Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Booth v. *A'Beckett, from the Supreme Court of Victoria; delivered 18th June,* 1863.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THIS Appeal is from a Decree dated 22nd October, 1858, made by the Supreme Court of the Colony of Victoria, in a Suit in Equity instituted there by the Respondent before us, Mrs. A'Beckett, formerly Miss Mills, for the purpose of setting aside a lease of certain landed property at Melbourne, dated 15th December, 1854, which had been granted or professed to be granted, by one Thomas Robinson to Mr. Isaac Booth, the Appellant before us. The Decree is set forth in pages 73 and 74 of the Record of Proceedings.

The title alleged by the Respondent was under the will of her father, John Mills, set forth in pages 24, 25, 26, and 27 of the Record. It is dated 26th July, 1841, the year in which the testator died. The Respondent was then and for several years afterwards an infant. Her case was and is that the property comprised in the impeached lease was part of the real estate of the testator, and was comprised in the devise contained in the will to John Jones Peers and William Witton in fee of property described in page 24 of the Record, upon trusts by the will declared—trusts mainly or solely for the Respondent's benefit—she having lived to attain majority—that Messrs. Peers and Witton, soon after the testator's death, by an instrument purporting to be dated in the year 1842, and set forth in the 29th and 30th pages of the Record, did in

professed exercise of a power contained in the will, profess to appoint her stepfather, Thomas Robinson (already mentioned), a trustee under it in the place of Messrs. Peers and Witton; that afterwards Thomas Robinson made the impeached lease dated (as has been said) in 1854; and that whether he had been regularly or irregularly, duly or unduly, appointed a trustee, the lease was not authorized by the power of leasing contained in the will, was a breach of trust, and was bad against the Respondent.

The defence of the Appellant was in the main that, as he alleged, the property so devised to him was not comprised in the devise under which the Respondent claims, and he insisted on the validity of the lease, and claimed the benefit of it against the Respondent.

There was much evidence in the cause on each side. Three of the questions raised were :—

1. Whether the property purporting to be demised by the impeached lease was comprised in the devise to Messrs. Peers and Witton in trust for the Plaintiff.

2. Whether, if it was, Thomas Robinson had been duly appointed a trustee under the will.

3. Whether, whatever the proper answer to the second question, the impeached lease was an instrument in fraud of the power of leasing given by the will, or made in an undue and improper exercise of the power.

As to the first question, the words of the will alleged by the Respondent to comprise the property in dispute are, "And also all that my other piece of land situate in the town of Melbourne, and being part of allotment number eight of section number twenty, whereon is erected and built a house and shop now in the occupation of James Taylor, together with the yard, outbuildings, and other appurtenances used and occupied therewith." Considering the whole of the evidence, their Lordships think this question open to reasonable argument. They are not satisfied that it ought to be answered against the Respondent, but, upon grounds to be presently noticed, abstain from answering it for or against her. They abstain also from answering the second question. But as to the third question, they are of opinion clearly that it must be answered in

the Respondent's favour, subject of course to the first question. This third point was indeed properly conceded on the Appellant's part; for assuming that in this suit and for its purposes Robinson should be taken to have become, as to the land in dispute, a trustee under the will, it is manifest that we must treat the lease as a gross breach of trust.

The title to the fee of the land in dispute, thus demised by Thomas Robinson to the Appellant, must be considered as having, at the time of the demise, been either in Thomas Robinson, or in the residuary devisees of the Testator. But if in Thomas Robinson, it was vested in him as a Trustee for the Respondent, so appointed, whether regularly or irregularly, after the Testator's death, in the place of the Trustees named in the will. Then as to the alleged title of the residuary devisees, there has been a decision against it by a competent Court of Law, as between them and Mr. Witton, one of the Trustees appointed by the will.

There is, however, more. The instrument purporting to be dated December 9, 1842, which contains the appointment of Thomas Robinson to be Trustee under the will (page 29 of the Record), purports to convey the land in dispute to Thomas Robinson expressly as a Trustee under the will, and in effect as a Trustee for the Respondent. The trusts declared by the deed being thus:—

"To have and to hold the said piece or parcel of land and premises hereinbefore mentioned and hereby released or intended so to be unto the said Thomas Robinson, his heirs and assigns, to the use of the said Thomas Robinson, his heirs and assigns for ever, upon the trusts and for the intents and purposes and with, under, and subject to the powers, provisoes, and declaration expressed and declared in and by the hereinbefore recited will of the said John Mills, deceased, concerning the said freehold hereditaments hereby devised, or such and so many of the same trusts, intents and purposes, powers, provisoes, and declarations, as are now subsisting undetermined, and capable of taking effect, and upon or for no other trust, intent, or purpose whatsoever."

The Deed in effect declares that the land now in dispute was devised by the will to Mr. Peers and Mr. Witton, in trust for the Respondent; and substituting Thomas Robinson for Mr. Peers and Mr. Witton declares Thomas Robinson a Trustee for the Respondent accordingly. This appointment and conveyance accepted by Thomas Robinson bound him as between him and the other parties to it, and as

between him and the Respondent. By it, as between her and him, he became her Trustee of the land, whatever the true reading of the will, and that character so accepted and acquired he never, as between them, became entitled to cast off or disclaim. But the lease in dispute, granted by him to the Appellant, was plainly in breach and violation of that trust, and at least as between Thomas Robinson and the Respondent void.

Is it, then, a just inference from the pleadings and evidence that the lease was taken by the Appellant, with notice of the position in which Thomas Robinson stood at the time with regard to the property and to the Respondent? Their Lordships consider that it is, and that, on the whole of the matters before them, the Appellant is shown to have against the Respondent no better title than Robinson could or can claim, at least so far as the lease is concerned.

The notice that the Appellant acknowledges of the instrument of demise to Ashurst, dated 1st of February, 1842 (stated in pages 38 and 39 of the record), which included part of the property afterwards demised to the Appellant, seems alone sufficient for the purpose, the reference in it to the testator's title being express, but it is not all the notice that the Appellant had. He knew enough to render it his duty as between himself and the Respondent to ascertain all the material facts relating to Robinson's title before accepting the lease of 1854; and therefore if the Appellant is to be taken to have in the pleadings set up the defence of a purchase for valuable consideration without notice,—of which, however, their Lordships are not satisfied,—the defence fails, in their opinion, upon the facts and merits.

It is almost or quite superfluous to add, that of course not any dealing between Robinson and the Appellant, or either of them, on one hand, and both or either of the residuary devisees on the other, which may have taken place after Robinson's acceptance of the trusteeship can possibly assist the Appellant in the present contention, whatever may be the true construction of the will.

The Decree has not granted an injunction, has not dealt with the possession of the land, and has done no more than this:—

"This Court doth declare that the said indenture of lease, dated the fifteenth day of December, one thousand eight hundred and fifty-four, in the pleadings of this cause mentioned, was fraudulent and void and a breach of trust, and ought to be set aside; and doth order and declare the same to be set aside accordingly. And this Court doth order and decree that the said Isaac Booth and Abraham Booth, according to their respective estates and interests in the premises, do execute a proper deed of assignment or surrender of the premises comprised in the said indenture of lease, for all the residue of the said term thereby granted, unto such person or persons as shall be appointed trustee or trustees of the will of the late John Mills in the pleadings mentioned; such deed or deeds to be settled by the Master in Equity in case the parties differ concerning the same, in which all parties are to join.

"And it is ordered, that it be referred to the Master in Equity of this Honourable Court to tax the Plaintiff's costs of this suit; such costs, when taxed, to be paid by the said Isaac Booth and Thomas George Washington Johnston Robinson to the Plaintiff, or to Frederick Michael Selwyn, her solicitor."

Their Lordships consider that the Decree could not with justice or propriety, could not consistently with principle or precedent, have been less favourable to the Respondent, and they will therefore humbly recommend to Her Majesty that the Appeal should be dismissed with costs.