

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Plomley v. Richardson and Wrench, Limited,
from the Supreme Court of New South Wales,
delivered July 18th 1894.*

Present :

THE EARL OF SELBORNE.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

[Delivered by the Earl of Selborne.]

THEIR Lordships do not think it necessary to hear further argument in this case. They are satisfied that the Court below was right in holding that a good title was shown upon both the points which have been argued.

First, as to the supposed equitable charge arising out of the transaction of the 15th August 1864. Looking to the deed which gave effect to that transaction it appears to their Lordships clear that the intention was this: to pay off the mortgage then held by Hart, and to take a conveyance to or for the benefit of the persons who would be beneficiaries, assuming the mortgage not to exist. But there was no money available for that purpose excepting moneys in the hands of Bloomfield, as executor of the will of Francis Smith. The will of Francis Smith related only to the interests of the Smith family and not to the interest of the Levien family, who were benefited by the transaction; and there was no power to apply the moneys of the Smith trust for the benefit of the Levien family. Therefore, if the matter is looked at as it stood

at the time when that deed was executed, their Lordships would certainly agree with the counsel for the Appellant in his argument that a right to be re-paid a proper proportion of the moneys, which had been advanced by one only of the families interested, would remain to that family in equity, notwithstanding the form of the deed; but the question is, whether, on the facts before their Lordships that is a claim which there could, at the present time, be any ground for making. In other words whether it is or is not sufficiently shown to have been satisfied or extinguished.

Now, to a certain extent, the matter is made intelligible by the statement of the Appellant, which must have been founded upon information given to him, at page 47 of the record; and this, it is to be observed, was not volunteered for the purpose of this particular question of the existence or non-existence of the charge, but manifestly to get rid of the attempt to set up the Statute of Limitations. "The rents were received " under Hart's mortgage, notwithstanding the " alleged reconveyance, for the purpose of working " out the equity to contribution of the devisees " of the Castlereagh Street frontage." Their Lordships do not for a moment suppose that such a statement would have been made in the correspondence between the solicitors of the vendors and the purchaser without sufficient knowledge on the part of the purchaser that the fact was so.

Their Lordships therefore start, first, with a transaction out of which such an equity would arise; secondly, with a course of action pursued for years on the footing of that equity, and with a view to work it out and satisfy it. They then come to a suit instituted in 1889, 25 years after the transaction, a period of time which, to say the least, would lead, under circumstances favourable to a presumption, to the presumption that the equity might have been worked out

during that time. But it is not upon any such presumption that the matter now stands ; because that was a suit by a person interested in the Levien, and not the other property, against the Smiths who, denying his title under the original will of Francis Smith, claimed by virtue of the ultimate limitations of that will the whole of both properties—being the same persons who as long as this equity was in existence were entitled to the benefit of it, and whom, their Lordships must take (in view of the statement made by the Appellant himself as to what had been done for many years to work out the equity) to have been sufficiently informed of their own interest. The Plaintiff in that suit, who succeeded in establishing his title under the will, claimed to have a conveyance made to him of the Elizabeth Street property, and in the presence of those parties, by an adverse judgment against them upon evidence an order such as he asked was made, that they should all concur in conveying to him the estate in fee simple. Either they did or they did not in that suit put the Court in possession of the facts which have given rise to this question. If they did, then the Court must have been satisfied that they had no claim which could interfere with the right otherwise established of the Plaintiff in that suit to have a conveyance in fee simple, which means a conveyance free from incumbrances. If they did not bring it forward, that was their own fault, if fault at all ; but the just inference is that the claim had, to their knowledge, ceased to exist, and that the means taken to work out the right to contribution had been sufficient and effectual for that purpose. A decree was made absolutely exclusive of any such claim, whether brought forward or not, binding those parties. Their Lordships think that this is a complete answer at

this distance of time to the idea that any such claim can now be made.

Upon the other point, as to the legal estate, the Court below was satisfied that, by the order made in another suit or proceeding on the 9th June 1868, a gentleman named Charles McDonald was legally appointed a new trustee in the place of George Edward Levien, who had been absent for more than a year from the Colony; and that the legal estate was vested in him, which McDonald has conveyed to the vendors, or at all events to their mortgagor; and as McDonald had the legal estate, that put an end to all question upon the subject. Had he the legal estate or not? That depends upon the Statute (16 Vict. No. 19) under which a new trustee could be appointed in place of a former trustee. The order making the appointment is at page 56 of the Record, and the points which are important are these: it purports to remove George Edward Levien from being a trustee of the will of Thomas Roberts deceased; and if it did not appear that there were circumstances which justified that part of the order, possibly the question which their Lordships might have to consider would be different from what it is now. But in point of fact Levien was in a situation, in which under the terms of the trust the parties to whom a power to appoint new trustees was given would have been entitled to do so; because the testator declared, that upon any vacancy in the trust by the death, resignation, residence out of the Colony or absence therefrom for a twelvemonth, insolvency, or other incapacity or inability to act in the trust, it should be lawful to appoint new trustees. Levien was in one of these situations. He had been absent from the Colony for more than a twelvemonth, and therefore the Court could have no difficulty in regarding him as having ceased to be able to act as a trustee.

Whether the word "remove" was the proper word, or the best way of expressing it or not, is wholly immaterial, if upon the facts of the case it was plain that the Court was right in treating him as a person who could no longer be retained as the trustee. The occasion on which the order was made was manifestly a proper one, because there was a legatee unpaid for whose benefit a proper investment had been made, doubtless in the names of both trustees; and until the difficulty with regard to the absent trustee was in some way removed there might be a difficulty in dealing with the investment, and making the payment which the acting trustee, the Defendant in the suit, was perfectly ready to make.

It has been suggested that the Court ought not, in a suit so constituted, to have exercised the power of appointing a new trustee. The Court had before it the acting trustee. The tenant for life, who would have had a voice in the matter if she had not died, died in 1863. It does not appear that any of the children who were beneficially interested were adults, and the acting trustee, by the terms of the will giving the power, would have been at least a necessary concurrent party. Therefore, there is nothing to lead to the conclusion either that it could have been exercised without his concurrence, or that there was any adult person who ought to have been consulted. But even if that were so, the Act of Parliament, which in other respects authorises the order to be made, clearly did not require that all persons interested should be made parties under such circumstances to the suit. By the 35th section it provides, that the application for the appointment of new trustees might be made by any person beneficially interested, and it was so made. And the effect of the succeeding sections is, that as to parties, in the first

instance, the Petitioner might judge for himself whom he would or would not serve, and that the Court, if it thought fit, might let the case stand over for notice to be given to any person or persons; plainly leaving those matters in the discretion, first of the Petitioner, and afterwards of the Court. Therefore, even if the Court might have done better in exercising that discretion, as a matter of fact, in this case it did not think it necessary to serve other parties, and their Lordships are of opinion that unless the order was *ultra vires* it took effect, whether or no it might have been better for the Court to have done or required something which it did not do or require.

Then, had the Court under the Act power under the circumstances to do what it did; and was the effect of what it did to vest the legal estate? These are the only remaining questions. Their Lordships think that those questions are really determined, without going into anything else, by the 30th, taken in connection with the 32nd section. The 30th section says:—"When-
 " ever it shall be expedient to appoint a new
 " trustee or new trustees, and it shall be found
 " inexpedient, difficult, or impracticable so to do
 " without the assistance of the Supreme Court,
 " it shall be lawful for the Court to make an
 " order appointing a new trustee or new trustees,
 " either in substitution for or in addition to any
 " existing trustee or trustees." That those circumstances existed in this case their Lordships have no difficulty in assuming.

That section by itself does not enable a vesting order to be made, but the 32nd section does. It provides as follows:—"It shall be lawful for the
 " Court, upon making any order for appointing a
 " new trustee, either by the same or by any subse-
 " quent order to direct that any lands subject to
 " the trust, shall vest in the person or persons who

“ upon the appointment shall be the trustee or
 “ trustees for such estate as the Court shall direct,
 “ and such order shall have the same effect as if
 “ the person or persons who before such order were
 “ the trustee or trustees (if any) had only executed
 “ all proper conveyances and assignments of such
 “ lands for such estate.”

Now, before noticing the argument which has been addressed to their Lordships, it seems well to observe that by the practice of the Supreme Court, now embodied in the rule 318 mentioned in the judgment of the Court below, the course was, when any reference was made to the master with a view to the appointment of new trustees, to direct the appointment to be made by the master in the first instance unless the Court should otherwise order. Accordingly, by this order the Court referred it to the master to appoint some fit and proper person to be trustee in the place of George Edward Levien and went on to direct “ that upon such appointment ” —that is by the master, evidently,—“ the trust
 “ property and effects be vested in the defendant
 “ Richard Driver and the said new trustee upon
 “ the trusts of the will or such of them as are
 “ capable of being carried into effect.” The learned Judge in the Court below rightly observed that that means necessarily, for the estate proper to be in the trustees, which was an estate in fee simple. The intention of that order, and of the practice of which it is an example, was, evidently, to avoid the necessity of coming again for a subsequent order, when an appointment which nobody challenged was made. The only question is whether it was competent. But the Act of Parliament expressly says that this may be done upon making any order for appointing a new trustee. It was argued that that must mean, not on appointing, as in this case by the master, but actually appointing by the Court itself; and,

therefore that in a Colony, where the practice prevailing was embodied in the rule to which reference has been made, it could only be done by a subsequent vesting order. Their Lordships think that would be placing upon the words used by Parliament an unnecessarily narrow construction, the effect of which in a Colony like this, where such a rule and such a practice prevails, would be to make it absolutely necessary in every case that the vesting should be effected, not by the same order but by a subsequent order. But the words of this section, which are the same as those in the English Act, seem to be expressly intended to enable the Court to make an order which is to have a prospective effect; because not only is it "upon making any order for appointing a new trustee"—surely this is and must be an order for appointing a new trustee, since it directs the master to appoint one,—but it may by the same order, as well as by a subsequent order, direct that the lands shall vest in the persons, who, upon the appointment, shall be the trustees. If the order itself appointed the trustee it would be in the person appointed. The language seems expressly adapted to such a practice as that of the Colonial Court, whether that practice prevails or prevailed in England or not. Then, when that is done, if the Court thinks fit so to do, and makes no other direction (and in this case it has made no other direction) the effect is to be the same as if the persons who before the order were trustees, had executed all proper conveyances. There is not a word which is not apt to authorise the thing which in this case was done, and done according to the rule and practice in the Colony, namely, not merely an inquiry who shall be appointed but an actual appointment by the master. That seems to be the most natural and convenient way of accomplishing the object and saving expense,

and their Lordships do not think it does any injustice. If the persons were in contest about the fitness of the person to be appointed, there would be an appeal to the Court against the decision of the master. The decision of the master would temporarily take effect, and no doubt with the consequence of vesting; but that consequence, as well as the appointment, would come to an end if the Court thought fit to discharge the appointment. The very object being to avoid legal formalities and the expenses connected with them, no injustice of any sort would arise in such a case.

Their Lordships, therefore, agree with the learned Judge of the Court below that there was a complete and legally effectual exercise of the power of appointing a new trustee, and that the legal estate was by means of such appointment vested in Driver and McDonald. Driver died and McDonald survived, and the title is good by McDonald's conveyance.

Their Lordships will therefore humbly advise Her Majesty that the decree appealed from is right, and that the appeal should be dismissed with costs.

