

IN THE HIGH COURT OF AUSTRALIA.

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*Silver*

v.

*The Official Receiver*

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REASONS FOR JUDGMENT.

*of Williams J.*

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No. 31 of 1941

H. J. Green, Gort, Print., Melb.

C.11235

Judgment delivered at *Sydney.*  
on *1st December 1941*

(10)

IN THE HIGH COURT OF AUSTRALIA  
NEW SOUTH WALES REGISTRY

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No. 31 of 1941.

ON APPEAL from the Federal Court of  
Bankruptcy, District of New South  
Wales and the Australian Capital  
Territory

JANE SANDS SILVIA

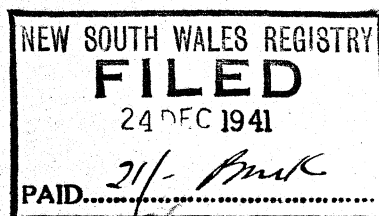
Appellant

-and-

ARNOLD VICTOR RICHARDSON (Official  
Receiver and Trustee of the Estate  
of William Gladstone Silvia - a  
Bankrupt)

Respondent.

ORDER.



*pd 19/12/41*

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ALLAN E. CUPIT,  
Solicitor,  
Federal Mutual Chambers,  
129 Pitt Street,  
SYDNEY.

Tel. BW5106.

IN THE HIGH COURT OF AUSTRALIA)  
NEW SOUTH WALES REGISTRY

No. 31 of 1941.

ON APPEAL from the Federal Court of  
Bankruptcy District of New South Wales  
and the Australian Capital Territory

BETWEEN JANE SANDS SILVIA

Appellant

-and-

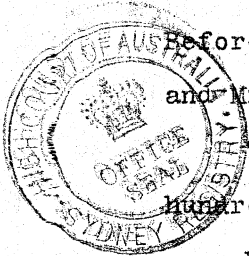
ARNOLD VICTOR RICHARDSON (Official  
Receiver and Trustee of the estate of  
William Gladstone Silvia - a Bankrupt)  
Respondent.

Before Their Honours Mr. Justice Starke, Mr. Justice McTiernan  
and Mr. Justice Williams.

THE First day of December in the year One thousand nine  
hundred and forty one.

WHEREAS on the Twenty-seventh day of June 1941 The Honourable  
Lionel Oscar Lukin a Judge of the Federal Court of Bankruptcy for  
the District of New South Wales and the Australian Capital  
Territory made a declaration and order in favour of the abovenamed  
respondent Arnold Victor Richardson, Official Receiver and Trustee  
of the estate of William Gladstone Silvia, a Bankrupt, whereby it  
was declared that the documents executed or purporting to have  
been executed in February 1939 namely:-

(a) Memorandum of Mortgage under the provisions of the Real  
property Act 1900 bearing date the Twentieth day of February  
One thousand nine hundred and thirty nine between the above-  
named Bankrupt of the one part and the Respondent of the other  
part whereby the said Bankrupt purported to mortgage to the  
respondent all his estate and interest in the land comprised in  
Certificate of Title Registered Volume 4412 Folio 118 under

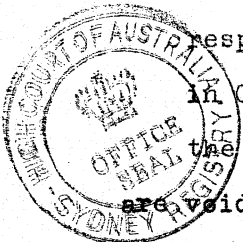


the provisions of the Real Property Act 1900 as amended,

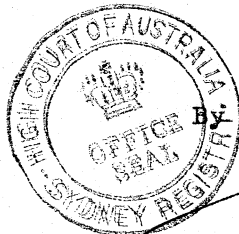
(b) Memorandum of Agreement bearing date the blank day of February One thousand nine hundred and thirty nine between the abovenamed bankrupt of the one part and the respondent of the other part whereby the said bankrupt purported to agree to sell to the respondent the lands comprised in Certificate of Title Registered Volume 4417 Folio 46 under the provisions of the Real Property Act 1900 as amended,

(c) Memorandum of Transfer under the provisions of the Real Property Act 1900 bearing date the twentieth day of February One thousand nine hundred and thirty nine between the abovenamed bankrupt of the one part and the respondent of the other part whereby the said bankrupt purported to transfer to the

respondent all his estate and interest in the land comprised in Certificate of Title Registered Volume 4417 Folio 46 under the provisions of the Real Property Act 1900 as amended, ~~are void~~ under the provisions of Section 37 (a) of the Conveyancing Act 1919-1939 of the State of New South Wales and whereby the appellant was ordered to deliver up the Titles to the abovementioned properties, namely said Certificate of Title Registered Volume 4412 Folio 118 and said Certificate of Title Registered Volume 4417 Folio 46 to the respondent and whereby the bankrupt was ordered to deliver up to the said Official Receiver possession of the said properties referred to and comprised in the two said Certificates of Title as aforesaid and whereby it was further ordered that the costs of the said Arnold Victor Richardson of and incidental to his motion dated the third day of March 1941 including the costs of the adjournment of the first day of May 1941 be taxed and certified by the proper officer of the Bankruptcy Court and paid by the said Jane Sands Silvia to the said Arnold Victor Richardson forthwith AND WHEREAS on the Twenty-first day of July 1941 the appellant duly filed a notice of appeal to this



Court from and against the whole of the said declaration and order AND WHEREAS this appeal came on to be mentioned on the Seventeenth and twenty-eighth days of November 1941, and to be heard before this Court this day WHEREUPON AND UPON READING the transcript record of proceedings transmitted by the Registrar in Bankruptcy for the District of New South Wales and the Australian Capital Territory to the New South Wales Registry of this Court AND UPON HEARING what was alleged by Mr. Simon Isaacs of Counsel for the appellant and by Mr. J. S. Ferrari of Counsel for the respondent IT IS ORDERED that this appeal be and the same is hereby dismissed AND IT IS FURTHER ORDERED that it be referred to the proper officer of this Court to tax and certify the costs of the respondent of and incidental to this appeal AND that such costs when so taxed and certified be paid by the appellant to the respondent or to Mr. Allan Ernest Cupit his Solicitor after service of a copy of the Certificate of Taxation.



By the Court

*J. Hardman*  
DISTRICT REGISTRAR.

SILVIA v. THE OFFICIAL RECEIVER.

JUDGMENT.

WILLIAMS J.

In 1938 W. G. Silvia owned the land comprised in Certificates of Title vol 4412 fol. 118 and 4417 fol. 46. In the middle of that year he was involved in a motor car accident as a result of which he was convicted of negligent driving and one Lee issued a writ against him for £3,000. On the 20th February 1939 he executed a mortgage over the first block which comprised the home in which he lived in favour of the appellant his Mother to secure the sum of £695. and also an agreement for sale of the second block which was vacant land having a water frontage the purchase price being the sum of £60. which the appellant paid to the bankrupt's solicitor in order to enable him to fight the action. The action was heard on the 16th August 1939 and judgment was recovered on 8th September 1939 for £789.3.0. and £156.3.10 costs. The sequestration order was made on 28th March 1940. The appellant gave evidence that at the date of the mortgage the bankrupt was indebted to her for an amount of upwards of £600. which he had never repaid and that she had never demanded the sum from him or charged any interest thereon. The market value of the land sold for £60. was over £200. The mortgage provided for the payment of interest every half year. The mortgage was never registered under The Real Property Act and no interest was ever paid in respect of it. The contract of sale was never completed and the bankrupt remained in possession of the vacant land. There was no reason for any delay in completing this contract because the whole of the purchase money had already been paid. At the date of the bankruptcy the position still remained the same, no documents had

been registered and nothing had been done to carry them into execution. The Official Receiver sought to set the documents aside under sec. 37 (a) of the Conveyancing Act and his motion was granted by the learned Judge in Bankruptcy.

In order to succeed under this section the mere intent to prefer one creditor to another is not sufficient, it is necessary to establish that the real object of the transaction was the vague and fraudulent intent to delay and hinder the other creditors including prospective creditors of the debtor. Generally speaking in order to establish this it is necessary to show that the transaction was a mere cloak by which the debtor has reserved some benefit for himself. If the transaction is simply an alienation to a creditor for full value it is difficult to infer any other intent than the intent to prefer that creditor to the others. But in this case the two transactions must be judged together and it is clear from the appellant's evidence that when she advanced the moneys to her son she never intended to claim any interest and after the documents had been executed to all outward appearances the position of the parties did not alter. The cumulative effect of the failure to act upon the transaction in the manner already mentioned coupled with the appellants own admissions that she knew of these actions against her son; that she knew her son had been convicted for negligent driving in connection with a matter out of which a Supreme Court action arose that she was worried about her son's conviction and that the civil action might go against him and that his home and property would be threatened and that she therefore wanted a mortgage and a transfer in her favour so that she could use them to protect

her son and the children if Lee brought bankruptcy proceedings after getting his verdict provides ample evidence the real reason why she entered into all these documents so many years after the advances had been made<sup>was</sup>/to remove the assets from the reach of the creditors so that the real intent of the transaction was not to prefer the appellants to the other creditors but to hinder and delay them in the sense of protecting the property not for her benefit but for that of her son.