1885

*Mar. 28.
*Nov. 16.

WILLIAM KELLY (PLAINTIFF) .....APPELLANT;

AND

THE IMPERIAL LOAN AND INVESTMENT COMPANY OF CANADA (LIMITED) AND WILLIAM DAMER (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgagor and mortgagee—Assignment of equity of redemption in trust—Re-conveyance by trustee—Foreclosure against trustee—Sub-

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Taschereau J.J.

sequent sale—Power of sale in mortgage – Exercise of by deed after foreclosure– Recitals in deed.

K. gave a mortgage of leasehold premises to the Imperial Loan and Investment Co., with a covenant authorizing the company to sell the premises on default, with or without notice to mortgagor, and either at public or private sale. The mortgage conveyed the unexpired portion of the current term, and "every renewed term." K., shortly after giving the mortgage, conveyed the equity of redemption in the mortgaged premises to one O'S. for a nominal consideration, and in trust to carry out certain negotiations for K., who then left the country and was absent for several years. During his absence, the lease of the ground mortgaged to the company expired, and was renewed in the name of O'S.

Default having been made in the payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, the mortgagees having knowledge of his want of interest in the premises. Prior to such suit, O'S., fearing that such proceedings would be taken against him, had executed a deed of re-conveyance of the equity of redemption to K., but such deed was never delivered.

O'S. then filed an answer and a disclaimer of interest in such suit, but he was afterwards persuaded by the mortgagees to withdraw the same, and consent to a decree, and a final order of foreclosure was made against him. Pursuant to this order the company subsequently sold the mortgaged premises to the defendant D. for a sum less than the amount due under the mortgage; the deed to D. recited the proceedings in foreclosure, and purported to be made pursuant to the final order of foreclosure.

K. brought a suit against the company and D. to have the decree re-opened and cancelled, and the deed to D. set aside, and prayed to be allowed to come in and redeem the premises.

Held,—affirming the judgment of the Court of Appeal, Strong and Henry JJ. dissenting,—that even if the decree of foreclosure was improperly obtained, and consequently void, yet the sale and conveyance to D. were a sufficient execution of the power of sale in the mortgage, and passed the renewed term conveyed by the mortgage.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Proudfoot V.C.

In August, 1875, the appellant mortgaged certain

(1) 11 Ont. App. R. 526.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

leasehold premises in Toronto to the respondents, which mortgage contained a proviso, that in default of the payment of the moneys thereby secured the mortgagees should have power to sell the mortgaged premises by private contract or at public auction, and without previous notice to the mortgagor.

In December, 1876, the appellant conveyed the equity of redemption in the said mortgaged premises to one O'Sullivan for a nominal consideration, which conveyance, the appellant alleged, was only intended to convey such equity of redemption in trust for certain purpose agreed upon between him and O'Sullivan.

The respondents took possession of the mortgaged premises in January, 1877, and the same were leased to one Patrick Scully for five years from the first day of January in that year, the appellant being a party to the indenture of lease.

The original lease to appellant expired in July, 1878, and O'Sullivan procured a renewal in his own name, appellant being then absent from the Province and his whereabouts not known.

In November, 1878, O'Sullivan, being threatened with suit for foreclosure of the mortgage, &c., conveyed the equity of redemption to appellant by deed purporting to be executed 15th November in that year, having previously notified respondents that he had no interest in the mortgaged premises, but that the same belonged to the appellant.

On 21st November, 1875, respondents filed a bill against O'Sullivan for foreclosure of said mortgage, and the latter at first took steps to defend such suit and filed a disclaimer, but he afterwards withdrew such defence and consented to a decree against him in the suit foreclosing his equity of redemption in the said mortgaged premises, which decree was made in May, 1880.

In September, 1881, the respondents sold the premises to the defendant Damer, reciting in their deed the proceedings against O'Sullivan and their title to the premises under the final order of foreclosure in such suit.

The appellant only ascertained the fact of the suit against O'Sullivan and the making of the decree on his return to the Province of Ontario subsequent to their occurrence, and he notified the defendant Damer that he was interested in the premises before the said sale, and also notified the respondents not to sell. After the sale he filed a bill to have the final order of foreclosure re-opened and cancelled, the sale to Damer set aside and an account taken of what was due on the mortgage.

Proudfoot V.C. before whom the cause was heard, made a decree in favor of the appellant, holding that the decree of foreclosure was improperly obtained on account of the knowledge in respondents of want of title in O'Sullivan, and ordered the account prayed for by the respondents. The Court of Appeal reversed this judgment, holding that notwithstanding the recital of the proceedings of foreclosure in the deed to Damer, the same could operate as an execution of the power of sale in the mortgage, and that such power authorized a sale of the renewal term as well as of the original.

This appeal was brought from the last-mentioned judgment.

Dalton McCarthy Q.C. and *Plumb* for appellant:

The learned judges of the Court of Appeal have found that, although the company had assumed to sell by virtue of their title acquired by foreclosure, yet the sale, though invalid upon the strength of their title, could be upheld as an exercise of their power of sale in the mortgage, because—1. The power of sale, though only expressed to be exercisable upon the original term of years mortgaged was nevertheless exercisable upon

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

the renewal term; and 2. That although it was the expressed intention of the company to convey to Damer by virtue of their foreclosure title recited upon the face of the conveyance, yet the title could, to the extent of its invalidity, be fed out of the unexercised power of sale.

Upon the first point, Mr. Justice Osler delivers the judgment of the court, Mr. Justice Burton merely saying that after considerable doubt he concurs; and the ground on which the learned judge bases his conclusion is, that a renewal term is considered as a graft upon the old lease, and "subject in equity to the same mortgage as affected it" (1).

Now it must be borne in mind that the mortgage from Kelly to the Imperial of the 7th August, 1875, was by way of demise or sublease under the then current term. Habendum is as follows: "Unto the said mortgagees, their successors and assigns for the residue now unexpired of the term of years thereby created, and every renewed term, save and except one day thereof."

The covenant for further assurance extends to the "term of years" only, but not to renewal terms, and the power of sale by express language only extends to and is exercisable upon the "term of years or such part or parts thereof as they may deem expedient."

In order to warrant the conclusion of Mr. Justice Osler, the authorities which he cites should show that not only is the renewal term subject to the same equities which affected the original term, but also to every legal incident created by express contract between the parties, and advisedly limited to the duration only of the original term.

The cases cited by the learned judge at page 538 of the report, show that there will adhere an equitable lien

(1) 11 Ont. App. R. 534.

upon the renewal term corresponding in equity to the legal charge created upon the original term—but not one of them goes the length of even raising the suggestion that a power of sale or other arbitrary remedy for enforcing the lien by the unaided hand of the person claiming it, of his own mere motion and strict right, without the assistance of a court of equity, will be implied as an incident to or attribute of that equitable lien.

The very fact in the cases referred to, that the persons asserting the right had to resort to courts of equity for a declaration of it, negatives the presumption of the continuance of a remedy whose exercise would have lain in their own hands.

The doctrine of the attachment by way of equitable lien upon the renewal term of a mortgage or other charge previously existing upon the expired term is a creation of the courts of equity, and can be called into action only by the intervention of the remedial power of the court; and it is submitted that the learned judges of the Court of Appeal lost sight of the origin of the principle and unwarrantably extended it in declaring that there was inherent in that equitable lien an incident which enabled its exercise at the mere motion of the claimant lien-holder without the intervention or aid of the court.

Powers of sale must be free from doubt, and will not be implied in a subsequent mortgage. *Curling* v. *Shuttleworth* (1); Coote on Mortgages (2): Nor will a power of sale be implied in a conveyance absolute in form by way of mortgage. *Pearson* v. *Benson* (3); Fisher on Mortgages (4).

A power of sale exercisable without notice has been held to be oppressive. *Miller* v. *Cook* (5).

(1) 6 Bing. 121.
(2) 4th Ed. 249, 253.
(3) 28 Beav. 598.
(4) 3rd Ed. 287; 4th Ed. 276.
(5) L. R. 10 Eq. 641.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

As to the second point decided by the learned judges in the Court of Appeal, that although it was the expressed intention of the company to convey to Damer by virtue of their foreclosure title, recited upon the face of the conveyance, yet the title could, to the extent of its invalidity, be fed by the unexercised power of sale. It is admitted in all the cases cited and by the learned judges in the Court of Appeal themselves, that where one has a power and an interest, the question of the execution or not of the power is wholly decided by the apparent intention to execute or not to execute it.

The apparent intention of the grantors, the company, in this instance, was to convey by virtue of their supposed interest acquired by foreclosure and not by virtue of their power of sale, and the deed upon its face bears evidence of the fact, and in this view of the case the authorities cited in the judgment of Mr. Justice Osler are authorities in favor of the appellant, notably *Maundrell* v. *Maundrell* (1). See also Rawle on Covenants (2); *Bowman* v. *Taylor* (3); *Lainson* v. *Tremere* (4); *Carver* v. *Jackson* (5); *Van Rensselaer* v. *Kearney* (6).

Upon either or both of these points the appellant submits that the judgment of the Court of Appeal should be reversed.

James Maclennan, Q.C., for respondents:

The sale to Damer, whether treated as a sale after foreclosure, or as an exercise of the power of sale contained in the mortgage to them, was effectual, and the same should not be disturbed. See *Grugeon* v. *Gerrard* (7).

Galt, counsel for Damer, contended that he was a *bonâ fide* purchaser for value of the said lands and pre-

(1) 7 Ves. 567, 10 Ves. 246.
(2) 4th Ed. 388.
(3) 2 A. & E. 278.
(4) 1 A. & E. 92.
(5) 4 Peters 86.
(6) 11 How. (U.S.) 325.
(7) 4 Y. & C. 119.

mises without notice of any equities in favor of the appellant, and that he was entitled to protect his purchase by claiming the benefit of all the rights which his co-respondents had at the time of the assignment by them to him.

The learned counsel also relied on the judgments delivered in the court below and cases therein cited (1).

Sir W. J. RITCHIE C.J., after reciting portions of the mortgage and of the deed to Damer, proceeded as follows:—

The recitals would seem to be inconsistent with the execution of the power, but the nature and effect of the instrument is entirely consistent therewith, and demonstrates, I think, a practical intent to execute the power, though, no doubt, the recital would show that the deed was executed on the assumption that the foreclosure was valid and that the property had thereby absolutely passed to the mortgagees.

The power authorized the defendants to convey the interest mortgaged absolutely; the deed executed purports to do, in express terms, that which the mortgagees had the right to do, if not under the decree of foreclosure then under the power.

Then why should the deed, notwithstanding the recital, not receive its legal effect, and be treated as a good execution of the power, the legal effect of the deed being precisely the same, whether under a valid decree, or, there being no valid decree, under the power, the intent being to do what the decree, if valid, would authorize, or what, if invalid, the power would authorize.

As, therefore, the mortgagees had power to give the deed effect, either by virtue of the foreclosure or of the power, the legal effect of the deed being strictly in

(1) 11 Ont. App. Rep. 530 et seq.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Ritchie C.J.

accordance with the power, that is to say, the deed intending to do the very thing which could be done under the power, why should it not have that effect? The mortgagees clearly intended to convey the property absolutely; the power gave them authority so to convey, and in conveying it absolutely they necessarily executed the power; and it not being alleged that the recital in any way affected the sale or the plaintiff's interest under it, or that he was in any way damnified by the execution of the power in the manner it was done. Where the nature of the interest is in accordance with the power, and the intention is clear to effect that which the power authorized to be done, I think we should be departing from recognized principles if we held that it does not demonstrate an intention to execute the power, or that the power is not thereby executed.

There can, I think, be no doubt that an instrument may be an exercise of a power, though on its face it does not so purport. In *Blake* v. *Marnell* (1) the Lord Chancellor says:

> It is perfectly clear and well established that the recital of a power is not essential to the due execution of it; it is sufficient if the estate over which the power extends is dealt with in a manner which can be effectual only by reference to the power.

It was argued that the power did not extend to the renewed lease. I think it did; that it was the intention of the parties that the mortgagees should have the security of the power of sale for realizing the money secured by the mortgage so long as the mortgage remained unpaid, and it should, therefore, be held to cover the renewed term, as well as the term originally assigned.

I think the judgment of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

(1) 2 Ball & B. 35.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

STRONG J.—I entirely agree with both the courts below, that the foreclosure proceedings were imperfect to the extent that the decree was a nullity. Even if the purchaser Damer had had no notice that the decree was valueless for the reason that the equity of redemption was not vested in the defendant I should have thought it no bar to the plaintiff's right to redeem, but as it is it is plain that he had notice

That the power of sale extended to the renewed term is, I think, clear. The words of the habendum include any renewed term which, indeed, without such words would be a graft on the mortgagees' interest, though but for the words of the power of sale, or, rather, one word in the power of sale, the latter might not have extended to the renewed interest. As the power is framed, however, it is very clear that it does comprehend a renewed term, for it is not merely a power to sell "the said term of years," in which case it would have been confined to the current term, but to sell "the *said* land," meaning, of course, all interest in the lands to which the mortgage applied.

Upon the remaining question, however, I differ very widely from the Court of Appeal. I quite agree in the law, or rather the rule, of construction as stated by both the learned judges in the Court of Appeal whose judgment we have, Mr. Justice Burton and Mr. Justice Osler, but I differ from them in their application of it to the case before us.

The rule of construction is laid down by Lord Eldon in *Maundrell* v. *Maundrell* (1), by Lord Romilly in *Carver* v. *Richards* (2), and by Lord Justice Christian in *Minchin* v. *Minchin* (3), and that rule, I apprehend, may be expressed as follows: If a man has a power but no interest, or not such an interest as will enable him to

(1) 10 Ves. 258. (2) 27 Beav. 488.
(3) 5 Ir. Rep. Eq. Series 258.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Strong J.

pass the estate which he purports to convey, he will by his conveyance, although he uses words applicable only to the conveyance of an interest and not to an appointment or the execution of a power, be held to have intended to execute the power, more especially in favor of a purchaser for value. This is as high as the rule can be put, perhaps more strongly than it is found actually expressed anywhere. And it should be added that even if it is shown that the party had no knowledge of the existence of the power, that makes no difference, it will still be presumed, in the absence of any indication of an intention to the contrary, that he purposed to execute it. The reason of the rule is said to be this, that when a person proposes to convey an estate it will be assumed that he intended his assurance should operate in any possible way in which it could operate, provided no contrary intention is indicated. In some cases it is said that where there is a general intention to convey it will be presumed, in the absence of any indication of a contrary intention, that the party meant to do so by the exercise of all powers vested in him which may be requisite to make his conveyance effectual. And it makes no difference that the grantor was not even aware of the existence of the power. But in every judicial expression of the rule it will be found that there is an exception of the case where a contrary intention appears on the face of the deed. And it is not enough that it may be inferred from the circumstances that the grantee would have executed the power if he had been aware that he possessed it, if the terms of the deed are inconsistent with the actual execution of it. (1)

From some authorities it might be supposed that if the deed can take effect at all by way of conveyance of an interest, whatever that interest may be, it will not be presumed that there was an intention to execute the

(1) *Langslow* v. *Langslow*, 21 Beav. 552; *Minchin* v. *Minchin*, Sup.

power, but that is not the latest and best statement of the principle. If it were it might be said here that as the legal estate vested in the mortgagee passed, the deed would operate as a mere transfer of the mortgage, but I admit with the Court of Appeal, that this is not enough to exclude the operation of the rule of construction mentioned, for I think it sufficiently appears here on the face of this deed that there was an intention to pass an absolute interest to the grantee, and that the deed was not intended to take effect as the mere assignment of a mortgage. That the foregoing is a correct statement of the law sufficiently appears from the case of *Carver* v. *Richards* (1), referred to in the judgments of the learned judges in the court below, and also from *Minchin* v. *Minchin*, *ubi sup*, where Lord Justice Christian states the law in terms which Mr. Farwell, in his treatise on Powers (2) has summarized as follows:—

> All that is requisite is an intention on the part of the donee that the fund shall pass to some one who is an object of the power. When that intent appears, and the only means which the person so intending possesses of giving effect to it is by an exercise of a power of which he is donee, then, though his mind is a mere blank as to the execution of power, though he has forgotten its existence, or never knew he had it, the law will presume that he must have meant to make use of the only means within his reach of achieving his express purpose. This is subject to one exception, which is theoretical rather than practical. When what we find is not merely the absence of a positive intention to exercise the power, but the demonstrated presence of a positive intention not to exercise it, then it will be held not to have been exercised, even though the intention to pass the subject is expressed.

The question, and I freely admit the only question here is, whether there does appear on the face of the deed any expression of an intention contrary to or inconsistent with the design of executing the power of sale. In most of the cases we find that the question has gen-

(1) 27 Beav. 488. (2) P. 156.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Strong, J.

erally arisen with reference to a general power of appointment, and by a general power I mean a power which the donee can exercise in favor of any objects and in any way he thinks fit and in respect of which he is in no sense a trustee for another. I concede, however, that though a power of sale in a mortgage is neither a power over the legal estate (for that estate is actually vested in the mortgagee) but is a mere equitable power to be executed for the benefit of the mortgagor as well as for that of the mortgagee, there is no reason why the same principle should not be applied as in the case of general powers of appointment of the legal estate.

It must, however, be remembered that the power of sale is a power to sell and convey the equity of redemption only, and that the conveyance of the mortgagee for the purpose of carrying out a sale under it operates on the legal estate as a conveyance strictly and not as the execution of a power, from whence it follows that if the equity of redemption is gone by foreclosure or otherwise the power is also extinguished.

The application of these principles in the present case depends altogether on whether it appears by the deed of the first of October, 1881, whereby the loan company conveyed to the defendant Damer, that the mortgagees did not intend to execute their power of sale. This deed contains a recital, as follows:—

> And whereas default being made in payment of the moneys due under the said mortgage from said William Kelly to the Imperial Loan and Investment Company, the said Imperial Loan and Investment Company exhibited their bill of complaint in the Court of Chancery for Ontario, and thereafter by an order of the said court made in the said cause, and dated the fifteenth day of May, one thousand eight hundred and eighty, it was ordered that the said Dennis Ambrose O'Sullivan stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the said leasehold premises,

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Strong J.

I regard this recital as amounting in effect to a recital that the power of sale was extinguished and gone. It recites the fact of the foreclosure and the legal effect and consequence of the foreclosure was of course to destroy the power which was incidental to the equity of redemption, the estate which was cut off and barred by such a decree. It is, therefore, for the present purpose, tantamount to a recital that the mortgagees had become the absolute owners of the estate, and that the power of sale no longer existed. Had there been such a recital in terms, there could have been no question that the deed would have disclosed an intention not to execute the power, and I am unable to distinguish between the extreme case which I put and that before the court. I am therefore of opinion that the recital demonstrates a very clear intention not to execute the power of sale by an exercise of which alone can the plaintiff's right of redemption in the present case be barred.

I have heard no answer to this proposition or argument, the factum does not contain any, and all the authorities I have looked at suggest none. I am compelled, therefore, to say that I arrive at this conclusion without the slightest doubt or hesitation. Although, as I have said, the principle upon which a general power of appointment is held to be executed by a deed not referring to it and containing only operative words technically applicable to a conveyance may be applied in a case like the present, yet I must add that there are reasons why the expression of a contrary intention which, in the case of a power of appointment may be considered to some extent technical only, is in the case of a sale by a mortgagee as in the present instance, substantial as well as technical. The mortgagee is, in respect of the power, a trustee to some extent for the mortgagor, and is bound to use reasonable care and

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Strong J.

diligence in selling; it is not, as in the case of a power to appoint in favor of any persons the donee may please to select as the objects of his bounty altogether a matter of indifference to him whether he carries out his purpose by a conveyance of an absolute estate or by an exercise of the power of sale; a mortgagee, who supposes himself to have the absolute estate, may for reasons of his own, choose to sell for a price less than he would think himself bound to demand if he knew he was actually executing a fiduciary power in respect of which he was liable to be called to account by the mortgagor. I mention this not as a reason why any other or different mode of construing this deed than that before stated should be adopted, but as a reason why the rule in question should here be strictly applied, as we should otherwise be making a precedent which might in other cases involve practical consequences to the prejudice of the mortgagors.

The principle of construction before mentioned as applicable to powers is not confined to such cases but is general, and is also the test applied when a grantee who has *primâ facie* a right to elect that the conveyance under which he takes shall operate either at common law or under the statute of uses, is sought to be restrained to one mode of operation. Hayes on Conveyancing (1).

It also applies when a person, having both a beneficial and fiduciary interest in property conveys by general words of conveyance by which *primâ facie* he will (notwithstanding the case of *Faussett* v. *Carpenter* (2) which, according to Lord St. Leonards, is now generally regarded as an erroneous decision) he intended to convey all his interest as well that which he has as a trustee as that of which he is the beneficial

(1) Vol. 1, p. 163. (2) 5 Bligh (N.R.) 75.

owner, unless from the recitals of the deed a contrary intention can be gathered. *Strong* v. *Hawkes* (1).

1885

KELLY v. IMPERIAL LOAN. &C., COMPANY.

Strong J.

I refer to these other instances for the purpose of showing that from the wide extent of the rule, any innovation upon it may have an application to cases not confined to the circumstances presented by the case now before us.

I am of opinion that the plaintiff was entitled to a decree for redemption and that the appeal should be allowed with costs.

FOURNIER J.—I concur in the judgment of His Lordship the Chief Justice.

HENRY J.—The appellant was mortgagor of the premises in question and the respondent company were the mortgagees. Subsequently to the mortgage the appellant assigned the equity of redemption to one O'Sullivan, but in trust to raise money and pay off the mortgage. The appellant removed to California and his address was not known to O'Sullivan when subsequently the respondent company threatened to foreclose O'Sullivan's interest. He, therefore, having no interest in the property and wishing to be clear of further responsibility about it, on the 15th November, 1878, re-conveyed the property to the appellant. On the 21st November, 1878, the company knowing that O'Sullivan had no beneficial interest in the property, filed a bill against him to foreclose the mortgage, setting it forth and alleging that he was entitled to the equity of redemption.

O'Sullivan, after having filed an answer and disclaimer of the interest in the property, was induced subsequently by the solicitor of the company to withdraw his answer and disclaimer and consent to a decree for foreclosure, which was passed and bears date the

(1) 4 DeG. M. & G. 185.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Henry J.

14th January, 1879. A final order of foreclosure was made on the 15th of May, 1880.

In September, 1881, the company agreed to sell the property to the defendant Damer for $20,000, which was less than the amount of their claim. Before the contract was completed by a conveyance, the appellant, as admitted by Damer in his evidence, notified him not to purchase the property as he had an interest in it.

On the 1st October, 1881, the company executed a conveyance to Damer by which after reciting the original lease, the assignment thereof to Kelly, that Kelly had, on the 7th August, 1875, assigned the same and all his interest therein by way of mortgage to the company, that he had subsequently assigned all his interest to O'Sullivan, whose equity of redemption therein had been foreclosed by the final order of foreclosure of the 15th May, 1880, that in pursuance of the covenant for renewal, Northcote, the original lessor had, on the 1st July, 1878, executed a lease of, and demised the land to O'Sullivan for 21 years, and the said lease, term and premises had become vested in and were then lawfully held by the company, and that the assignee had agreed with the assignors to purchase the lease and premises; the company granted, &c., to Damer, "the said parcel of land and all other the premises comprised in and demised by the said in part recited indenture of lease together with the said indenture of lease and the right of renewal thereof," &c. Habendum to the assignee for and during the residue of the said term granted by the said indenture of lease and the estate term and right of renewal, if any, and other interest of the assignors therein.

The instrument contains the usual covenant for title right to convey and further assurance.

The learned judge held that the decree and final order of foreclosure were void as against the plantiff, that

O'Sullivan could not be treated as a trustee within G. O. Chy. 58, 61, O.J. Act, Rule 95, for the purpose of representhim, and that even if he could be so treated, yet that the re-conveyance had been executed before the filing of the bill; therefore the plaintiff was at that time the owner of the equity of redemption and the proper party to the action, of which the company had notice.

(2) That the sale to the defendant Damer could not be supported as an exercise of the power of sale in the mortgage, as it did not profess to be made under the power, but under the title gained by means of the foreclosure suit.

(3) The plaintiff was entitled to redeem, subject to Damer's right to compensation for improvements.

The questions to be determined are:

(1) Whether the decree and final order of foreclosure in the action against O'Sullivan affected the rights and interests of the appellant.

(2) If not, whether the defendant Damer is affected by any irregularity or invalidity in the proceedings.

(3) If he cannot rely upon a title acquired by his co-defendant under the foreclosure, whether their conveyance to him can be upheld as an effectual execution of the power of sale in their mortgage.

The first question is answered by all the learned judges in the court below, and I think properly, that the decree and order did not affect the rights or interests of the appellant.

As to the second question I have only to say that after notice of the appellant's interests he can stand in no better position than that of the company; and now as to the third and only remaining, can the conveyance to Damer be upheld as an effectual execution of the power of sale in the mortgage?

It is no doubt well settled law, that where a party makes a conveyance under a power, it is unnecessary to

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Henry J.

refer to the power, and that where a party has an interest and a power and makes a conveyance beyond his interest, but within the power, the conveyance is to be understood as an execution of the power for the same reason, namely, that it is unnecessary to set forth the power, and as if the company in this case had made the conveyance without having had recourse to measures for foreclosure and decree and order.

In the case of *Maundrell* v. *Maundrell* (1) cited by Mr. Justice Osler herein, where a man had interests in two different estates and powers over them, he executed an instrument reciting the power over one of them and his interest in it, and as to it expressly executed his power and conveyed his interest by lease and release. As to the other, he recited, not that he had power to appoint, but that he was seized in fee and conveyed his interest in it by lease and release. It was held that the latter estate passed out of his interest only, and not by force of the power, from the apparent intention not to execute the power.

In this case the respondent company in their conveyance show most clearly their intention not to execute the power. There is no reference to the power but it recites the lease to the appellant and the mortgage, his subsequent assignment to O'Sullivan and the foreclosure of O'Sullivan's equity of redemption; a further lease from the lessor of the appellant to O'Sullivan in pursuance of a covenant for renewal, and alleges that the last mentioned lease, term and premises had become vested in and were lawfully held by the company.

If the decision in *Maundrell* v. *Maundrell* above referred to is correct then we must hold that the conveyance to Damer was made under the foreclosure and not in the execution of the power. A sheriff or other officer making a levy or distress under a defective warrant may

(1) 7 Ves. 246, 10 Ves. 258.

1885

KELLY v. IMPERIAL LOAN, &c., COMPANY.

Henry J.

justify under another and a good one. The issue in such a case relates to the act of levy or distress. If the officer was justified by either warrant the taking was lawful and that is the only question; or if the officer was justified in the act of taking, no wrong was done —but that is a case very different from the one under consideration. In fact, the law as to powers and their execution is settled upon principles peculiar to it and them, and in the application of them little can be gained by analogy from decisions on other subjects, and each case must, pretty much, depend on its own circumstances.

The Lord Chancellor says, *Roake* v. *Denn* (1):

Now the law applicable to this question, as has been stated by the Lord Chief Baron, has been settled by a long series of decisions, from the case which has been referred to in the time of Sir Edward Coke, Sir Edward Clere's case, down to the present time, that if the will, which is insisted upon as the execution of the power, does not refer to the power, and if the disposition of the will can be satisfi, ed without their being considered to be an execution of the power unless there are some other circumstances to show that it was the intention of the devisor to execute the power of appointment by the will, under such circumstances the courts have uniformly decided that the will is not to be considered to be an execution of the power. Now in this case there is no reference in the will to the power; there was other property in the county of Surrey, sufficient to satisfy the terms of the will; and there is no circumstance whatever to satisfy my mind, as I conceive it ought to be satisfied, that there was a manifest intention in the testatrix to execute an appointment under the power given by this will.

If the company had nothing but the power, the conveyance in question, we would, I think, be bound to conclude to have been made in execution of it; if the company had not, as in this case, set out their title by the foreclosure. Independently of that foreclosure the company had an interest as mortgagees, and that interest was covered by the conveyance to Damer. They had therefore an interest to be assigned but they had no other unless by the foreclosure or by an execution of

(1) 4 Bligh N. R. 20.

1885

KELLY v. IMPERIAL LOAN, &C., COMPANY.

Henry J.

the power by a conveyance which, though silent as to the power, did not show they were not acting in the execution of it.

They had given one or more notices to the appellant that they would sell or lease under the power, but it is shown they never did.

Mr. Boulton, their solicitor, in his evidence, on being shown one of the notices identified it and said: "Yes, and we attempted to sell and failed in so doing, and after several efforts to realize upon the property in some way, by lease or otherwise, I got instructions to take proceedings for foreclosure;" and Mr. Boulton admits that the sale was not made under the power but under the foreclosure.

Such being the case how can we, in opposition to facts so fully and plainly proved, arrive at the conclusion that there was any execution of the power. I can find no case or decision to sustain the proposition that where a party in the conveyance distinctly shows he is not executing a power that conveyance can be held to be an execution of it. See Sugden on Powers (1). He says: "It is intention that in these cases governs, therefore, where it can be inferred that the power was not meant to be exercised, the court cannot consider it as executed." Again at p. 353: "A power will not be deemed to be executed contrary to the intention of the party where he supposes a different power to be vested in him."

The case of *Maundrell* v. *Maundrell* is on principle very similar to this one. In that case the instrument recited the power as one of the properties, and in the other was recited not that he had the power but that he was seized in fee and so conveyed it. Here the company in their conveyance did not recite the power but a title in

(1) 8th Ed. p. 350.

fee through the foreclosure. I think to decide in favor of the respondents in this case would be to reverse the judgment in the other case with which I have compared it, which, as far as I can discover, has never been overruled. I am of opinion, for the reasons given, that the appeal herein should be allowed and the usual decree for redemption in the court below to be made with costs.

TASCHEREAU J.—I think the appeal should be dismissed. The mortgage clearly gives the power to sell, and the sale, as it was made, must be held to be an execution of that power. To hold the contrary would be to defeat the intention of the mortgage.

Appeal dismissed with costs.

Solicitors for appellant: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for respondents Imperial Loan Co.: *Boulton, Rolph & Brown.*

Solicitors for respondent Damer: *Caston & Galt.*