Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Sydney and Suburban Mutual Permanent Building and Land Investment Association, Limited, v. *Robert Edward Lyons, from the Supreme Court of New South Wales; delivered* 28*th April* 1894.

Present:

LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Morris.*]

The facts out of which this appeal arises are as follows:—The Imperial Land Building and Deposit Company were the owners of a certain building estate known as "Henderson's estate" situate at Bondi near Sydney. That Company caused the estate to be put up for sale by public auction on the 5th October 1889, having previously advertised the sale in the "Sydney Morning "Herald" of the 11th and 21st September. The sale was in lots, according to a printed plan called the "Sub-Division plan," and upon terms of payment stated in the plan, a *fac-simile* of which is set forth in the record. At the sale the Respondent purchased four lots, Nos. 9, 10, 11, and 12 on section 2 of the plan, and the usual contract note was signed. The Respondent on the same day made a verbal agreement for the purchase of four other lots, Nos. 13, 14, 15, and 16 on the same section. No defence of the

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Statute of Frauds has been raised, and the two purchases were treated as one transaction. The purchase-money for the whole of the lots was 878l. 10s. The respondent paid the deposit and first instalments of both purchases, and gave promissory notes for the balance, which were paid in due course.

The respondent made various applications to the solicitor of the Imperial Building Company for an abstract of title to the lands bought by him, but none was furnished until the month of November, 1890. Subsequently to being furnished with the abstract the solicitor of the respondent, on search being made at the Registry of Deeds Office, discovered that on the 3rd of June, 1890, the Imperial Building Company had executed a mortgage to the appellants of the legal estate of the whole of Henderson's estate at Bondi to secure payment of the sum of 1050l. with interest, and by subsequent charges executed on the 17th of June, 1890, 23rd of July, 1890, and 31st of October, 1890, had charged the same estate with further sums, amounting in the aggregate to the sum of 3325l. beyond the said sum of 1050l.

The Imperial Building Company soon after fell into difficulties, and was ultimately wound up, and a liquidator was appointed. The abstract of title furnished to the respondent by the Imperial Building Company did not disclose the mortgage of the 3rd of June, 1890, nor any of the further charges. The appellants had registered the mortgage deed and the further deeds of charge immediately after the dates named. A question of priority now arises between the appellants, who rely on the registration of their deeds, and the respondent in respect of the contracts for sale.

Sect. 11. of the Colonial Act, 7 Vict. No. 16, is as follows:

"And be it enacted

" that all deeds and other instruments (wills " excepted) affecting any lands or hereditaments " or any other property in the said part of the " Colony of New South Wales which shall be " executed or made *bonâ fide* or for valuable " consideration and which shall be duly regis- " tered under the provisions of this Act shall " have and take priority not according to their " respective dates but according to the priority " of the registration thereof only."

Section 22 of the same Act is as follows :— " And be it enacted that the term instrument " hereinbefore used shall for the several purposes " of this Act be construed to include not only " conveyances and other deeds but also all " instruments in writing whatsoever whereby " real or leasehold estate or stock shall be affected " or shall be intended so to be."

The Colonial Act; 22 Vict., No. 1 (The Titles to Land Act, 1858), by Section 18 provides that " No instrument hereafter executed and " registered under the provisions of any Act in " force for the registration of deeds shall lose any " priority to which it would be entitled by virtue " of such registration by reason only of bad faith " in the conveying party if the party beneficially " taking under such instrument acted *bonâ fide* " and there was a valuable consideration for the " same paid or given."

The Appellants claim to hold the lands in question as against the Respondent by virtue of the said Acts, on the ground that they were *bonâ fide* purchasers, without notice of the Respondent's claim. The question is whether in the circumstances of this case the Appellants are *bonâ fide* purchasers. The Respondent impeaches the *bona fides* of the several deeds of mortgage :—1st, on the ground that the Appellants had actual notice of the sale of some of the property comprised in their deeds.

2ndly. That the real agreement between the appellants and the Imperial Building Company was for security to be given only of the unsold portions of the estate. It appears that Mr. Callaghan was a director of the appellant company, and that Mr. Green was a director of the Imperial Building Company. They had com- munication with each other on behalf of their respective companies, with the object of the Imperial Building Company getting a loan which it most urgently required. Mr. Callaghan alleges that his first communication with Mr. Green was on the 2nd of June, while Mr. Green alleges that upon the 29th of May a letter was written at a board meeting of the Imperial Building Company as follows:—

"The Manager, Sydney and Suburban Building Society.

"Post Office Chambers,

"Pitt Street,

"29th May, 1890.

"Dear Sir,—Referring to the interview between Mr. Callaghan and Mr. Green, one of my directors, I beg to apply for a temporary loan of 1000l. We will lodge as security for the advance the deeds relating to the title of the Henderson's Estate, Bondi, of the unsold and those of the sold allotments which have not been conveyed. We will also lodge the promissory note of the directors and an undertaking to sign mortgage when called upon.

"Faithfully yours,

"Wm. P. Smairl, Manager."

Three of the directors, Mr. Green, Mr. Martin, and Mr. Manning, as well as Mr. Smairl, all depose to the writing of the letter, and in the letter-book of the Imperial Building Company a press

copy of the letter is contained. All the witnesses prove that the letter on being written was handed to Mr. Green to be taken by him to the Appellants' office which was quite near, and that Mr. Green took the letter away, and shortly after returned stating that the loan would be granted in the terms of the letter. Mr. Green deposes that he left the letter with some one—he cannot now recollect who it was—in the office of the Appellants. On the other side Mr. Callaghan and the other directors of the Appellant Company, and Mr. Lewis their manager, denied all recollection of having received the letter, and the clerk in charge of the office of the Appellants denied having received it. The learned Judge at the trial came to the conclusion that the letter was written and that it was left by Mr. Green at the Appellants' office on the 29th May, but that it was extremely probable it was lost.

Their Lordships do not consider it necessary to decide whether the letter reached the hands of the directors or of the manager of the Appellant Company, because they are of opinion that upon the facts of the case the Appellants were aware that the mortgage deed of the 3rd June 1890 was not a real conveyance of what it purported to convey. On the 2nd June 1890 Mr. Smairl purports to sign a formal application to the directors of the Appellants for the loan. The application is filled in by Mr. Lewis. It sets forth that the estate upon which the loan was to be secured was the whole of the Henderson estate "as per sub-division "plan." Mr. Smairl alleges that this application was signed by him in blank at Mr. Lewis' request a few days after the loan had been made, and that Mr. Lewis, in reply to Mr. Smairl's statement that he had already sent in an application in writing on the 29th May, said it would be attached to the application form. All this is

is denied by Mr. Lewis. It becomes unnecessary to decide which of these conflicting statements is the true one, for it cannot be denied that the application form referred to the sub-division plan, and that the sub-division plan was before the board of directors of the appellant company. What follows? Mr. Smairl brought to the office of the appellant company the deeds of the entire property to lodge them as security for the advance. On the 3rd of June he called with Mr. Callaghan at the office of the solicitors to the appellants, and saw Mr. Weaver, the managing clerk. Mr. Weaver advised that a legal mortgage of the property should be given as security. Mr. Weaver ascertained on search that some of the property had been sold and conveyed and the conveyances registered. He then, he says, either saw or wrote to Mr. Lewis. There was not time to make proper inquiries on the part of the appellants, as the transaction was to be completed and the advance made to the Imperial Building Company on that day, the 3rd of June. Consequently Mr. Weaver inserted the entire estate as being mortgaged, although he knew, and the appellants' directors and Mr. Lewis all knew, that the mortgage would include lots actually conveyed and registered. Their Lordships are of opinion that the real contract between the parties was for an advance to be made on the unsold portion of the estate, and that the appellants took as security the Henderson estate valeat quantum—subject to what it turned out to be. To Mr. Weaver was delegated how to carry out this arrangement. It was admittedly done in an extremely hurried manner. Mr. Weaver prepared a legal mortgage of the whole of the estate—that is, a mortgage of the entirety of a property of which his employers well knew lots had been already sold, though they may not have known what particular lots. The deeds on which the

Appellants rely do not evidence the reality of the contract by parole, and can be no better than an equitable mortgage would be. They include what the mortgagees knew they had no right to get from the mortgagors, and cannot be considered a *bonâ fide* purchase as against the Respondent. Their Lordships have consequently come to the conclusion that the judgment of the Supreme Court of New South Wales should be affirmed, and they will humbly advise Her Majesty accordingly. The Appellants must pay the costs of this appeal.