Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Godfrey v. Poole, and another from the Supreme Court of New South Wales; delivered 17th March 1888.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

This is an appeal from a decree of the Supreme Court of New South Wales, by which an appeal from a decree of Mr. Justice Fawcett, the Acting Primary Judge in Equity, in a suit in which the present Appellant was the Plaintiff, was dismissed with costs.

The facts of the case, as found by Mr. Justice Faucett, are clearly stated in the Reasons of the learned Chief Justice.

It is sufficient to state here that Francis Mooney, having obtained in 1856 three lots of land in the Colony by grants from the Crown, mortgaged them in 1863 to Adolphus William Young, to secure the sum of three hundred and fifty pounds, with interest at the rate of eight per cent. per annum. By the terms of the mortgage the mortgagee had an absolute power of sale in case of default. In the year 1864, Mooney, being largely indebted to his master, Mr. Lithgow, was induced, under pressure of Mr. W. W. Billyard, the solicitor of Lithgow, to execute a deed of the 30th September of that year, by which he con-

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veyed to the said W. W. Billyard and one William McMillan all his real estate upon trust to sell the same, and to pay off his mortgage and other debts, and as to the ultimate surplus of the said trust moneys and premises, after satisfaction of the said mortgage and other debts, in trust to pay over the same unto trustees to be named by Ellen Mooney, the wife of the said Francis Mooney, to be held by them in trust for the sole, separate, and unalienable use of the said Ellen Mooney for life, free from the debts, control, interference, or engagements of the said Francis Mooney, and after her decease in trust for the children of the said Francis Mooney and Ellen, his wife, in equal shares and proportions, as tenants in common. This deed was duly registered.

Very shortly after the execution of the deed the trustees, Billyard and McMillan, paid off Young's mortgage, and an acknowledgement bearing date the 20th of October 1864 was endorsed by Young on the mortgage deed. So far as appears by the evidence in the suit, all Mooney's creditors were paid, except Mr. George Chisholm and Henry Rolfe, whose claims were, it seems, not known to the trustees at the time when they were dealing with Mooney's assets. In point of fact, the debt to Rolfe was not wholly due at the time of the execution of the deed of trust, that debt, amounting to the sum of only 18*l.* 0*s.* 3*d.*, having accrued between the 14th of March and the 7th of October 1864. These two creditors each sued Mooney in the District Court, and recovered judgements against him—the one for 51*l.* 6*s.* 3*d.*, and the other for 18*l.* 0*s.* 3*d.* Chisholm's judgement was obtained on the 6th and Rolfe's on the 7th March 1865. Execution was issued on Rolfe's judgement for debt, and costs, 28*l.* 6*s.* 2*d.*, and, on the 1st of April 1865, the

Registrar of the District Court sold Mooney's interest in the said three pieces of land to Godfrey the Plaintiff for the sum of 18*l*. 10*s*., being 10*l*. 6*s*. 2*d*. less than the amount of the execution. On the 25th April 1865 the Registrar executed a conveyance of Mooney's interest in the three plots of land to the Plaintiff, who, on the 19th of September 1865, obtained, in consideration of the sum of 2*l*. 10*s*., an assignment of Rolfe's judgment debt to himself.

The three plots of land were, at that time, mere bush land, and the Plaintiff never obtained actual possession thereof.

On the 2nd October 1882 (seventeen years after his purchase, the Plaintiff filed his statement of claim, in which he alleged that Mooney was, on the date of the indenture of the 30th September 1864, indebted to various creditors, and particularly to Rolfe and Chisholm; and that the said indenture was without valuable consideration, and was a fraud upon his creditors, and was also void as against the Plaintiff as a subsequent purchaser for value. He charged that the legal estate did not pass by this indenture to Billyard and McMillan; and further, that, on the registration of the conveyance to him from the Registrar of the District Court, the indenture of the 30th September 1864, became by virtue of the Act 27 Eliz., cap. 4, and by virtue of the operations of the 78th and 79th sections of the District Courts Act of 1858, as against him, the Plaintiff, void and of no effect, and that the legal and equitable estate in the land passed to him as a *bonâ fide* purchaser for value. He further charged that that indenture was, by virtue of the Act 13 Eliz., cap. 5, void as against him as assignee of Rolfe's judgement, and also as against Mooney's creditors. He asked for a declaration to the effect that the Defendants should be declared trustees for him, that they should be directed to convey to him, and that they should

be restrained from interfering with the lands comprised in the said indenture.

It is unnecessary for the purpose of this case to state the manner in which the Defendants derived their title. It is fully set out in the reasons given for the judgement of the Supreme Court, by which it is shown, as stated by the Chief Justice, that they derived their title under the trust deed through a conveyance dated 17th of May 1872, executed by the trustees and by Mooney and his wife to Jacob Marks.

His Honour the Acting Primary Judge dismissed the Plaintiff's claim, with costs, and on appeal the Full Court sustained that decision, and dismissed the appeal, with costs.

The question now is whether the sale of Mooney's interest in the land under the execution on Rolfe's judgement, the conveyance executed by the Registrar on the 25th April 1865, and the assignment of Rolfe's judgement to the Plaintiff, vested in him any title to the land or the right, either as a creditor of Rolfe or as a purchaser for value, to treat the trust deed of the 30th of September 1864 as fraudulent and void.

It was contended by the Plaintiff's Counsel, on the authority of Walwyn *v.* Coutts, and Garrard *v.* Lord Lauderdale, that Mooney's conveyance to Billyard and McMillan, in trust for his creditors, was a revocable instrument, which passed nothing to the trustees, but left Mooney the same interest in, and control over, his property as though he had never executed it, inasmuch as it had never been executed or assented to by the creditors nor even communicated to them.

There is a great distinction, however, between those cases and the present, in which there was an ultimate trust for the benefit of the wife and children which was binding upon the debtor and rendered the deed irrevocable by him.

It was further contended on behalf of the Appellant that, even if the trust deed was not revocable by Mooney himself, it was void as against his creditors.

There is no principle, nor is there, so far as their Lordships know, any decision, which supports the position that a deed which contemplates the full payment of all creditors as its primary object can be held void as intended to defeat or delay creditors.

It was found by both the Lower Courts that the deed was not fraudulent in fact, and their Lordships are not prepared to hold that that finding was erroneous, or that the trust for the wife and children was merely colourable and collusive.

Indeed, after the concurrent findings of the Lower Courts, the objection that the deed was fraudulent in fact was not insisted upon at the bar.

Still it was contended, that, the deed being voluntary so far as it related to the trust in favour of the wife and children, it was fraudulent in law and void as against creditors, under the 13 Eliz., cap. 5.

It is unnecessary to refer to the numerous cases to which their Lordships' attention was called by the learned Counsel in his argument for the Appellants. It may, however, be stated, as regards the Statute 13 Eliz., cap. 5, that the rule was correctly laid down by the late Vice-Chancellor Kindersley in the case of Thompson *v.* Webster, 4 Drewry, 632, in which he says:—

> "The principle now established is this:—The language of the Act being, that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor, in making the settlement, was to defeat, hinder, or delay his creditors."

The only remaining question is whether the

deed was void under the 27 Eliz., cap. 4, as against the Plaintiff as a purchaser for value. This depends upon the proper construction of that Act, coupled with the District Courts New South Wales Act, 1858, Sections 78 and 79. They are as follow :—

"Section 78. It shall be lawful for the Registrar of every such Court, by himself or his deputies, &c., to receive and take under any writ of execution whereby he is directed to levy any sum of money, and to cause to be sold all and singular the lands, tenements, and herditaments of or to which the person named in the said writ is or may be seised or entitled, or which he can either at law or in equity assign or dispose of.

"Section 79. In case of any sale by the said Registrar, by himself or his deputy, of the right, title, and interest of any person of, to, or in any lands or hereditaments, the said Registrar is hereby required to execute a proper deed of bargain and sale thereof to the purchaser, which deed of bargain and sale shall operate and be effectual as a conveyance of the estate, right, title, and interest of such person; provided, nevertheless, that no such deed of bargain and sale shall so operate and be effectual as aforesaid until the same shall have been duly registered in the proper office for the registration of deeds, and be in the index book thereof in the name of the person whose interest in such land and hereditaments is intended to be thereby conveyed."

Assuming that, as regards the trust for the wife and children, the conveyance was voluntary in the sense of its having been made without any valuable consideration, it is clear that Mooney after he had executed the deed, which he could not revoke, was not seised or entitled to the lands comprised in the deed within the

meaning of Section 78; nor had he any right, title, or interest therein which the Registrar could convey within the meaning of Section 79.

It was contended that if Mooney had sold the land to a purchaser for value the deed of the 30th of September 1864 being voluntary, the trust for the wife and children would have been void as against such purchaser by reason of the 27 Eliz., cap. 4. There being no fraud in fact, the trust deed when executed though voluntary was not of itself fraudulent in law. A subsequent sale to a purchaser for valuable consideration by the settlor would have raised a legal presumption of fraud in regard to the prior voluntary trust deed, which could not have been rebutted. Clarke *v.* Wright, 6 Hurls and Norman, 875. The same presumption, however, would not arise from a subsequent sale to a purchaser for value by any other person than the settlor. The principle is clearly explained in Doe dem. Newman, 17 Queen's Bench Reports, 724. It is there laid down that

> "The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them; Doe dem. Offley *v.* Manning (9 East, 59). Where the same person executes the voluntary conveyance and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance it is otherwise, for the acts of one man cannot show the mind and intention of another."

Where there is no fraud in fact, two acts by the same person are necessary to render a voluntary conveyance fraudulent under the 27 Eliz., cap. 4, viz., a voluntary conveyance by

the grantor, and a subsequent sale by him to a purchaser for valuable consideration.

It was laid down in the House of Lords in Dolphin *v.* Aylward, 4 Law Reports, English and Irish Appeals, 500, that a creditor cannot seize under an execution any interest in an estate which is vested in another person by a voluntary conveyance executed by his judgement debtor, merely upon the ground that the settlement was voluntary.

In this case Mooney reserved no interest to himself by the trust deed, he consequently had no interest which could be seized under the execution against him, and if there was nothing that could be seized there was nothing which the Registrar could convey. Mooney might possibly have had the power by committing a dishonest act and selling to a purchaser for value to raise a legal unrebuttable presumption that the voluntary conveyance in favour of his wife and children was fraudulent as against the purchaser, but no one else had the power of raising such a presumption, nor was it an estate, right, title, or interest within the meaning of Section 78 of the District Courts Act, or one which the Registrar could sell or convey under Section 79 of the Act.

For the above reasons their Lordships are of opinion that the Plaintiff's claim was properly dismissed by the Primary Judge in Equity, and they will humbly advise Her Majesty to dismiss the appeal and to affirm the decree of the Supreme Court. The Appellant must pay the costs of this appeal.