1883

In re WHIPPY, DECEASED.

not apply at all to deaths which had taken place before it passed; and that, in fact, it did not apply to cases where the death was previous to the date last mentioned. On reference to the Act, I find, however, that it is clearly meant to apply to grants consequent upon all deaths—at whatever time they may have happened—there being in the schedule one scale of fees expressly applicable where the death was on or before April 5th, 1805, and another where the death was after that date.

I cannot, therefore, accept the premises upon which these points are based. Supposing, however, that the Colonial law and the English statute respectively did have the effect and meaning ascribed to them by Mr. Scott, no inferences which could be drawn from them as to the intention of the Legislature in passing the Stamp Ordinance could, to my mind, prevail against what I consider to be the clear meaning of its provisions.

Case remitted to the Commissioner.

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April 23.

[CIVIL JURISDICTION.]

WILSON *v.* IRVINE.

Specific Performance—Lands Commission—Caveat—Ordinance XXV. of 1879, *s.* 20—*Civil Procedure Rules*, 270, 286—*Ordinance XXXIV. of* 1876.

Specific performance of agreement to transfer lands the subject of a claim before the Lands Commission decreed notwithstanding the bankruptcy of the vendor before the issue of the Crown grant, there being no evidence of any inadequacy of consideration or undue preference.

Held, further, that the purchaser was not bound to file a *caveat* under s. 20 of Ordinance XXV. of 1879 for the protection of his interests, such provision being permissive only and not obligatory;

and that it made no difference to the decree being made that a judgment, which might operate as a lien upon the land, had been obtained against the vendor by a third party since the agreement for transfer had been made.

Quære, as to the validity of rule 286 of the Civil Procedure Rules when read with s. 91 of the Real Property Ordinance 1876.

This was an action between Adam Rankine Wilson, and Cyril Hamilton Hunter Irvine, trustee of the estate of George Matthew Henry, a bankrupt, for the specific performance of an agreement. From the statement of claim, it appeared that the plaintiff had purchased from one George Matthew Henry 2,000 acres of land, in respect of which the latter was a claimant before the Lands Commission. The agreement for purchase had been made in May, 1879, and the amount for same, namely 500*l.*, was paid partly in that month and the balance in July. A deed of agreement was signed and registered, and in July, 1881, two years after the purchase-money had been paid, Henry became bankrupt, and the defendant was appointed trustee in his estate. Certain land was allowed Henry, and a Crown grant issued for the same. Defendant had possession of the Crown grant in his position as trustee and declined to deliver the same to the plaintiff, who, thereupon brought an action.

The defence, which was of a highly technical nature, traversed the allegations in the statement of claim, and demurred thereto as a whole. It denied that the land was ever vested in the vendor, challenged the consideration paid as being inadequate, and alleged a fraudulent preference.

Mr. Solomon for the plaintiff.
Mr. Winter for the defendant.

The arguments sufficiently appear from the judgment.

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FIELDING CLARKE, Acting C.J. It appears that in May, 1879, Henry agreed to sell to the plaintiff 2,000 acres of land at Vatu Kali, Taviuni, being part of a block of some 5,000 acres or more for which he was then the claimant before the Lands Commission. The price was to be five shillings per acre, and 500*l.* was paid by the plaintiff to Henry. About 750 acres had been subsequently finally allowed, and a Crown grant for the same was in the hands of the defendant as Henry's trustee. The written agreement in which the arrangement was afterwards embodied shows that the parties contemplated the possibility of a greater or lesser quantity than 2,000 acres being allowed, and provided accordingly. The 4th clause provides:

> That should the first party not become entitled to convey to the second party the full extent of 2,000 acres the first party agrees to repay to the second party the price *pro tanto* of such land not conveyed but stipulated to be conveyed, together with interest from May, 1879.

This clause in my opinion imports that in case of the claimant getting less than 2,000 acres, he should convey what he did get and suffer an abatement from the price. The 5th clause provides:

> That should the first party become entitled to convey in virtue of the Crown grant more than 2,000 acres, he shall be bound to convey 2,000 acres in one block, extending from the shore to the full length back of the land he shall become entitled so to convey.

The meaning of this clause is that, in the event of more being granted, the claimant should convey 2,000 acres; the option being with the vendor to choose the particular area subject to the provision that it should consist of one block extending the whole depth of the land allowed, and having a sea frontage. The agreement, unless shown to be vitiated for some good

reason, must be carried out as far as possible. The written agreement was in May, 1880, and in order to satisfy the Registrar-General, it was re-executed with slight alterations in September following. Before the date of the first agreement the whole money had been paid, and its receipt is acknowledged. It has been said that the price was inadequate. Even if that were so, the inadequacy in itself would not be a sufficient reason to set aside the contract unless it were combined with circumstances showing that any undue and improper advantage had been taken of Henry's difficulties. It is, however, difficult to say that five shillings per acre is an inadequate price considering Wilson's position at the time. He was not so much purchasing land as purchasing a prospect of obtaining land, and in the event of no land being allowed the claimant, he might have found it difficult to recover back his 500*l*. Henry no doubt got the most for his land that he could get. It has not been suggested that there was a pre-existing debt, in respect of which Henry wished to prefer Wilson to other creditors, nor was there any intercourse between plaintiff and Henry that would interfere with the ordinary relations of vendor and purchaser. There has been no reflection cast upon the transaction by the evidence, and in the Court's opinion it is perfectly *bonâ fide*. The defendant raises the point that, under s. 20 of Ordinance XXV. of 1879, the plaintiff should have filed a *caveat*. The Court acquiesces in the view of the plaintiff's counsel that the provision is permissive, not obligatory. It might be adopted by those dissatisfied with the order of priority indorsed on the Crown grant. It was a protection which the plaintiff might have availed himself of, but he was not barred from adopting other remedies. If the defendant had transferred

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the land to a *bonâ fide* purchaser without notice, the plaintiff would have suffered from not taking advantage of the Ordinance. In one of the early Ordinances* it is provided that suits relating to land may be brought after the Crown grant is issued, and that Ordinance, in the opinion of the Court, justifies the present action.

The defendant next pleaded that the plaintiff had full knowledge that a judgment had been confessed by Henry, for 429*l.* 7*s.* 8*d.*, on June 26th, 1879, from which date it operated as a lien. Even supposing it did so operate, the Court inclines to the opinion of the plaintiff's counsel, that the lien was a matter between the plaintiff and the judgment creditor, Mr. Smith. Surely, if Mr. Smith does not come here to support his lien, it would be no ground of defence as between the present parties. As, however, the question of the effect of a judgment was discussed at some length at the trial, it might be as well to say a few words respecting it. The lien is relied upon as arising under rule 286 of the General Rules made under the Supreme Court Ordinance. Judgment was not entered up till November, 1880, although confessed in June. Rule 270 provides that,—

> Every final judgment or order, and every judgment by default or by confession, or by consent of the parties, shall be dated in the judgment book as of the day on which the same was pronounced or entered up, as the case may be, and shall take effect from that date.

Where a judgment is pronounced and recorded, the judgment takes effect from the date when it was pronounced; in other cases from the date when it is entered up. Therefore there was no effectual judgment at the date of agreement. Apart, however, from

* No. III. of 1875.

the question of date, it is doubtful whether rule 286 is of any validity.

[His Lordship here referred to s. 91 of the Real Property Ordinance 1876 as being inconsistent with the rule.]

It may be questioned, therefore, whether the rule has any statutory authority to support it. Even had it validity, the judgment was only entered up in November, 1880, and was, therefore, subsequent to the purchase whether the first or second deed were looked to. This really settled all question in the case. There was no valid objection to the sale. It was not made in contemplation of any bankruptcy. It was not a general assignment of all Henry's property. It was a particular assignment of a particular property which he held in conjunction with other property. It was a valid sale, not of land in fee, but of a claim for land, and the judgment was entered up some months after the sale was completed. It is not necessary to consider the meaning of the signature of Henry junior, to the second deed. What did that matter? G. M. Henry professed to convey the land to the plaintiff, and it is admitted that the land allowed is part of G. M. Henry's estate. Nor is it necessary to consider the effect of registration in giving priority t the second deed over the first. If a party makes a contract to sell a property which he has not got, upon getting it, or any part of it, he will be obliged to fulfil the contract as far as he can. The trustee is in Henry's position, and had Henry received the grant he would have been bound to complete the conveyance. Specific performance of the agreement will be enforced as far as possible. No expenses can be allowed as against the plaintiff for the appeal by the trustee on the part of the creditors before

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the Appeal Court, the only result of such appeal having been slightly to prejudice Henry's interest. With regard to the fees paid for the Crown grant, the trustee was not bound to take up the grant under onerous conditions, and he could have washed his hands of the matter. He should, therefore, be repaid the amount of them. It had been suggested that the Court should settle a question relating to the proofs of bankruptcy, but it could not do so at *Nisi Prius*. The Court's opinion that the contract should be carried out as far as it can be carried out might however be a guide to the trustee. Under the agreement the plaintiff is entitled to the transfer of the whole land contained in the Crown grant, the allowance having been for less than 2,000 acres. I order that on payment of the fees paid by the trustee to the Land Office for the Crown grant, the defendant do transfer the land, and as trustee pay the costs of the action.

Judgment for plaintiff with costs.

1885
May 21.

[CIVIL JURISDICTION.]

THE UNION BANK OF AUSTRALIA (LIMITED) *v.* SHARPE, FLETCHER AND COMPANY (LIMITED).

Interpleader Summons—Joint Stock Company in Sequestration—Rights of Execution Creditor—Bankruptcy Ordinance 1877, *ss.* 6, 7, 8, 15, 19, 42, 44, 45, 46, 47, 48—*Bankruptcy Act*, 1869, *s.* 87—*Judicature Act*, 1875, *s.* 10—*Partnership Ordinance* 1878, *ss.* 205, 206, 207, 209.

In the administration of the assets of a Joint Stock Company in sequestration under the Bankruptcy Ordinance 1877 and the Partnership Ordinance 1878, by analogy to English law, the rules obtaining in Bankruptcy proceedings under similar circumstances do not necessarily apply,—