Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of the Registrar of Titles v. *Robert Brand Paterson from the Supreme Court of Victoria, delivered 6th December,* 1876.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Robert P. Collier.

THIS is an Appeal by the Registrar of Titles in the Colony of Victoria against three Orders of the Supreme Court of that Colony, dated respectively the 2nd of September, 1872; the 3rd of April, 1873; and the 19th of September, 1874. The determination of it turns chiefly upon the construction to be put upon certain clauses of an Act passed by the Colonial Legislature in June 1866, and known as the "Transfer of Lands Statute."

The circumstances under which the Orders in question have been made are the following:—

In October 1871, John Mulholland was the registered proprietor of certain lands. On the 20th of that month a copy of a writ of *fieri facias,* which had been issued in an action against him in the Supreme Court, at the suit of William Mainfold Aitken, was served on the Registrar of Titles, in conformity with the 106th section of the "Transfer of Lands Statute," specifying those lands as "the lands sought to be affected thereby." The usual entry was thereupon made in the Register book.

On the 2nd of January, 1872, Mulholland presented for registration transfers of the same lands from himself to one William Baylis, in consideration of 632*l.* paid to him by Baylis.

On the 5th of that month a copy of an *alias fieri*

facias in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the Registrar of Titles.

On the 21st of that month, and therefore after the expiration of three months from the date at which the copy of the first writ was served on the Registrar of Titles, that officer registered the transfers from Mulholland to Baylis, and issued to the latter the usual Certificates of Title.

On the 2nd and 28th of March, 1872, transfers of the same lands from the District Sheriff to the Respondent under the *alias* writ were lodged for registration with the Registrar; but he refused to register them, or to issue Certificates of Title to the Respondent as the proprietor. The consideration for these transfers is said to have been only 8*l*. The Respondent, therefore, if really a purchaser, and not a mere agent of the Judgment creditor, seems to have known that he was buying a very questionable title.

Upon this the Respondent, proceeding under the 135th section of the Statute, required the Registrar to set forth in writing the grounds of his refusal; and afterwards took out a summons in the Supreme Court, calling upon him to substantiate and uphold those grounds. The matter of this application was determined by Chief Justice Stawell on the 2nd of September, 1872, when the first of the Orders under Appeal was made. By that Order the Registrar was directed forthwith to enter in the Register a copy of this *alias* writ of *fieri facias*, unless the same had already been entered; and also forthwith to register the transfers to the Respondent, in accordance with the 106th section of the Statute.

This Order having been made upon him, the Registrar tendered to the Respondent Certificates of Title, qualified by a note in these terms:—"This Certificate is issued to Mr. Robert Paterson, the transferee, from the District Sheriff, under the circumstances appearing *in re Robert Brand Paterson*, reported '3 Australian Jurist,' pp. 52 and 54; and in pursuance of the decision of the Supreme Court in that case." The Respondent refused to accept Certificates of Title in that form; and required the Registrar to proceed against Baylis under the 132nd section, in order to compel him to deliver up, for the purpose of being cancelled,

the Certificates of Title issued to him ; and on the Registrar's refusal to do so, took out another summons in the Supreme Court against him, calling upon him to appear and substantiate and uphold the grounds of such refusal. That summons was disposed of on the 3rd of April, 1873, by the second of the Orders under Appeal, which directed the Registrar of Titles forthwith to call in the Certificates of Title to Baylis, and to issue to the Respondent clear Certificates of Title to the same land.

In obedience to this Order the Registrar took out a summons in the Supreme Court, under the 132nd section of the Statute, against Baylis, and one Smith, who had acquired from Baylis a charge upon the lands and was in possession of the Certificates issued to Baylis, calling upon them to show cause why those Certificates should not be delivered up for the purpose of being cancelled. This summons was ultimately dismissed by the Court on the grounds that Smith had a valid charge on the land, and that so long as that subsisted the Court had no power to comply with the summons. It may be observed that the 145th section of the Statute contains a strong provision in favour of purchasers for value ; and apparently governed the decision of the Court on this occassion .

The parties being thus at a dead-lock,—one Order requiring the Registrar to do that which the Court, on dismissing the last-mentioned summons, had in substance declared he was at present incompetent to do, the Respondent took out a third summons calling upon the Registrar of Titles to substantiate and uphold the grounds on which he had refused to register the Respondent as proprietor of the land, and to issue to him clean Certificates of Title in respect of it.

The Court, on the 19th of September, 1874, made an order upon this summons directing the Registrar to do what he had refused to do ; and this is the third of the Orders under appeal.

It is, however, to be observed that the learned Judges who made this last Order, did so only because they felt themselves bound by the former Orders against which there had been no appeal. Neither of them seems to have been satisfied that those Orders were correct ; and Mr. Justice Fellows expressed an opinion that the Court had been wrong

throughout. An Appeal to Her Majesty in Council against the last Order was allowed in the Colony; the Appellant subsequently obtained here special leave to appeal against the first two Orders, and thus the whole matter is now open on appeal before their Lordships.

The first question to be determined is obviously the correctness of the Order of the 2nd September, 1872.

The general object and intention of the "Transfer of Lands Statute" are to simplify titles to land by making them depend wholly upon registration, and the Certificate of Title issued in conformity with the Register Book. Its provisions deal with transfers of land, whether by the voluntary act of the Proprietor, or under an execution issued against him. The material provisions relating to this first class of transfer are the 37th, 42nd, and the 47th sections.

The last of these makes the certificate conclusive evidence that the person to whom it is issued is the proprietor of the land; the second provides that the land shall not pass from one proprietor to another by virtue of an unregistered contract, but only upon registration; and the first provides that every instrument presented for registration shall be registered in the order of, and as from the time at which the same is produced for that purpose. The time, therefore, at which an instrument is presented for registration is very material. It is the duty of the Registrar to register it as from that time. On such registration the land passes; and the purchaser is entitled to the Certificate which is to be the conclusive evidence of his title.

The second class of transfer is dealt with by the 106th section. This provides that no mere registration of an execution shall bind or charge the land; but that the Registrar, on being served with a copy of the writ of *fieri facias*, accompanied by a statement specifying the land sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the Register Book; and after the sale of the land under such writ, shall, on receiving a transfer thereof, enter such transfer in the Register Book; whereupon the purchaser shall become the tranferee, and be deemed the proprietor of the land. It further

provides that until such service as aforesaid no sale or transfer under the writ shall be valid as against a purchaser for value notwithstanding the writ was actually lodged for execution at the time of the purchase, and the purchaser had actual or constructive notice of the lodgment of such writ.

And then, after dealing with the case in which the writ may have been satisfied, it expressly provides that every such writ shall cease to bind, charge, or affect the land "unless a transfer upon a sale under such writ shall be left for entry upon the Register within three months from the day on which the copy was served."

The policy of the Legislature in framing this section was obviously to prevent titles from being affected by the operation beyond a limited time of unexecuted Writs of execution as charges on the land; and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby.

Again, there is nothing in the Statute, or in this particular section of it, to prevent a judgment debtor from making a contract for the transfer of his land to a purchaser for value, subject to the rights which the section gives to an execution creditor, or to a possible purchaser through the Sheriff.

Such a contract, no doubt, can only be perfected by registration, and must, therefore, remain defeasible until the writ is withdrawn, or satisfied, or the term of three months from the day on which the copy was served, has expired.

In the present case, therefore, the title of Baylis to the lands was clear, unless it can be shown to have been overridden by that of the Respondent claiming as transferee not under the original, but under the *alias* writ of *fieri facias*.

The Chief Justice in giving Judgment on the first summons said: "The Registrar reads the words 'any writ' as meaning the original writ. There is nothing to justify such a conclusion. 'Any writ' for obvious reasons, unless limited by the context, refers to an *alias* or *pluries* writ, just as

much as to the original writ." It is not necessary to the Appellant's case to contest this general proposition. Let it be assumed that an *alias* writ is duly issued in order to affect land not previously affected by the execution, such writ would, of course, have the same operation as an original writ would have had. But it would have no more. It would affect the land for three months from the date of the service of a copy of it upon the Registrar; but a transferee under it would take subject to rights acquired before such service. Nor, though it would have this operation, could it, in their Lordships' opinion, have the further effect of enlarging, contrary to the plain policy of the Statute, the operation of the original writ.

In the present case it is not shown, nor is it easy to see, how the *alias* writ came to be issued. The Common Law Procedure Act for the Colony (28 Vict., No. 274) seems to contain no special provisions touching the issue of *alias* writs of execution. It may, therefore, be presumed that an *alias* writ of *fieri facias* could only be regularly issued in the Colony under the circumstances in which it might be issued in this country; or at all events when such a proceeding might be necessary in order to reach property which had not been reached, and could not be reached by the original writ. In the present case the land in question had been reached by the original writ; nor is there any reason to suppose that when the *alias* writ issued, the original writ was not still in force. The 292nd section of the Common Law Procedure Act provides that every writ of *fieri facias* may be in the form contained in the 26th schedule to the Act; and according to that form the writ would be returnable "immediately after the execution thereof." The section indeed goes on to say that all writs of execution may be made returnable on a day certain, or may be returnable after the execution thereof. But there is nothing here to show that in this case the original writ had expired before the 5th of January, 1872; and the act of the Registrar in delaying the registration of the transfers to Baylis until the 21st affords a strong inference that the original writ was in force up to that date.

Therefore, whether the *alias* writ was or was not

properly issued (a question upon which their Lordships offer no opinion) it seems clear that the service upon the Registrar of a copy of it in order to affect lands already affected by the original writ, can be accounted for only by supposing that the object of the party making the service was the unwarrantable one of attempting to enlarge the statutable term of three months within which, in order to enforce his execution against the lands, he was bound to procure the sale of them.

Again, their Lordships are of opinion that upon the true construction of those provisions of the statute (which have already been referred to and considered) Baylis had, on the 5th of January, 1872, acquired a title to the lands which could only be defeated by a Sheriff's transfer of them in pursuance of the original writ. The transfers to the Respondent were, *ex concessis*, in pursuance of the *alias* writ, and were made at a time when, according to the statute, no valid transfer could have been made in execution of the original writ. If this be so the Registrar was right in completing Baylis' title by registration on the 21st of January, and in issuing the Certificates to him; and was also justified in refusing to register the subsequent transfers to the Respondent. It follows that the first order is erroneous, and ought to be reversed.

This being so it becomes unnecessary for their Lordships to consider particularly the correctness of the other two Orders. They are founded upon the first, and, if that cannot stand, must fall with it. The case has been heard *ex parte*, and their Lordships are therefore the more desirous to abstain from expressing any opinion upon the construction of the statute, and upon the reasons given by the learned Judges of the Supreme Court for their various Orders, which is not essential to the determination of the present Appeal.

They will humbly advise Her Majesty that all the three Orders under appeal be reversed, and in lieu thereof that Orders be made dismissing the summons of the 29th of June, 1872, with costs; and the summonses of the 12th of March, 1873, and the 29th of August, 1874, without costs. Considering that the subsequent litigation would have been avoided if the Registrar of Titles had appealed

against the first Order at the proper time, their Lordships have come to the conclusion that the Orders of Dismissal of the two last summonses should be without costs. They think, however, that the Registrar is entitled to the costs of this Appeal.

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