-deeds; but neither the mortgage nor the title-deeds have been produced. A copy, however, of the mortgage is annexed to the plaint, and referred to in it. There is a blank in that copy for the time at which the principal should be repaid. A collateral issue has been raised, namely, could the defendant be compelled to produce the mortgage or the title-deeds deposited?

This is not a case coming within the Indian Insolvent Debtors' Act, or Act XXVIII. of 1865. The plaintiffs, claiming under a private deed of trust for the benefit of the creditors, stand in no better position than the mortgagor himself. The deed is not as favorably circumstanced as it would be in England, if registered under Sec. 197 of the Bankruptcy Act of 1861. Therefore, with regard to the right of the plaintiffs to compel the production of the indenture of mortgage, this case does not fall within *Ex parte Caldecott (l)* and *In re Mark's Trust Deed (m)*.

(l) Mont. 55.

(m) L. R. 1 Ch. App. 429.

Whether, independently of the law and practice of bankruptcy, a mortgagor can compel the mortgagee to produce the mortgage deed itself, is a question which has given rise to conflicting decisions. It seems to be admitted that as a general rule, and in the absence of fraud or other very special circumstances, the mortgagee cannot be compelled to produce the title-deeds deposited with him so long as the mortgage debt is unpaid (*n*). And a person who claims a lien upon a deed generally has the same right to refuse production (*o*), unless it be the object of the suit to impeach the deed (*p*). In favour of the production of the mortgage deed itself are an order of Lord King, reported by Moseley (*q*), *Patch v. Ward* (*r*), decided by Stuart, V.C., and, perhaps I may add, *Owen v. Nickson* (*s*), in which a list or memorandum of deeds deposited by way of equitable mortgage, under the Act to amend the Law of Evidence (*t*), was ordered by the Court of Queen's Bench to be produced in an action of detinue brought to recover the deeds. Of that case Mr. Fisher, in the 2nd edition of his work on Mortgages, says: "The order was considered by one of the learned Judges (*Hill, J.*) to be justified by the case of *Latimer v. Neate* (*u*), in which, however, the instrument ordered to be produced, and alleged to be a mortgage, had been set up by the defendant as conferring an *absolute* title, and was impeached for fraud" (*v*). Sir L. Shadwell, V.C., in *Browne v. Lockhart* (*w*), expresses but little respect for the order in Moseley. He says: "I apprehend that such an application would not be listened to at the present time. It does not quite tally with our notions of the right of the mortgagee to keep his

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(*n*) *Greenwood v. Rothwell*, 7 Beav. 291; Sugden V. & P. 371, 13th ed.; and see *Wallwyn v. Lea*, 9 Vesey 24, over-ruling *Strode v. Blackburne*, 3 Vesey 222.

(*o*) *Griffith v. Rickets*, 7 Hare 305.

(*p*) *Balch v. Symes*, T. & R. 87; *Fencott v. Clarke*, 6 Sim. 8; *Phillips v. Evans*, 2 Y. & C., C.C. 647.

(*q*) Anon. Moseley 246.

(*r*) L. R. 1 Eq. 436.

(*s*) 7 Jur. N. S. 497.

(*t*) Stat. 14 & 15 Vict., c. 99, s. 6; see Act XV. of 1852, s. 6.

(*u*) 4 Cl. & F. 570, explained 2 Ph. 484.

(*v*) 1 Fisher on Mortgages, p. 346, para. 594; and see p. 341, para. 583.

(*w*) 10 Sim. 421.

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deeds to himself until the moment arrives when the mortgagor appears with the principal and interest in his hand; and then the mortgagee is not bound to part with the deeds before he has received his money; at least it must be a simultaneous transaction." In *Addison v. Walker* (x), to an inquiry in the bill, whether the defendant did not claim to be a mortgagee of the whole, or some and what part, of a testator's estates, the defendant, by his answer, stated that he was mortgagee of part of the testator's estates, without saying what part, and that he had an equitable lien on the whole by deposit of title-deeds. He scheduled the title-deeds in his possession, insisting that he was not bound to produce them; the plaintiff excepted to that answer, and contended that the defendant, having stated he was a mortgagee of part of the estates, was bound to go further, and state what part, and the Court of Exchequer held that he was not bound to state the contents of title-deeds, and overruled the exception. In *Bentinck v. Willink* (y), Wigram, V. C., in laying down that the defendant, a mortgagee of plantations in Demerara, could not be compelled in a suit by the mortgagor to produce the *grosse* (if it had been in his possession), which *grosse* is, according to the law of Demerara, the authentic document which evidences the mortgage (the mortgage itself being an act of court), said, "It is not alleged that there is any right, according to the Dutch law, in a mortgagor to call on a mortgagee to produce the *grosse*, or the title-deeds, until the mortgage is satisfied, and, there being no suggestion of any peculiarity in that respect in the Dutch law, I can only consider what the law of this court is. Now I believe that no point is better settled than this, that where a mortgagor is proceeding against his mortgagee, a Court of Equity will not compel the mortgagee to produce his securities, except on payment of the mortgagee's claim; and the rule does not depend upon any peculiarities of system, but is founded on principles of abstract justice." In *Crisp v. Flatel* (z), which was a suit to redeem certain admitted mortgages, but the bill contested the validity of another

(x) 4 Y. & C. 447.

(y) 2 Hare, pp. 1 and 8.

(z) 8 Beav. 2.

mortgage, and prayed a declaration that it was not a valid security, Lord Langdale, M.R., refused to compel the defendant to produce that mortgage for inspection. *Dendy v. Cross* (a) is a strong case to the same effect, and decided by the same Judge (b). In *Patch v. Ward*, already mentioned, the order of Stuart, V.C., may possibly be sustainable, on the ground that Ward prepared the mortgage as solicitor both for mortgagor and mortgagee, and subsequently took a transfer of it, and foreclosed. But the general doctrine, laid down there, that the privilege of the mortgagee not to produce his title-deeds does not extend to the mortgage deed itself, is opposed to the main current of authority. Many of the cases which I have mentioned do not appear to have been cited in *Patch v. Ward*. The Lords Justices seem to have rested their decision *In re Mark's Trust Deed* upon, and to have attributed the case of *Ex parte Caldecott* to, the special powers which have been given in bankruptcy to compel the production of documents (c), and do not hint at any such general doctrine as that laid down in *Patch v. Ward*. My opinion would have been very clearly in favour of the right of the defendant to refuse to produce not only his muniments of title, but also his mortgage deed, were it not that the decision of the Court of Queen's Bench, in *Owen v. Nickson*, compelling the production of a memorandum of deposit of title-deeds by way of equitable mortgage, which memorandum must be viewed in the same light as a deed of mortgage, raises some doubt as to whether the ancient privilege of the mortgagee, so far at least as regards the withholding of the mortgage deed, must not be considered as to some extent infringed upon.

But even assuming that the Court has power to direct the defendant to produce both the mortgage and the other title-deeds, there are other difficulties in the plaintiff's way.

This is not a suit praying redemption. In *Drew v.*

(a) 11 Beav. 91.

(b) See also *Lewis v. Davies*, 17 Jur. 253; *Gill v. Eyton*, 7 Beav. 155; *Jones v. Pugh*, 12 Sim. 470; *Lloyd v. Wait*, *Ibid.* 103.

(c) Stat. 24 & 25 Vict., c. 134; Stat. 12 & 13 Vict., c. 106, s. 120; 6 Geo. IV., c. 16, ss. 33, 34; and see Stat. 11 & 12 Vict., c. 21, s. 4.

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O'Hara (d) Lord Manners held that "a person deriving title from a mortgagor after he had executed the mortgage could not be in a better situation than the mortgagor, who could not file any bill against the mortgagee, except to redeem him"—a rule not absolutely without exceptions: *Jeffreys v. Dickson (e)*, *Dalton v. Hayter (f)*.

For the plaintiffs Sec. 15 of the Civil Procedure Code (Act VIII. of 1859) was relied upon. It enacts that "no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

Sec. 50 of Stat. 15 & 16 Vict., c. 86 (amending the practice and course of proceeding in the Court of Chancery), passed in 1852, and Sec. 29 of Act VI. of 1854, amending the practice and course of proceeding on the Equity side of the Supreme Courts in India, are in the same words as the section of Act VIII. of 1859 which has been quoted.

Notwithstanding the form of the prayer of the plaint, the nature of the declaration which it seeks substantially is a declaration that the defendant has not any lien or claim at law or in equity upon the immoveable property comprised in the title-deeds deposited with him by C  m  , except so much thereof as may be specified in the mortgage as thereby actually mortgaged to the defendant.

In *Jackson v. Turnley (g)*, Kindersley, V.C., refused to entertain a suit merely for the purpose of declaring that a person who claims to have a right which may arise hereafter has no such right. In discussing the intention of the Legislature in making the English enactment (*h*), similar to that here relied on for the plaintiffs, he said—

"There is another observation: for I think that even if the Legislature did think that the right of making a declara-

(*d*) 2 Ball & Beatty, note *b*, p. 562; Acc. *McDonough v. Shewbridge*, *Ibid.* 555; *Hughes v. Cook*, 34 Beav. 407.

(*e*) L. R. 1 Ch. App. 183. (*f*) 7 Beav. 313.

(*g*) 17 Jur. 643 S. C. 1 Drewry 617.

(*h*) Stat. 15 & 16 Vict., c. 86, s. 50.

tory decree should be given to the Courts of Equity as to legal rights, still it would, if it meant to give a right to make a declaration, and nothing more, have expressed its intention in a very different manner. I will not suggest the expressions, but I think it would be enacted in a very different form from that which has at least left it so ambiguous. Now, what is the language of the section?—for there is no preamble, and nothing else to guide us; and it is to be borne in mind that a suit might have been objected to on the ground that the party only asked, and could only have, from the nature of the case, a declaration of right. That was one objection, and it might have been said by the defendant, ‘you have no right to bring me here to litigate, irrespective of your having no right to a declaration of consequential relief.’ Has the Legislature meant to remove both those objections, or only the first? What is the language used? [His Honour read the section.] Now, the only objection intended to be removed was this:—‘Though you may have a right to sue, and bring me here in this suit, you have no right merely to ask for a declaration.’ That objection the Legislature has removed; but did it also mean, besides removing that, to say that anybody who had an apprehension, however well founded, that, at some day or other, and in some possible events, a claim would be made against him, may institute a suit to have the rights declared? I should not be justified in holding this by the words used, or by anything that appears in the rest of the Act, or by anything that has ever been done by the Legislature. The Legislature has enabled the parties, where the question arises upon the construction of an instrument, or any other question of that nature, or upon the rights of the parties, which were capable of being litigated in a Court of Equity, to agree upon a special case, and take the opinion of the Court upon that point. If it comes within that provision, let the parties agree upon a special case; but here they do not agree. In that cautious way, where the parties agree who might have litigated it, they may come before the court without suit. But here the question could not be litigated between these parties: the representatives of the deceased partner

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could not file a bill against the lessors to ascertain whether in the abstract, and in an event which might occur hereafter, these lessors would have a right to file a bill against the representatives of the deceased lessee. I must also observe that the language of the last branch of the clause is not unimportant; for it says afterwards, 'it shall be lawful for the Court to make binding declarations of right, without granting consequential relief.' That seems to import that it supposes a case in which the court was capable of granting consequential relief, if consequential relief had been asked or desired; but here none is asked or desired."

Wood, V. C., in *Rooke v. Lord Kensington (i)*, said: "I apprehend it to be quite clear that nothing before the Chancery Jurisdiction Improvement Act, and nothing in that Act, justifies the position that a party can come here asserting that he has a good legal title, but that somebody else has set up an equity, not interfering with the possession of the plaintiff, but only placing his title in an unsatisfactory state, and can claim a declaration determining his right against these dormant claims. Such a suit would be a mere action of declarator, which, whatever may be the merits or value of such a jurisdiction, the Legislature has not empowered this court to entertain. The authorities before the late statute are numerous. *Grove v. Bastard (j)* is an authority to show that nothing in the nature of a mere action of declarator can have a *locus standi* here. Then under the Stat. 15 & 16 Vict., c. 86, the 50th section only says that no objection is to be taken in this court in consequence of the legal right being at issue, as appears by the case of *Turner v. Blamire (k)*. It was not the intention that a party should come here with merely a legal title, but that, there being equities to be tried, the mere fact of the legal title being also at issue is not to oust the jurisdiction of the court. Therefore, as to all that part of the bill by which the plaintiff seeks to be quieted in the enjoyment of his legal estate, there can be no relief."

(i) 2 Jur. N. S. 735, 2 Kay & J. 753; 25 L. J., Ch. 795.

(j) 1 De Gex Mac. & Gor. 69. (k) 1 Drewry 402.

The remarks of Phear, J., in *Kenaram Chuckerbutty v. Dinánáth Panda* (l), upon Sec. 15 of Act VIII. of 1859, are particularly apposite to this case. He said: "It seems to me that this section gives the Court power to make a mere declaration of right, without anything more, only in those cases where the facts proved before it are such that it would have been able to give consequential relief had the plaintiff asked for it, and the Court seen fit to grant his prayer. In other words, the plaintiff, in order to entitle himself to a bare declaration of right under this section, must make out, to the satisfaction of the Court, some act done by the defendants which is hostile to and invades that right, and which would justify an injunction or a decree for damages, or a decree for delivery of possession, being passed against the defendant, if the Court had so thought fit to exercise its discretion. In this case, it does not appear that the defendant has done anything whatever which can give the plaintiff a cause of action against him. No doubt, when challenged by the plaint, he is ready to deny the plaintiff's claim. But this denial by itself does not give the plaintiff a right of suit if he had it not before, although of course it may afford some evidence of its existence."

The same views were adopted in many other instances in which declaratory decrees were sought: e.g., *Cauzee Muzkur Hossain v. Dinobundoo Sen* (m); *Baboo Motee Lal v. Rance, wife of Maharaja Bloop Sing Bahadoor* (n); *Brinder Dabee Chowdhraïn v. Pearce Lall Chowdhry* (o) (where it was held that the mere fact of a Hindú widow making alienations during her life, which are not binding on the heir of her husband after her death, does not entitle him to a declaratory decree); *Brojo Kishoree Dasse v. Srinath Bose* (p); *The Trustees of Birkenhead Docks v. The Birkenhead Dock Company* (q); *Gosling v. Gosling* (r); *Webb v. Byng* (s); *Bristow*

(l) 9 Calc. W. Rep., Civ. R. 325.

(m) 1 Bourke Calc. R. 9. (n) 8 Calc. W. Rep., Civ. R. 64.

(o) 9 Calc. W. R., Civ. R. 460; see also 2 Hay's Rep. 608.

(p) 9 Calc. W. Rep., Civ. R. 463.

(q) 18 Jur. 883, S. C. 4 De Gex Mac. & Gor. 732; 23 L. J. Ch. 457.

(r) 5 Jur. N. S. 910.

(s) 3 Jur. N. S. 1243; S. C. 8 De Gex Mac. & Gor. 633.

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v. *Whitmore (t)*; *Lady Langdale v. Briggs (u)*; and the cases cited by Mr. White from the Appendix to 10 Hare.

The principle which pervades the cases which have been mentioned, and which relate to declaratory decrees under Sec. 15 of Act VIII. of 1859, and the similar section in the English statute, is applicable to the present case. The plaintiff does not allege that the mortgagee, the defendant, has taken, or attempted to take, possession of any premises to which he is not entitled; nor does it aver that he has taken any active measures whatsoever to enforce his alleged lien on the property (asserted by the plaintiffs not to be included in the mortgage), either by the institution of legal proceedings or otherwise. Nor has any ground been mentioned upon which an injunction could be granted. In short, no foundation has been laid upon which, if the Court were so minded, it could decree consequential relief. Under these circumstances, howsoever willing I might be to assist the general creditors of B. F. C  m  , I have no choice but to find in the negative the issue whether the plaintiffs are entitled to the declaration prayed; and accordingly to dismiss the plaintiff. The decree must, therefore, be for the defendant; and as, having regard to the authorities, this suit was a very bold experiment, the plaintiffs must pay the costs.

Decree for defendant with costs.

(t) 4 Kay & J. 743. (u) 2 Jur. N. S. 932; 8 De Gex Mac. & Gor. 391.

NOTE BY EDITOR.—It may be useful to mention the following cases in which declaratory decrees have been made: *Norman v. Johnson*, 6 Jur. N. S. 905; *Byam v. Byam*, 1 Jur. N. S. 79; 19 Beav. 58; *Savil v. Bruce*, 29 Beav. 55-57; *Hope v. Hope*, 4 De Gex Mac. & Gor. 328; S. C. 23 L. J., Ch. 602 (of English law for information of foreign Courts); L. R. 4 Eq. 310 (of right to renewal). See further, as to declaratory decrees, *Jenner v. Jenner*, L. R. 1 Eq. 361; *Gobind Monee Dossee v. Ram Lall Bysack*, Calc. W. Rep., Full Bench Rulings 1864, p. 165; and *Puree Jan Khatoon v. Bykunt Chunder Chuckerbutty*, 9 Calc. W. Rep. 380.