Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Underwood v. *Pennington and others, from the Supreme Court of New South Wales; delivered July 27th*, 1877.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR HENRY S. KEATING.

THIS was an action of ejectment brought by the Respondents as trustees, appointed by two private Acts of the Legislature of New South Wales, to recover the possession of certain lands included in those Acts, which had been demised to the Appellant in the month of December 1870, by persons having at that time all the interest in the lands leased. The demise was for a year, and to continue until a quarter's notice should be given after that period by either party, at the rent of 100*l.* a year, and the question is whether the Respondents can maintain the action so brought.

It appears that the lands which are the subject of the ejectment were part of a considerable estate belonging to one James Underwood, who by his will, dated in March 1840, devised it to trustees for the benefit of several persons and their families. In the year 1873 an Act of the Legislature was passed which recited the will of the testator, and that the estates which were vested in the trustees named in the will were at an end; and that the will contained no power to sell the lands demised; that large portions were adapted for subdivision into allotments for building purposes, but in their then state were

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unimproved and unproductive, and that in consequence of the complication of the interests in the whole of the land it was impossible to improve or properly to manage the same, and that it was expedient that the lands should be sold and the proceeds of such sales paid into the Supreme Court. The Act proceeded to enact that "from and after the passing of this Act the legal "estate in the lands and hereditaments devised by "the said will of the said James Underwood shall "for the purposes of this Act vest in William "Henry Mackenzie, senior, accountant, John "Piper Mackenzie, Official Assignee of Insolvent "Estates, and Robert John King, merchant, all "of Sydney aforesaid, their heirs and assigns, as "joint tenants." The second section of the Act provided that it should be lawful for these trustees to sell the said lands and hereditaments or any part thereof, either by public auction or by private contract, in such parcels and allotments, and with such rights of way over such lands or any portion thereof, as they should deem expedient, and subject to such terms and conditions and for such price as could reasonably be obtained for the same, and to convey them so as to confer the absolute legal estate upon the purchasers. Then it gave them power by the third section to give credit for any number of years, not exceeding three, for the purchase money, and also allowed them powers of mortgage under certain circumstances. By the fourth section, after deducting their costs and expenses of the sale and the costs of passing the Act, they were to pay the balance of the proceeds, *together with the rents, if any*, received in respect of the same premises, into the Supreme Court. There was then a provision by the sixth section for their remuneration, and that remuneration was to be by way of such commission as the Supreme Court should think right for their

pains and trouble in effectuating the sale or sales or in otherwise exercising the powers and performing the duties herein conferred and imposed. The seventh section of the Act provides that "whenever any of the trustees shall "die or go to reside out of the colony of New "South Wales, or desire to be discharged from "or refuse or become unfit or incapable to act "in the trusts in him reposed, before the same "shall have been fully discharged and performed, "he shall be held to have vacated the said "trusts, and it shall be lawful for the surviving "or continuing trustees or trustee for the time "being, or the acting executors or administra-"tors of a last surviving or continuing trustee, "or for the last retiring trustees or trustee, by "instrument in writing to appoint any new "trustee or trustees in the place of the trustee "or trustees so vacating as aforesaid; and as "often as any new trustees or trustee shall be so "appointed as aforesaid, all the trust property "then remaining unconveyed shall by virtue of "such instrument, and without other assurance "in the law, be divested out of the surviving "or continuing trustee or trustees, and the "trustee or trustees so vacating as aforesaid, "and shall become and be vested in the new "trustee either solely or jointly with the "surviving or continuing trustees or trustee, and "every new trustee to be appointed as aforesaid "shall have the same powers, authorities, or "discretion as if he had been originally named "a trustee in the Act."

In the following year another Act of the Legislature was passed, the title of which is "An Act to amend" the former Act. The amendment consisted in adding two trustees to the three originally appointed, and making any three of the five a quorum for the purpose of carrying out the trusts of the first Act. The

words which are used are that "all the trusts, "powers, and authorities by the said 'Under- "wood's Estate Act of 1873' vested in or con- "ferred upon William Henry Mackenzie, senior, "John Piper Mackenzie, and Robert John King, "in the said Act named as the trustees of the "said Act, or upon other the trustees for the "time being of the said Act, and all matters and "things incident thereto, shall be vested in" the old trustees "and two other trustees to be ap- "pointed in manner herein-after mentioned, and "such trusts, powers, authorities, and matters "may be carried out, exercised, and done by any "three of the said five trustees, or other the "trustees for the time being of the said Act, "and any conveyance executed by any three of "such five trustees, or of other the trustees for "the time being of the said Act, of land sold "under and for the purposes of the said Act, "shall be valid and effectual to vest the said "land and the legal estate therein in the person "or persons to whom the same shall be so con- "veyed, as fully and effectually in all respects "as if the said conveyance had been executed "by all the trustees for the time being of the "said Act." The Act then went on by section 2 to provide for the mode of appointment of the two additional trustees, that they should "be "appointed in the first instance by the primary "Judge of the Supreme Court in Equity, and "every vacancy occurring in the trusteeship shall "be filled up by the surviving or continuing "trustees in the manner provided by section 7 "of Underwood's Estate Act, 1873."

Now, it seems clear that the object of this Act was merely to increase the number of the trustees from three to five for the purpose of making three of the five a quorum to carry out all the trusts of the former Act. Accordingly, two trustees having been appointed under this Act,

thus constituting five altogether, they were minded to require the rents reserved upon the lease in question to be paid to them, and for that purpose they executed a power of attorney to authorise a demand of the rent on their behalf, which was signed by the five trustees. The rent was refused, and this action of ejectment was brought under the proviso for re-entry.

In the course of the argument many points were suggested to show why the action of ejectment could not be maintained, which their Lordships were of opinion were not open to the Apellant upon the present appeal, and they intimated that the questions must be confined to those raised by the counsel for the Appellant in the Court below, and to those raised by the judgment of the Chief Justice, viz., first, whether the legal estate vested in the three trustees under the first or "Underwood's Estate Act of 1873" was such as would enable them to maintain this action of ejectment, and, if it were, then whether that legal estate, by means of the second Act of 1874 to amend the former, was extended to the five trustees, so as to enable them also to maintain the present action.

Now, the learned counsel for the Appellant did not, of course, deny that the legal estate was vested in the three trustees under the first Act, nor did he seriously contend that such legal estate in the three trustees would not have enabled them to maintain an ejectment, supposing the preliminary proceedings to that ejectment to have been properly conducted. He could not formally concede the point, inasmuch as the Chief Justice below had taken a different view. The Chief Justice considered that the words "for the purposes of this Act" in the first section confined the powers of the trustees in whom the legal estate was vested, to the power merely to sell and convey the lands included

in it, that the legal estate was vested in them for those purposes alone, and did not confer upon them the power to bring an ejectment. Their Lordships are of opinion that such a view of the Act of 1870 is too limited. The legal estate by the first section of that Act is vested in the three trustees in the most unreserved terms; and it is difficult to conceive any splitting, as it were, of that legal estate, so as to deprive the trustees in whom it is vested of any powers which would be naturally incident to a legal estate, or to make it surplusage by reducing it to a mere power to sell.

Assuming therefore a private Act to be read as a private conveyance, the legal estate transferred by that conveyance to the trustees would give them all the benefits of the Statute of Henry VIII., and enable them to do all that assignees of the reversion under a conveyance could do, including the right to bring an action of ejectment.

But the learned counsel for the Appellant, not so much disputing that proposition, mainly relied upon the wording of the second Act, as not giving to the additional trustees any share in legal estate which had been vested in the trustees under the first Act. He referred with minuteness to the exact expressions used in that second Act, and their Lordships think it may be conceded that the words used therein are not the most apt that could have been employed for carrying out what they conceive to have been manifestly the intention of the Legislature. The words are that "all the trusts, powers, and authorities" vested by that first Act, "and all matters and things incident thereto shall be vested in" the new trustees; and it was argued that inasmuch as the legal estate is not in distinct terms given to the new trustees, therefore

it did not vest in them, and that although the Act does in terms enable them to confer a legal estate on the purchaser, yet that it does not vest in them any share of that legal estate which was vested in the three trustees under the first Act, and consequently that the power of attorney being signed by five trustees, two of whom had no legal estate, was null and void, and gave no authority to make the demand upon which the action was founded.

Now it would appear a strange state of things if the five trustees, any three of whom were to be a quorum, should have different estates and consequently different powers under the two Acts, because upon that construction of the Acts, the three under the first could bring an ejectment, but the two appointed under the second could not. Their Lordships, however, looking at the second Act as a whole, and reading it together with the Act of which it professes to be an amendment, see no reason to doubt that the object of the Legislature was to place the additional trustees exactly upon the same footing as the trustees created under the first Act. The mode of appointment in the second section of the second Act is that although two additional trustees in the first instance were to be appointed by the primary Judge in Equity, yet every vacancy afterwards occurring in the "trusteeship," which is the word used in the Act as applicable to the five trustees, shall be filled up by the surviving or continuing trustees in the manner provided by section 7 of the former Act. That at once refers to the former Act; and, according to the seventh section of that Act "as "often as any new trustee or trustees shall be "so appointed as aforesaid, all the trust property "then remaining unconveyed shall be divested "out of the surviving or continuing trustee or "trustees, and the trustee or trustees so va-

" cating as aforesaid, and shall become and " be vested in the new trustee or trustees either " solely or jointly with the surviving or con- " tinuing trustees or trustee, and every new " trustee to be appointed as aforesaid shall " have the same powers, authorities, and dis- " cretions as if he had been originally named " a trustee in this Act," thus vesting the property in the new trustees to be appointed under the second Act in the same way as those appointed under the first Act.

Their Lordships therefore think that, looking to the two Acts together, there can be no doubt that the intention of the Legislature was to place all the trustees upon the same footing; and that there are words sufficient to carry out that intention. The trusts vested in the trustees under the first Act were to be carried out by means of the legal estate, and the first section of the second Act provides that all those trusts, powers, and authorities, and all matters and things incident thereto, shall be vested in the additional trustees. Those words, coupled with the mode of appointment, are, in their Lordships' view, sufficient to carry out what is manifestly the intention of the Legislature, to place all the trustees exactly upon the same footing.

As to the two additional trustees being appointed in the first instance by the primary Judge in Equity, their Lordships do not think that that establishes any distinction in the construction of the statutes between them and the trustees to be subsequently appointed; the object of the statutes appearing so manifestly to have been to invest them all with the same powers and give them the same estates.

That construction disposes of the questions and the only real questions raised upon this appeal, inasmuch as that raised by the learned counsel

for the Appellant, as to the signature of the power of attorney, would not arise; it should not be supposed, however, that, even if it had arisen, their Lordships would have come to a conclusion that a power of attorney expressed to be by these five gentlemen, "and each of them," to demand the rent, would have been vitiated even if two of them had not had the legal estate. But it is unnecessary in their view to enter upon that question at all, because they are of the opinion already expressed that the legal estate was in the five, and that that legal estate conferred upon them the power to maintain this ejectment.

Their Lordships will therefore humbly advise Her Majesty that this Appeal be dismissed with costs.