Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Williams v. *Scott, from the Full Court of the Supreme Court of New South Wales; delivered 19th June* 1900.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR HENRY DE VILLIERS.
SIR FORD NORTH.

[*Delivered by Sir Ford North.*]

On the 2nd of December 1898 the Respondent, a mortgagee with power of sale, agreed to sell to the Appellant a piece of land at Sydney, in New South Wales, for 550*l*. The purchaser paid a deposit of 25 per cent. or 137*l*. 10*s*. So far as regards the title, the contract was an open one.

The title disclosed by the abstract, so far as material was as follows:—By her will dated the 12th April 1887 Mrs. Catherine Austin appointed her son David Austin and her daughter Catherine Neilan her trustees and executors, and devised the property in question and other property to them upon trust to sell the same; and after payment of her debts, funeral, and testamentary expenses, and the costs of sale to divide the residue of the proceeds among her eight children named in her will.

Catherine Austin died in 1888, and by a deed dated the 28th of June, 1889, and made between the said David Austin and Catherine Neilan described as trustees and executors of

10798. 100.—6/1900. [27] A

Catherine Austin of the first part William Neilan (the husband of Catherine Neilan) of the second part the said David Austin as administrator *de bonis non* of the deceased husband of Catherine Austin of the third part, Sydney John Bull of the fourth part, and the said David Austin as purchaser of the fifth part; after reciting (*inter alia*) the will and death of Catherine Austin and that the said David Austin and Catherine Neilan had contracted with the same David Austin for the sale to him as purchaser of the land in question, It was witnessed that in consideration of 550*l.* paid by the purchaser to the trustees the parties of the first three parts conveyed the property by the purchaser's direction to S. J. Bull to such uses as the purchaser should by deed or will appoint and in default of appointment to the use of the purchaser in fee. By a receipt indorsed upon that deed it appears that on the day of its date the trustees received the whole purchase money of 550*l.* from David Austin.

The abstract also showed that by deed dated the 30th September 1897 David Austin mortgaged the property to the Respondent for 500*l.*

The purchaser's solicitors objected to the title upon the ground that David Austin was incapable of purchasing from himself and his co-trustee, and that the title therefore was not a marketable one. The vendor's solicitors insisted that the title was good, and produced a copy of what they described as an absolute release to the trustees from all the beneficiaries under the will of Catherine Austin, such release bei ngdated the 15th of June 1889. The purchaser's solicitors pointed out that the release was insufficient, as it did not show that the beneficiaries were aware, or knew the effect, of the transaction in question: to which the vendor's solicitors replied that the transaction was well known to and acquiesced in by all the beneficiaries: and that in fact it was because the sale was made in the form set out in

the conveyance of the 28th June 1889 that the release of the 15th of June was executed. The purchaser's solicitors still insisting on a deed of confirmation, the vendor's solicitors wrote on the 9th of January that they declined to procure such a deed, as they did not consider it necessary : not suggesting, however, that there could be any difficulty in procuring the execution of such a deed by all parties. In the same letter the vendor's solicitors also wrote "Since writing you "previously we have discovered that the sale "was not made to David Austin, but to John "Austin; who was not a trustee, but was one of "the beneficiaries under the will of Catherine "Austin. We have obtained a copy of the "contract for sale, which may be inspected "here. We send, herewith, a copy of the "advertisement. This property was put up for "sale by Messrs. Richardson and Wrench on the "16th November 1888, and was knocked down "to John Austin for the sum of 550*l.* subject to "Messrs. Richardson and Wrench's usual printed "conditions. Subsequently to the date of the "contract John Austin agreed with David Austin "that the latter should take the land purchased "by John Austin, and relieve him of the "contract. This was done, and the land was "conveyed to Mr. S. J. Bull as trustee for "David Austin. The property was not therefore "purchased by D. Austin from the trustees, but "from John Austin."

This disclosure did not induce the purchaser's advisers to dispense with confirmation by the beneficiaries; and as such confirmation was refused they claimed to have the deposit returned; saying however that they were willing purchasers, and if their objections were met in a fair way within the next week or 10 days their client would still be prepared to purchase the land; to which the only reply of the vendors' solicitors was, on the 16th January, that they had answered all

the requisitions; and that, under a power in the contract, the vendor would re-sell unless the purchase was completed during the week, and hold the purchaser liable for any loss on such re-sale. They did accordingly advertize the property for sale; but this was stayed by an injunction in the present suit, commenced by the purchaser against the vendor for rescission of the contract, upon the ground that the vendor had failed to make out a good title to the property, and for a return of the deposit and other consequential relief.

On the 3rd of March 1899 the suit came on to be heard before the Chief Judge in Equity who agreed by the wish of both parties to decide the one point as to the title raised by the requisition above quoted, and to leave it open to either party to ask for a reference to the Master as to the title on all other points. On the same day he made a decree, declaring that the Defendant had failed to make out a good title to the land and that the contract must be rescinded; directing that the deposit should be repaid to the purchaser with interest, and that the Plaintiff's costs of the suit should be paid by the Defendant; declaring that the Plaintiff was entitled to a lien on the Defendant's interest in the land for such deposit and interest; and restraining the Defendant from dealing with the land to the prejudice of that lien.

The vendor—the Defendant in the action and present Respondent—appealed from that decree; and the appeal was heard before the Chief Justice Sir Frederick Matthew Darley and Mr. Justice Owen and Mr. Justice Walker. The two former agreed that the title was one which could be forced upon a purchaser, and that the decision of the Court below was wrong. The latter was of opinion that the appeal should be dismissed.

Their decree was dated the 25th of May 1899, and declared, in effect that the decree of the 3rd of March should be reversed;

and that the agreement of the 2nd December 1898 ought to be specifically performed and carried into execution in case a good title could be made to the land in question; and directed inquiries as to the title. It also directed that the costs of that appeal should be paid by the Plaintiff (the present Appellant) to the Defendant; and that the other costs of the suit should be reserved until further consideration.

It is clear undisputed law that a trustee for the sale of property cannot himself be the purchaser of it—no person can at the same time fill the two opposite characters of vendor and purchaser. But the purchase by David Austin is attempted to be supported upon two grounds not quite consistent with one another, viz., 1st., that he was the purchaser of the property from all the beneficiaries, who agreed in the sale to him with full knowledge of all the circumstances; and 2nd, that he and his co-trustee sold the property to John Austin, one of the beneficiaries, who not being a trustee was under no incapacity to purchase; and that David Austin subsequently purchased it from John Austin.

As regards the first point, their Lordships are unable to agree with the view taken by the majority of the Full Court. No sufficient evidence is forthcoming that any of the beneficiaries knew of the circumstances under which David Austin acquired and took the conveyance of the property. The only document relied upon is the release already mentioned—but this is not specifically directed to the defect in question, and is quite insufficient for the purpose of curing it. It is unskilfully framed and inaccurate; and instead of being precise is extremely vague and general. It is impossible to treat this release as finally bringing the trust to an end: the property now in question still remained vested in the trustees; and the purchase money remained

unpaid. Although the release states that the property had been sold, the fact that the sale had been to David Austin, a trustee for sale, and was therefore impeachable as not being a sale at all, is not disclosed: and the explanation that this release of the 15th of June was executed because of the form of the conveyance executed 13 days afterwards is not intelligible. The accounts referred to in the release, which would probably have thrown some light upon the matter, are not produced. The only other evidence bearing upon this point is the affidavit of Mr. White, who appears to have been in 1889 an articled clerk of Mr. Bull, the solicitor of the trustees of Catherine Austin; and who is now a member of the firm acting as the vendor's solicitors. He says in the 3rd paragraph of his affidavit, that all the beneficiaries under the will knew that the land was purchased by John Austin, acquiesced in the sale, and ultimately received the purchase money and executed the release. It is remarkable that in the letters written by this gentleman's firm as the vendor's solicitors the knowledge asserted and the acquiescence relied upon, are knowledge of and acquiescence in a sale not to John Austin at all, but to David Austin the trustee—a totally different matter: the alleged sale to John Austin not having been discovered till a later period Moreover a general statement that persons knew and acquiesced is in itself of little weight; it is a statement not of facts, but of results; a mere allegation by one party of the condition of mind of others. It may be that the deponent's statement that the parties knew and acquiesced is merely an inference drawn by him from the fact that they have not taken any steps to re-open the matter. To give such a statement any value as evidence it should also show what knowledge of the material facts the parties had,

and how they had obtained such knowledge, and by what acts of theirs their acquiescence was shown—but this is wholly wanting. It is difficult to understand, on the perusal of Mr. White's affidavit, what are the "foregoing facts" which he says he knows of his own knowledge. It cannot be that he refers to all that has previously been stated. This would make different parts of the affidavit inconsistent with one another: and would treat the deponent as swearing to facts irreconcileable with existing documents. This affidavit of the Defendant's solicitor is not supported by any other evidence. David Austin, the trustee who has been ever since 1888 in possession of and is now residing upon the property, and has mortgaged it to the vendor, and who must know all the facts, is not called as a witness; nor is Mrs. Neilan the other trustee; nor are any of the beneficiaries to whom knowledge and acquiescence are imputed; and no reason is given for their absence. Under these circumstances it is clear that, if David Austin did himself purchase from the trustees, as stated in the conveyance of the 28th of June, there is not before their Lordships any evidence of such acquiescence with full knowledge on the part of the beneficiaries as would prevent them from now coming forward to challenge the validity of the sale. They are not parties to this action, or bound by any of the proceedings in it.

The other point relied upon is that the sale by the trustees was really made not to David Austin the trustee, but to John Austin, one of the beneficiaries, who was not a trustee, and was therefore capable of being the purchaser. This is absolutely inconsistent with the terms of the conveyance itself, which recites that the contract was by the trustees with David Austin, and shows that the whole purchase money was paid by him. The

abstract of title was made out upon the footing that David Austin, and not John Austin, was the purchaser from the trustees, and the title is not traced through John Austin at all. The alleged sale to John Austin was apparently not even known to Mr. White until after the abstract had been delivered. He does in his affidavit state that on the 16th of November 1888 this property was sold by auction by Messrs. Richardson and Wrench to John Austin for 550*l.* and puts in a copy of the contract then entered into. Where this document comes from is not stated, nor is there any proof that it is a correct copy, nor is the absence of the original accounted for. It purports to be a copy of the conditions of sale at the auction, and to bear at its foot the signatures "J. Austin" and "Richardson and Wrench for Vendor." The original with John Austin's signature would in ordinary course have remained in the possession of Messrs. Richardson and Wrench, the vendor's agents; but although an affidavit is made by a Mr. Gregg (who describes himself as one of the Managing Directors of Richardson and Wrench Limited) which states that the land was sold to John Austin, the highest bidder, for 550*l.* he does not state that he was concerned in the matter, or was a member of or in the employ of that firm in 1889, nor disclose his means of information upon the subject, or refer to either original or copy of any contract bearing John Austin's signature. Neither Mr. Gregg's evidence, nor the copy contract put in by Mr. White, refers to any deposit having been paid by John Austin; and this bears out the statement on the conveyance that the whole 550*l.* was paid by D. Austin on the 28th of June. Mr. White states in his affidavit that John Austin purchased this land *bonâ fide* for his own use and paid a deposit on account of the same; that he sub-

sequently agreed to sell it to David Austin, and it was arranged that instead of the land being conveyed to John Austin, and by him to D. Austin, it should be conveyed direct to Mr. S. J. Bull as trustee for D. Austin. It is not stated when or how or by whom this alleged arrangement was made, or how Mr. White was informed of it. If the arrangement had been such as he states, John Austin should have been joined as a party to the conveyance; which should have recited the contract by the trustees to sell to John, and the contract by John to sell to David: and the conveyance by the trustees to David, or to Mr. Bull, should have been under John's direction. Although John was not a party to this deed, he was a party to and executed the release of 15th June, in which he is described as "of Sydney, freeholder." If the conveyance had been thus framed the truth would have been fairly stated, whatever else might be said about the transaction. Upon what conceivable ground can it be supposed that the parties should have ignored the real facts, and have invented a false account of the transaction, and that, too, one which introduced a palpable blot upon the face of the title? Here also evidence is absent which might have been available if the transaction had been such as is suggested. But D. Austin and Mrs. Neilan the trustees are silent. Mr. S. J. Bull, the solicitor of the trustees, who as trustee for David Austin himself was a party to the conveyance of 28th June, and is at present practising as a solicitor at Sydney, is silent also. John Austin makes no affidavit: but it does not appear what has become of him.

It may be that the true account of the transaction is that suggested in the letter of the 9th of January 1899, viz., that after John Austin had contracted to buy he desired to get

rid of his purchase, and David Austin agreed to take the land off John's hands, and stand in his place, and relieve him of his contract. This might account for the form of the conveyance. But this, it will be observed, is quite a different thing from an affirmance of John's contract to purchase, and a subsequent resale by John as owner to David, the state of facts to which Mr. White deposes. If these were the true facts, the transaction would be invalid upon a different ground, viz. that so long as the contract with John was executory only, and John had neither paid his purchase money nor taken up his conveyance, and the trustees who were vendors had power either to enforce or rescind or alter the contract, it was not competent for David Austin to step into John Austin's place, or take over John Austin's contract for his own benefit. See *Parker* v. *McKenna*; Law Reports, 10 Chan. App. 96. In any case the result would be the same.

It was strongly contended by the purchaser's Counsel that Mr. White's statements must be accepted as unchallenged, because no attempt was made to shake them by cross-examination. This is a point deserving serious consideration. But Mr. White's evidence is by no means satisfactory as it stands. The proposition seems to have found some favour in the Full Court that if the documents are capable of an innocent interpretation in favour of the title, and the Court can say that the parties have not infringed any principle of law and were not guilty of misconduct, it will rather put that interpretation upon it than assume that the parties had been guilty of some wrongdoing, or breach of law; and that in the absence of evidence to the contrary the Court must assume that the release was a proper one, and that the *cestui-que-trusts* were informed of all necessary

matters. Their Lordships are unable to agree in this view. The conveyance itself is incapable of any interpretation but one, and that is unfavourable to the title. A trustee for sale of trust property cannot sell to himself. If notwithstanding the form of the conveyance the trustee (or any person claiming under him) seeks to justify the transaction as being really a purchase from the *cestui-que-trusts* it is important to remember upon whom the onus of proof falls. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestui-que-trusts* were informed of all necessary matters. The burthen of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at arm's length; that the *cestui-que-trusts* had the fullest information upon all material facts; and that, having this information, they agreed to and adopted what was done. Their Lordships cannot accept the affidavit of Mr. White as sufficient proof of these matters; especially when other independent evidence which might have been given is not forthcoming.

Under these circumstances it would be inequitable to force such a title as this upon the Appellant. It is not merely that the purchaser would be running the risk of proceedings being taken by the *cestui-que-trusts* to reopen the transaction. The purchaser would be saddled with a property which he would be unable for many years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it.

Their Lordships will humbly advise Her Majesty to discharge the order of the Full Court, and dismiss with costs the Appeal to that

Court; and to direct that the Respondent repay to the Appellant the costs which by the decree of the Full Court the Appellant was ordered to pay to the Respondent. Their Lordships direct the Respondent to pay to the Appellant her costs of this Appeal.