Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Silas Harding (administrator of the estate of Maria Louisa Harding, deceased, intestate) v. William Stephens Howell, from the Supreme Court of Victoria; delivered 9th March 1889.

Present:

LORD WATSON.
LORD FITZGERALD.
LORD HOBHOUSE.
LORD MACNAGHTEN.

[*Delivered by Lord Fitzgerald.*]

This is an appeal from a decree of the Full Court of the Colony of Victoria dismissing the Appellant's appeal from the judgement of the Primary Judge in Equity, and affirming the decision of that Judge.

The suit was instituted on the 22nd September 1884, by the Respondent as Plaintiff, against the Appellant and Richard Howell as Defendants, for administration of the estate of Mary Louisa Harding, deceased, intestate, of which the Appellant is administrator, and praying that certain real estate belonging to the intestate, but alleged by the Appellant to have been conveyed by him to one Silas George Tangye, might be got in and sold, or that the Appellant might be charged with the full value thereof, and for accounts and distribution.

The Appellant in his defence denied that the intestate had any real estate, save certain property

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the subject of a voluntary settlement, which after her death had been avoided by a sale and conveyance for value.

The facts of the case are as follow :—

The Appellant had been owner in fee of two estates, known as the Chocolyne and the Devon estates.

By an indenture dated the 4th December 1878, and made between the Appellant of the first part, the said intestate Mary Louisa Harding (his wife) of the second part, and the Respondent of the third part, the Appellant, in consideration of 8,076*l.* expressed to have been paid to him by the said Mary Louisa Harding, conveyed the Chocolyne estate unto the Respondent and his heirs, to hold to him and his heirs to the use of the said Mary Louisa Harding, her heirs and assigns, for ever, as and for her separate estate, and the Appellant covenanted with the Respondent, his heirs *cestui que* use and assigns, for title, and that all the said estate might be quietly entered into, held, and enjoyed without interruption or disturbance by the Appellant, or by any person claiming through him, and that he, the Appellant, his heirs, executors, and administrators, would at all times execute and do all such assurances and acts for further or better assuring all or any of the said premises unto and to the use of the Respondent, his heirs *cestui que* use, and assigns, as by him or them should be reasonably required.

By a further indenture, dated the 25th February 1879, and made between the same parties as the said indenture of the 4th December 1878, the Appellant, in consideration of 7,026*l.*, conveyed the Devon estate unto the Respondent, his heirs and assigns, to the use of the said Mary Louisa Harding, her heirs and assigns, as separate estate, in like manner and with like covenants.

The form of the conveyances was such that the estates did not remain in the trustee, but

passed at once and vested in Mary Louisa Harding.

It was admitted that the two deeds were voluntary deeds, and that the statement in each of a money consideration was untrue.

Mary Louisa Harding died on the 25th January 1882, intestate, leaving her husband (Appellant) surviving, and two brothers, Respondent and Richard Howell, her next of kin.

The Respondent and the said Richard Howell were the only persons entitled to share with the Appellant in the proceeds of her estates.

The Appellant alleged that on the 8th February 1883 he conveyed the said Chocolyne and Devon estates, comprised in the conveyances of 4th December 1878 and 23rd February 1879, to Silas George Tangye (his nephew) for 7,250*l.*

There was some correspondence and considerable delay about taking out administration, but finally, on steps being taken by the Respondent to constitute himself administrator, and also by the Curator, the Appellant insisted on and obtained in his marital right administration to his deceased wife on the 4th of October 1883.

By an order of the Primary Judge, dated the 4th December 1884, it was ordered that the action should stand over, to enable the Respondent to make such demands and tenders of conveyance, and do such other acts as might be advised, for the purpose of enforcing fulfilment of the covenants for further assurance contained in the said indentures of the 4th December 1878 and 25th February 1879, and that the Respondent should have liberty to amend the statement of claim accordingly. It is not necessary, in the view which their Lordships entertain, to state the proceedings consequent on this order.

The cause was heard before Mr. Justice Molesworth, who held that, assuming the conveyance to be *bonâ fide* and for value, so as to defeat the voluntary conveyances made in favour of

Mrs. Harding, yet the Defendant (now Appellant) was liable on his covenants, and, by his judgement of the 9th April 1885, it was declared that the Respondent, as one of the next of kin of the said Mary Louisa Harding, deceased, was entitled to have the value, on the 23rd of December 1884, of the said Chocolyne and Devon estates charged against the Appellant as part of the assets of the intestate for which he was liable as her administrator, and it was ordered that an inquiry should be made what was the value of the said estates on the 23rd December 1884.

On the 8th May 1885 the Appellant gave notice of motion on appeal from that judgement to the Full Court, and on that motion the Court, by order dated the 9th September 1885, directed that the following issue should be tried before a special jury:—"Did Silas George Tangye, "in the month of February 1883, purchase "the Chocolyne and Devon Park estates, or "either of them, from the Defendant Silas "Harding *bonâ fide* and for valuable con- "sideration?"

That issue was tried on the 29th and 30th days of October 1885, and the jury found that "Silas George Tangye did not, in February "1883, purchase the Chocolyne and Devon "Park estates, or either of them, from the De- "fendant Silas Harding *bonâ fide* and for valuable "consideration."

The cause again came before the Full Court on the finding on the issue, but was not finally disposed of until July 1886.

The Full Court, in its reasons, after stating the course of the cause up to the finding of the issue, proceeds as follows:—

"We reserved our judgement until after the trial. The jury found in the negative, and it appeared, therefore, *primâ facie* that one way or the other the administrator was bound to re-

imburse the intestate's estate to the full value, the only question being at what time the value should be calculated.

"Meantime, however, Harding had prepared a surprise for the Court. When the hearing of the appeal was resumed, his Counsel asked leave to read an affidavit made by him on his own behalf, to the effect that, subsequently to the trial of the issue, he had again conveyed the settled lands to the same nephew, the price named being 8,475*l.*, or about 1,200*l.* in excess of the sum for which he had pretended to sell them before, and that this time the purchase money had been really paid. Upon this affidavit Mr. A'Beckett pressed the Court to further postpone its final judgement, and to refer it to the Chief Clerk to inquire whether the facts were as the affidavit alleged. Without deciding whether the affidavit can properly be used at this stage, yet in our opinion, even if it can, the Defendant, before he obtains the inquiry which he demands, is bound to satisfy the Court that the result might influence our judgement in his favour. Exception might be taken to the affidavit as insufficient, inasmuch as it does not negative the existence of a secret undertaking between Harding and Tangye that the purchase money is to be repaid to Tangye as soon as the conveyance has served its purpose. But we think it better to deal at once with the point of law on which Mr. A'Beckett relied."

The Court then proceeds to deal with the question of law raised before them and in the Court below, and finally affirms the decision of Mr. Justice Molesworth with the following important observation :—

"It was the duty of Harding as administrator to get in the estate of the intestate. But instead of that, supposing what may well be doubted, that the second sale was genuine and not a sham like the first, he procured the intervention of a

third party with the view of depriving the persons entitled in distribution of property which as administrator, he ought to have secured for them. Having put himself in a position in which his duty conflicted with his interest, he should not, on equitable principles, be permitted to plead that he preferred his interest to his duty."

Their Lordships think it proper to say that although they do not think it necessary to quote in its terms the correspondence between the parties in reference to the administration as set out at pages 19 to 22 of the Appendix, it has not escaped their attention, and they refer to it as indicating that the delay of about one year and ten months in taking out the grant of administration arose from the interposition of the Appellant, amd is attributable to him.

On the 4th of October 1883 administration was taken out by the Appellant.

The administration in question was obtained under the provisions of the Victorian Administration Act of 1872.

Section 5 provides that the Court shall have jurisdiction to grant probate or letters of administration of the estate of any deceased leaving property, whether real or personal, within the colony of Victoria.

And by Section 6, on the Court granting probate or administration, all the hereditaments of the deceased person shall vest as from the death of such person in the executor or administrator.

And by Section 7 it is provided that the real estate of every deceased person shall be assets in the hands of his executor or administrator for the payment of Crown fees and duties, and for the payment of his debts in the ordinary course of administration, with powers to sell, mortgage, and convey to a purchaser.

Section 8 declares that in all suits in equity

concerning the real estate of a deceased person, the executor or administrator shall represent his real estate, and all persons interested therein.

And by Section 10, the executor or administrator shall have the same rights and be subject to the same duties with respect to the real estate as executors or administrators had previously been subject to with respect to personal estate.

Section 14 provides that, upon the receipt of an office copy of the probate of any will or of any letters of administration, the registrar of titles shall, on an application in writing of the executor or administrator to be registered as proprietor in respect of any land therein described, enter in the register book a memorandum notifying the appointment of such executor or administrator, and the day of the death of the proprietor when the same can be ascertained, and upon such entry being made such executor or administrator shall become the transferee, and be deemed to be the proprietor of the estate or interest of the deceased proprietor in such land, and shall hold the same under such equities as the deceased held the same, but for the purpose of any dealings with such land every such executor or administrator shall be deemed to be the absolute proprietor thereof.

Section 26 provides that every person to whom a grant of administration shall be made shall previous to the issue of such administration execute a bond to the Chief Justice of the said Court, with two sureties conditioned for duly collecting, getting in, and administering the real and personal estate of the deceased.

Their Lordships observe that the administrator thus takes the real estate of the intestate from the day of the death of the deceased in the fullest manner with statutable powers and duties for its realization and distribution. It is not controverted that according to the statute law of

Victoria the duty of the administrator is to realize the whole estate, whether arising from personal or from real property, and, after the payment of debts and other liabilities, to distribute the surplus amongst the next of kin.

Upon the argument in support of this appeal much learning was expended on the over-reaching effect of the Statute of 27th Elizabeth in favour of a *bonâ fide* purchaser for value.

Their Lordships do not intend in the least to question the principle which governs the construction and effect of that statute as now long established by decided cases. It has been over and again said that "so many titles stand on it "that it must not be shaken," and in that their Lordships concur. They do not intend to convey that up to the 4th of October 1883 there was anything to restrain the grantor, in these voluntary settlements, from making a *bonâ fide* sale to a purchaser for value in order to over-reach and defeat them, save the liability which he might incur to the representative of his deceased wife on the covenants contained in the settlements.

A very able argument was also addressed to their Lordships in relation to the liability, if any, arising on these covenants. It was pointed out that these covenants could not nor could any of them be enforced at law. The trustee, it was said, could not sue as he was a mere re-lessee to uses, and the right to sue on the covenants passed with the estate to his *cestui que* use, and that the Appellant administrator could not at law sue himself.

It was further urged that the covenant not being capable of being enforced at law, it created but an imperfect obligation to which equity would not give effect in favour of a volunteer. It was urged also for the Appellant that the case raised but two questions,—

1. Could the Respondent enforce the covenants as against the Appellant?

2. Did the second sale and conveyance to Tangye destroy the voluntary settlements?

Their Lordships pass by these questions for the present to consider another and higher one referred to in the judgement of the Full Court below, and rather imperfectly discussed here.

The two estates passed under the voluntary settlements to Mrs. Harding, and continued in her to her death, and on the happening of that event still continued to be part of her assets, although liable to be defeated by a purchaser for value, in whose favour the law would have raised a legal presumption of fraud in the prior voluntary settlements.

The abortive attempt of 8th February 1883 has been disposed of by the finding on the issue, and their Lordships must consider the conveyance of that date to Tangye as having had no operation and passing no estate to him. Up to the time of the grant of administration to the Appellant, if a curator had been appointed, he could at once have sold, and would have been bound to do so, and a sale by him and conveyance to the purchaser, or a sale and conveyance under the order of the Court, would have put an end to the power of the settlor to defeat his settlements by a sale to a purchaser for value.

The Appellant elected to take out administration. His marital right to do so, in preference to all others, does not admit of question. Administration was not nor could it be forced on him. He insisted on his civil right. (*See* Ognell's Case, 4th Reports, 48B, and Johns *v.* Rowe, Croke's Reports, Vol. 4, p. 106). What then followed? The estate passed to him, not beneficially, but as a trustee of his wife's assets, and under obligation to realize and apply and distribute them according to law. That was the

position of the Appellant when this suit was instituted,—when the Primary Judge pronounced his decree,—and when the appeal came to be heard in the Full Colonial Court. The second alleged conveyance to Tangye does not seem to have been properly before the Full Court, nor, if it had been, would it weaken the position of the Respondent, or afford the Appellant any protection.

If it was not a *bonâ fide* sale and conveyance for value, it had no operation to defeat the prior settlements, and the administrator is chargeable with the value of those estates as part of the assets of his intestate.

If, on the other hand, it was a sale and conveyance by the settlor to a purchaser for value, so as to defeat the settlements, then it was on the part of the administrator a breach of the trust which he had accepted and the duty he had undertaken. A Court of Equity will compel him to make compensation for that breach of trust and of duty to the extent pointed out by Mr. Justice Molesworth.

The view which their Lordships thus express render it unnecessary for them to deal with other questions raised in the argument.

Their Lordships are of opinion that the decision of Mr. Justice Molesworth, affirmed by the Full Court, was, in its results, substantially correct, and ought to be affirmed, and the appeal dismissed, and they will so humbly advise Her Majesty. The Appellant must pay the costs of the appeal.