Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bullen and Richey v. *A'Beckett, Weigall, and others, from the Supreme Court of Victoria; delivered 7th July,* 1863.

Present:

LORD KINGSDOWN.
SIR EDWARD RYAN.
SIR JOHN T. COLERIDGE.

THIS is an Appeal against a Judgment of the Supreme Court of Melbourne, in an action of ejectment brought by the Respondents, in which a verdict passed for them, with leave to move to enter it for the Appellants, and, in deciding that question, the Court was to have the same power as a jury to draw inferences of fact. A rule was accordingly obtained, and, after argument, discharged by the unanimous opinion of the Court, against which the present Appeal has been brought.

The Respondents may be stated generally to claim the premises in question under the will of John Mills, and two subsequent and successive conveyances: the first in 1842 by Pease and Witton, trustees under the will, to Robinson, who had married Hannah Mills, the widow, and executrix of the will with Pease and Witton executors; the second in 1860, by Robinson and Witton (Pease having died), under a Decree of the Court of Chancery in the Colony, to A'Beckett and Weigall, the two first Respondents. The Appellants claim under sales by the Sheriff, in execution of a writ of *fieri facias*, issued upon a Judgment by default in an action brought upon a covenant of the testator Mills. The action was brought by one Burn against one Moore, a co-covenantor with the testator Mills, and his executrix and executors.

Upon these facts the first question, and the only one on which any serious argument was maintained, arose. The Appellants maintain that in an action against an executor to recover the debt of a testator, in which the Plaintiff recovers a judgment, the Sheriff may sell and convey to a purchaser the lands of the testator; which involves the proposition not merely that the lands are by law liable for the debt, but that they pass to the executor as such, and are in his hands, as legal assets, at least for that purpose. To support this, the 54 Geo. III, c. 15, s. 4, is relied upon. That section, after enacting that lands and other hereditaments and real estates in New South Wales, shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the Law of England liable to the satisfaction of bond or specialty debts, goes on as follows: "and shall be subject to the like remedies, proceedings, and process in any Court of Law or Equity in the said Colony, or its dependencies, for seizing, extending, selling, or disposing of any such houses, lands, &c., towards the satisfaction of such debts, &c., and in like manner as personal estates in the said Colony are seized, extended, sold, or disposed of for the satisfaction of debts."

The Appellants contend for a literal construction of these words. Lands, they say, are to be subject to the like remedies and process, for seizing and disposing of them towards the satisfaction of debts, and in like manner as personal estates are seized or disposed of for the same purpose. As, therefore, the personal estate passes to the executor, and is liable to be levied on in his hands under a *fieri facias*, so the real estate must be considered as in his hands, and liable to the same process.

It is obvious that if this be the true construction the nature of the property and the course of its legal devolution must be changed. It is one thing that the heir or the devisee, as the case may be, should take the real estate subject to being charged in respect of debts, and that the whole property should be administered in a Court of Equity, with a due and equal respect to the rights of all parties claimants upon it; and another that it should be in the power of any single creditor to charge the

executor to the extent of his debt and the value of the land, and for the executor to sell the land, of which, *de facto*, he has not the possession, and of which another has, who is not made a party to the creditor's proceeding. There are no words in the section that import any such change in the law, or any intention to make it, and there should have been the clearest, to warrant such a construction. The object of the section clearly was to render real estate in New South Wales liable for debts of every kind, as it was in England for specialty debts; and the creditor is to proceed in respect of the real estate as he would in respect of the personal estate, but in both instances against the person in whom the property is. This object the words used seem to their Lordships, in their obvious construction, sufficiently to carry out; but they cannot be made, without doing them great violence, to import what the Appellants contend for, nor, indeed, could this be held without leading to many most inconvenient consequences. And if the section does not import that the real estate is to pass to the executor, at least for the purposes of the Act, then the Appellants must contend that the executor is to be liable to the extent of its value, and be compelled to deal with it as legal assets, although in the hands of the heir or devisee, he himself having no other control over it whatever.

Every lawyer must see at once in how many ways and to what a serious extent injustice may very probably result, and in many cases, from this. Nothing but an established course of practice or some conclusive authority would warrant their Lordships in adopting a construction open to such remarks; but it appears from the Judgment of the Court below that the opposite construction has always prevailed in the Colony, and the cases cited in the argument for the Appellants do not apply, for the reasons stated in that Judgment, in which their Lordships concur, and which it is unnecessary now to repeat.

Another point which was made for the Appellants arose upon the Colonial Registration Act (5 Victoria, No. 21), it appearing that the conveyance of Pease and Witton to Robinson, in 1842, had not been registered; whereas a later conveyance from Witton to Bullen had been; which latter, therefore, it was urged, would have priority over the former.

In order, however, to the giving it this priority, it must have been a deed executed *bonâ fide*, and for a valuable consideration. Whether this were so, was a question of fact; and one upon which, therefore, the Court were by consent to draw their inference. It appears that it distinctly refused to draw this inference in favour of the deed; and, as appears to their Lordships, for sufficient reason. By the earlier deed Witton had joined with Pease his Co-trustee in conveying the property to Robinson upon the trusts of the will; it was in effect an exercise of the power of changing the trustees conferred by the will. By the later deed, Witton, who had made this previous conveyance, conveys to Vaughan, who had been a purchaser under the Sheriff, in order to confirm the title from the Sheriff, for a nominal consideration only. Whatever may be thought of the *bona fides* of this, it was clearly not a deed for a valuable consideration.

Their Lordships upon the whole, therefore, think that the grounds of appeal wholly fail. They will express that opinion to Her Majesty, and humbly advise that it be dismissed with costs.