Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Mutual Provident Land Investing and Building Society, Limited, v. *Macmillan and wife, from the Supreme Court of New South Wales; delivered 27th July* 1889.

Present:

LORD WATSON.
LORD BRAMWELL.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Barnes Peacock.*]

Their Lordships are of opinion that the judgment and order of the Supreme Court discharging the rule Nisi for a new trial, with costs, ought to be affirmed.

The action was brought by James Laker Macmillan and Lucy Jane Macmillan, his wife, to recover certain freehold property which at the time of their marriage belonged to the wife. It was proved that on the 24th March 1882 Mrs. Macmillan, then Lucy Jane Marsh, spinster, executed a power of attorney under seal by which she appointed Hamilton White to be her attorney, and thereby authorized him, amongst other things, in her name and on her behalf absolutely to sell all the messuages, lands, and tenements to which she then was or should become seised, possessed, or entitled in law or in equity, and she thereby declared that the said power of attorney should continue in force until notice of her death or the revocation of the power

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of attorney should have been received by her attorney. The Defendants claimed to have derived title under a conveyance of the property to William Joseph Trickett, executed on the 31st October 1884. The deed purported to be a conveyance from (amongst others) Lucy Jane Marsh, spinster, therein described as of Sydney, but then absent therefrom. The deed was executed by the said Hamilton White as her attorney, and he was also made a party to the deed and covenanted to produce the power of attorney. He also made a statutory declaration which was endorsed on the conveyance that he had not received any notice of the revocation of the power of attorney by death or otherwise.

Before the execution of the deed, namely, on the 1st October 1884, Miss Marsh was married to James Laker Macmillan, the co-Plaintiff, and had therefore ceased to be Lucy Jane Marsh, spinster, and was not competent to convey the property, of which an interest passed to her husband upon her marriage.

Mrs. Macmillan was called as a witness, and stated that before she left New South Wales to be married she distinctly told White that she revoked the power of attorney, and that he then knew she was to be married in three weeks.

The case was tried before Mr. Justice Innes and a jury, and one of the questions put to the jury was, "Had Miss Marsh, now Mrs. Mac-" millan, revoked the power of attorney before " the conveyance to Trickett?" to which the jury answered "Yes." The question and answer evidently related to the parol revocation spoken to by Mrs. Macmillan. By the 17 Vict., No. 25, New South Wales, intituled An Act to give greater effect to Powers of Attorney, it was enacted as follows:—

"1. Whenever the person who may have executed or shall hereafter execute any Power

of Attorney (whether such person were or be at the time within the Colony or not) shall have declared or shall declare therein that such power shall continue in force until notice of his death or of the revocation of such power shall have been received by the Attorneys named therein then and in every such case such power shall operate accordingly and every act hereafter done performed or submitted to by the said Attorneys within the scope of the powers and authority conferred upon them after such death or revocation as aforesaid and before notice thereof shall have been received shall be as effectual in all respects as if such death or revocation had not happened or been made and a solemn declaration made by any such Attorney that he has not received any notice of the revocation of such Power of Attorney by death or otherwise shall if made immediately before or after executing any such conveyance or other instrument as aforesaid or doing performing or submitting to any such act as aforesaid be taken to be conclusive proof of such non-revocation at the time of such execution in favour of any person who shall *bonâ fide* and for valuable consideration and without notice to himself of any such revocation have accepted any such conveyance or other instrument from or dealt with such Attorney in the name of his principal."

The learned Judge also left two other questions to the jury, namely :—

2nd. Did Mr. Trickett accept the conveyance to himself *bonâ fide,* and for valuable consideration ?

3rd. Was the female Plaintiff married to the male Plaintiff on the 1st October 1884 ?

The following is the Judge's note of what took place :—

" Summed up. Leave three questions.

' Jury retire at 11.5.

" Rogers requiring me to tell them formally that they are not bound to answer the questions, and that they may find generally for Plaintiffs or Defendants. I recall them and tell them so formally. In five minutes they come in with the first question only answered, but saying they meant to say yes to the third, and that out of regard to my suggesting that they should not answer the second they had declined to do so, and they find for the Plaintiffs.

" I therefore tell them that, so far from having suggested that they should not answer the second question, I had requested them to do so, and that I feared they had involved the parties in protracted litigation. They said they were prepared to answer the question, but had understood me to say that they were not to do so.

" I send them back to reconsider their verdict, and decline to accede to Rogers' request to have the verdict for the Plaintiffs recorded yet.

" And after a few minutes I recall them, and explain fully to them the position, again telling them they were not bound to answer the questions, and they might still find as they pleased for Plaintiffs or Defendants.

" The jury, after ten minutes, return a verdict for the Plaintiffs, and answer the questions.

" Verdict for Plaintiffs."

The answer to the 2nd question was, " We " believe Mr. Trickett, from his conversations " with Mr. Manning, and from what he knew " of Mr. White, should have made inquiries as " to the validity of the power of attorney before purchasing."

And to the 3rd, " Yes."

In his reasons for his judgment on the motion for a new trial, Mr. Justice Faucett remarked that, in his opinion, the statute applied only to cases where no notice of revocation has been

received either by the attorney or by the purchaser, and Mr. Justice Innes, who tried the case, stated that it was clear that White, the attorney, had direct notice of the revocation, and that, in his opinion, the Colonial statute applied only to cases where no notice of revocation had been received either by the attorney or by the purchaser. Their Lordships are unable to concur in that construction of the statute. It appears to them that the sole object of the statutory declaration is to protect a *bonâ fide* purchaser, without notice, against the fraud of the attorney; so that the declaration made by White that he had no notice of the revocation of the power by death or otherwise would have been conclusive proof of non-revocation, if Trickett had been a *bonâ fide* purchaser for valuable consideration, without notice of any such revocation.

Their Honours, however, appear to have been of opinion that the evidence was sufficient to justify the general verdict found by the jury. There was evidence before them that, at one time or other, Trickett was informed by Manning that he did not believe White and would not have taken his declaration. Trickett does not dispute that the communication was made to him, but he says that it was after, whereas Manning says it was before, the transaction was completed. If the jury believed Manning in preference to Trickett, as to the time when the information was given, their Lordships cannot say that they were not entitled to infer from the evidence that Trickett, at the time of the purchase, had cause to suspect and did suspect the truthfulness of White's declaration. The fact that the jury found as they did upon the second question is not inconsistent with their general verdict, considering that they were expressly told by the presiding Judge that they were not bound to answer it, and would naturally be un-

willing to stigmatise the conduct of Trickett in plain terms.

In these circumstances, their Lordships are not prepared to say that the Lower Court was wrong in refusing to grant a new trial. They will, therefore, humbly advise Her Majesty that the order of the Supreme Court be affirmed.

The Appellants must pay the costs of this appeal.