Stuart v Kingston [1923] HCA 17; (1923) 32 CLR 309 (18 May 1923)

HIGH COURT OF AUSTRALIA

Stuart and Another Plaintiffs, Appellants; and Kingston and Others Defendants, Respondents.

H C of A

On appeal from the Supreme Court of South Australia.

18 May 1923

Knox C.J., Higgins and Starke JJ.

Ligertwood (F. Villeneuve Smith K.C. with him), for the appellants.

F. G. Hicks and D. Kerr, for the respondent Kathleen Pittar Kingston,

Finlayson, for the respondent the Public Trustee,

Cleland K.C. and Napier K.C. (with them McLachlan), for the respondent McCarthy.

Ligertwood, in reply.

The following written judgments were delivered:—

May 18

Knox C.J.

The substantial question in this proceeding is whether the appellants—the plaintiffs in the action—are entitled to compel the restoration to the estate of Sir George Kingston of certain lands, namely, (a) the property known as "Marino" and (b) a parcel of land known as Sec. 489A Hundred of Noarlunga.

In the view which I take of the case the relevant facts are as follows:—Sir George Kingston died in the year 1880 leaving him surviving five children, Ludovina, Hester, Charlotte, Strickland Gough and Charles Cameron, all of whom had attained the age of twenty-one years, his wife having predeceased him. By his will he devised his freehold and leasehold estates to his trustee upon trust, when and as they, in order to effectuate any of the purposes of his will or with a view to the advantage of his estate or the more convenient division thereof among the persons entitled thereto, should in their discretion find it necessary or expedient so to do, to sell his said estates, and he directed his trustees to stand possessed of the moneys to arise from the execution of the said trusts and of the proceeds of conversion of his residuary personal estate upon trust, in the events which happened, for his five children in equal shares. In October 1884 probate of this will was granted to the testator's daughters Ludovina and Hester—the other executor named in the will having died. At the time of his death testator's real estate consisted of (a) land situate in Grote Street, Adelaide, referred to as the Grote Street property, (b) property known as "Marino," and (c) Sec. 489A Hundred of Noarlunga.

On 18th December 1882 Charles Cameron Kingston agreed with his sisters, who subsequently took out probate, to purchase the Grote Street property for £11,000 payable in December 1887. Apparently no part of the purchase-money was paid, but Charles Cameron Kingston remained in possession of the property, and on 31st December 1888 accepted from the executrices a lease thereof at a rental of £4 a week determinable by the lessors at a month's notice. On 17th January 1889 Charles Cameron Kingston mortgaged his share under his father's will to the executrices to secure the payment of £12,375 admitted to be owing by him under the agreement of 1882. The mortgage contained a covenant for payment of this sum with interest at 7 per cent., and a recital that it had been agreed that Charles Cameron Kingston should give up possession of the Grote Street property and relinquish all claim thereto under his agreement for purchase and that the executrices should be at liberty to sell that property, crediting the net proceeds of sale to Charles Cameron Kingston in reduction of his debt of £12,375. Charles Cameron Kingston, however, remained in possession of the Grote Street property apparently paying little or nothing by way of rent or interest.

In the year 1883 Strickland Gough Kingston had mortgaged his share in the estate of his father to the Bank of South Australia to secure the payment of a sum exceeding £10,000, and in the year 1893 this mortgage was transferred to Alfred Jabez Roberts as trustee for Mrs. Lucy Kingston, the wife of Charles Cameron Kingston. In 1896 Roberts transferred the mortgage to Nathaniel Alexander Knox, who took it as trustee for Mrs. Lucy Kingston and in 1900 transferred it to her. The equity of redemption in Strickland Gough Kingston's share appears to have been of no value.

Hester Kingston died on 12th May 1893, and the appellants are now the beneficial owners under her will of her share in her father's estate. On 23rd April 1897 Charlotte Giles, another daughter of the testator, was appointed trustee of his estate jointly with Ludovina Kingston in place of Hester Kingston deceased. On 23rd November 1898 the trustees of the will gave Charles Cameron Kingston notice to quit the Grote Street property on 26th December then next.

On 10th April 1899 an agreement was entered into between Charles Cameron Kingston, Mrs. Lucy Kingston and Nathaniel Alexander Knox and the trustees of Sir George Kingston's will in the following terms:—"In the Estate of Sir George Kingston deceased.—In order to settle family differences it is agreed between the undersigned as follows:—(1) Mrs. C. C. Kingston to take the Marino Estate subject to mortgage of £500 and subject to Regan's tenancy, also Sec. 489A Hundred of Noarlunga subject to lease to J. Westcombe. (2) Mrs. Kingston to pay to the trustee £270 in cash on transfer and possession. (3) All arrears of rent in respect of Marino and Sec. 489A Hundred of Noarlunga to belong to the trustees. (4) Mrs. Kingston and her trustee Mr. N. A. Knox and Mr. C. C. Kingston to release the trustees from all claims under the will of Sir George Kingston deceased or otherwise howsoever in respect of the estate of Sir George Kingston deceased. (5) The trustees to release C. C. Kingston from all claims. (6) Mr. and Mrs. C. C. Kingston to give up possession of the Grote Street property to the trustees on or before the 21st day of May next. (7) Mrs. Kingston to be entitled to the possession of Marino on or before the 21st day of May next simultaneously with vacation of Grote Street and fulfilment of agreement in other respects. (8) Mr. C. C. Kingston to have the books at Grote Street belonging to Sir George Kingston's estate and any other personal estate of the testator on the premises. (9) The advertised sale of the properties of the estate to be withdrawn and Grote Street not to be advertised for sale again till after the 21st of May next. (10) Marino to be taken subject to Regan's tenancy, the trustees guaranteeing that same is terminable before July 1900 by a half year's notice which may be given not later than October next and that the rent is not less than £100 per annum. With Marino is taken any right of action against Regan except for rent and royalty in arrear."

Before the date of this agreement both Charles Cameron Kingston and his wife had complained of acts of waste committed or permitted by the trustees in connection with "Marino." Mr. Nathaniel

Alexander Knox appears to have been made a party to this agreement as the assignee from Roberts of the mortgage over Strickland Gough Kingston's share which he held as security for an advance made by him. This agreement was the result of negotiations which were brought about by the action of the trustees in advertising the Grote Street property for sale. The negotiations were conducted by Mr. Gall as solicitor for the trustees, Mr. McLachlan as solicitor for Charles Cameron Kingston, and Mr. Nathaniel Alexander Knox, himself a solicitor, representing the share of Strickland Gough Kingston of which, subject to a charge in his favour, Mrs. Lucy Kingston was the mortgagee and, in all but name, the beneficial owner.

On 6th June 1899 a certificate of title under the *Real Property Act 1886* was issued to the trustees Ludovina Kingston and Charlotte Giles for the whole of the land comprised in the property known as "Marino" pursuant to an application made by them on 21st December 1898 to have the land brought under the Act.

Mr. and Mrs. Charles Cameron Kingston having refused to carry out the agreement, the trustees, after taking counsel's opinion, in July 1899 instituted proceedings in the Supreme Court against Mr. and Mrs. Charles Cameron Kingston and Nathaniel Alexander Knox for specific performance. By his statement of defence Charles Cameron Kingston set up that the agreement of 10th April 1899 was a breach of trust, and that the making by the plaintiffs of the said agreement was a breach of trust by them, and gave particulars as follows: "The plaintiffs have committed and permitted prior to making the said alleged contract great waste to the Marino property (mentioned in the said claim) and the plaintiff Ludovina Cameron Kingston contrary to the trusts of the will of Sir George Strickland Kingston used for her own benefit and permitted the use of large sums of money belonging to the estate of the said George Strickland Kingston and the plaintiffs were personally liable for such waste use and permission to use and the alleged agreement to sell sought to be enforced in this action provided for a release of the plaintiffs from such personal liability in consideration of trust property in the estate and was and is a breach of trust and the plaintiffs are unable to sell convey and make a good title to the property agreed to be sold unless with the consent of all beneficiaries under the said will including the children of Strickland Gough Kingston deceased which consent has not been obtained." The plaintiffs thereupon applied for an order under Order LXIX. of the *Rules of Court 1893* giving them the relief claimed; and on 1st August 1899 *Boucaut* J. ordered that it be referred to the Master to inquire and report "whether the infant children of Strickland Gough Kingston deceased are interested in the agreement for compromise sought to be enforced in this action and if so whether they are benefited or prejudiced thereby and how; also whether any and what other parties (if any) are necessary parties to this action in respect of Miss Hester Holland Kingston's share in the estate of the late Sir George Strickland Kingston deceased. Also whether in any event the interests of the said infants require that possession of the Grote Street property in the claim referred to shall be given up by the defendants Charles Cameron Kingston and Lucy Kingston to the plaintiffs."

On the inquiry before the Master all parties were represented by counsel. Mr. Gall gave evidence, and was cross-examined by counsel for Mrs. Kingston, for the purpose of establishing that the agreement was a breach of trust, and the circumstances surrounding the making of the agreement were investigated. Evidence was led to show that the agreement was for the benefit of the present appellants, and that full consideration was being given for "Marino." Evidence was also given that Charles Cameron Kingston was hopelessly insolvent at the date of the agreement; and there was some evidence as to the value of the several properties. Counsel for Charles Cameron Kingston argued that the present appellants should be separately represented in respect of Hester's share in the estate, and counsel for Mrs. Kingston insisted that the agreement was a breach of trust and could not be enforced. The Master, however, reported as follows:—"(1) Molly and Dorothy the infant children of Strickland Gough Kingston deceased are interested in the agreement for compromise

sought to be enforced in this action they being presumptively interested in the estate of the late Sir George Strickland Kingston by virtue of the will of the late Hester Holland Kingston deceased. (2) The said infants are benefited by the said agreement. (3) No parties are necessary to this action in respect of the said Hester Holland Kingston's share in the said estate. (4) In any event the interests of the said infants require that possession of the Grote Street property in the claim referred to should be given up by the defendants Charles Cameron Kingston and Lucy Kingston to the plaintiffs."

The matter then came on before *Boucaut* J. on the Master's report. Counsel appeared for the plaintiffs and for the defendants Charles Cameron Kingston and Nathaniel Alexander Knox, who had filed submissions to the judgment of the Court, and Mrs. Kingston appeared in person and strenuously opposed a decree for specific performance. On 24th October 1899 *Boucaut* J. made a decree, the material portion of which is as follows:—"This Court doth find that the agreement dated the 10th day of April 1899 in the plaintiff's claim set forth ought to be specifically performed and carried into execution and (the plaintiffs on their part undertaking to perform and carry out the said agreement) doth decree the same accordingly and this Court doth further order as follows:—(1) That the defendants Charles Cameron Kingston and Lucy Kingston do within fourteen days after service of this judgment upon them give up to the plaintiffs possession of the Grote Street property in the plaintiffs' claim mentioned. (2) That the defendants Charles Cameron Kingston and Lucy Kingston his wife and her trustee the defendant Nathaniel Alexander Knox do release the plaintiffs from all claims under the will of Sir George Strickland Kingston deceased or otherwise howsoever in respect of the estate of the said Sir George Strickland Kingston deceased. (3) That the defendant Lucy Kingston pay to the plaintiffs the sum of £270 in cash on transfer to and possession by her of the Marino property mentioned in the plaintiffs' claim subject to the existing mortgage thereon and Regan's tenancy thereof and Sec. 489A Hundred of Noarlunga subject to lease to J. Westcombe." On 13th March 1900 leave was given to the plaintiffs to proceed on this decree.

On 27th April 1900 the trustees executed a memorandum of transfer under the *Real Property Act* to Mrs. Lucy Kingston of the lands comprised in "Marino," which was registered on 29th May 1900; and the Public Trustee as administrator of Mrs. Lucy Kingston's estate is now the registered proprietor of those lands. On 3rd May 1900 the trustees by deed conveyed to Mrs. Lucy Kingston Sec. 489A Hundred of Noarlunga, and on 5th May 1900 the matter was completed by the execution by Charles Cameron Kingston and Mrs. Lucy Kingston of the release provided for by the agreement.

The appellants on 21st February 1920 brought this action against the present trustee of the will of Sir George Kingston and the Public Trustee as representative of Charles Cameron Kingston and Lucy Kingston, claiming a declaration that the agreement of 10th April 1899 was a breach of trust and is not and never was binding on them and that "Marino" and Sec. 489A formed part of the estate of Sir George Kingston and consequential relief. The action was tried before *Angas Parsons* J., who held that the appellants had failed to establish any claim to relief and dismissed the action. From that judgment this appeal is brought.

The first question for consideration is whether the agreement of 10th April 1899 was a breach of trust. The trustees of the will held "Marino" and Sec. 489A on the trust for sale set out above. The plaintiffs contend that the transaction in question was not a due execution of the trusts of the will. Counsel for the defendant McCarthy attempted to support the transaction as being either (a) a sale authorized by the trust for sale, or (b) an appropriation of these properties in satisfaction of the share of Strickland Gough Kingston under the will, or (c) a compromise or settlement of the claim of Mrs. Lucy Kingston as assignee of the share of Strickland Gough Kingston which the trustees were empowered to make by sec. 21 of the *Trustee Act 1893*.

In my opinion the transaction cannot be supported on any of these grounds. The agreement was expressed to be and was in fact an agreement to settle family differences. It appears from the case submitted for counsel's opinion that, in taking steps to enforce it, and presumably in entering into it, the trustees were actuated by the desire to avoid accounting and all questions which might be raised as to waste or breach of trust in not having forced a sale before, and that the trustees recognized that, even if the delay in selling and the waste were occasioned by the conduct of Charles Cameron Kingston, that fact would afford no answer to a suit by Mrs. Lucy Kingston as assignee of Strickland Gough Kingston's share. An analysis of the terms of the agreement shows that the considerations moving from Charles Cameron Kingston and Mrs. Lucy Kingston were (a) the payment of £270 by Mrs. Lucy Kingston, (b) a release by Mr. and Mrs. Kingston and Nathaniel Alexander Knox of all claims against the trustees under the will of Sir George Kingston or otherwise howsoever in respect of his estate, (c) the giving up of possession of the Grote Street property. For these considerations, which included a release of the trustees from their personal liability for alleged breaches of trust and waste, the trustees agreed to convey and assign to Mrs. and Mr. Kingston real and personal property belonging to the trust estate and to release Charles Cameron Kingston from all liability to the trust estate. The agreement was indivisible both in form and in substance, and the proceedings to enforce it were taken on that footing. The claim against the trustees in respect of alleged waste had been put forward by both Mr. and Mrs. Charles Cameron Kingston in 1898 and 1899, and the case for opinion shows that the trustees or their advisers were apprehensive of proceedings in that respect. Part of the consideration for the agreement consisted of a release of the trustees from their personal liability in respect of this claim so far as the shares of Charles Cameron Kingston and Strickland Gough Kingston were concerned. It follows that the consideration for the disposition of the trust property included a personal benefit or advantage to the trustees, and this fact alone is, in my opinion, sufficient to dispose of the contention that the transaction was authorized either by the trust for sale contained in the will, or by the power of the trustees to appropriate trust property in satisfaction of the share of a beneficiary, or by the power conferred by the *Trustee Act* to compromise claims relating to the trust estate.

The next point raised by Mr. *Cleland* was that, even assuming this transaction was a breach of trust, the appellants were bound by the judgment of the Court in the action for specific performance. It is true that in that action the question of breach of trust was raised by the pleadings; and I think *Boucaut* J. must be taken to have decided either that the agreement was not a breach of trust or that, if it was, the Court had power nevertheless to authorize the trustees to carry it out. But the appellants were not parties to that action by representation or otherwise, nor was the estate of Hester Kingston, under whom they claimed, represented; and I know of no authority, and none was cited by counsel, which would justify this Court in holding that in these circumstances the appellants were precluded by the judgment from raising in the action the issue whether the agreement of April 1899 was a breach of trust. The contention is opposed to the general principle that a transaction between two parties in judicial proceedings ought not to bind a third (*Duchess of Kingston's Case*[1]), and to the maxim *Res inter alios acta alteri nocere non potest*. I think, therefore, that it is open to the appellants to assert in this action, notwithstanding the judgment in the former action, that the transaction of 10th April 1899 was a breach of trust. But it does not follow that the fact that Mrs. Kingston was compelled by the judgment of a Court of competent jurisdiction to perform the agreement may not be relevant to other questions raised on this appeal.

The next point raised by counsel for defendant McCarthy was that, even assuming the transaction of 10th April 1899 to have been a breach of trust, the appellants, in order to succeed, must establish that Mrs. Kingston knew all the facts necessary to make that transaction a breach of trust. Assuming this proposition to be correct, it is a sufficient answer that the evidence shows that Mrs. Kingston herself in March 1899, in correspondence with Mr. Knox, complained of the commission of waste by the trustees and threatened to take steps to have them removed on that ground, and the agreement

itself provides for the release of the trustees from their personal liability for such alleged waste. Mrs. Kingston had professional advice before she signed the agreement which was submitted by her solicitor and the solicitor for her husband for signature by the trustees. Moreover, Mr. Knox, who was trustee for her of the mortgage of Strickland Gough Kingston's share, took part in the negotiations which led up to the making of the agreement; and in these circumstances it is impossible to avoid the conclusion that both he and Mrs. Kingston knew the facts which made the transaction a breach of trust.

The appellants have, in my opinion, established (a) that the transaction of 10th April 1899 under which Mrs. Kingston acquired "Marino" and Sec. 489A was a breach of trust on the part of the trustees, (b) that Mrs. Kingston had at that time notice of the trust and (c) that Mrs. Kingston and her trustee Mr. Knox knew the facts which made the transaction in question a breach of trust. It follows that they would be entitled, apart from any protection which may be afforded by the judgment in the action for specific performance or by the provisions of the *Real Property Act*, to follow the trust property in the hands of the Public Trustee as administrator of Mrs. Kingston's estate, and to insist either unconditionally or on terms on that property being administered in accordance with the trusts of Sir George Kingston's will.

With respect to Sec. 489A, which has not been brought under the provisions of the *Real Property Act*, the only question is whether the fact that Mrs. Kingston was compelled by the judgment in the former action to accept a conveyance of that land affords any answer to the appellants' claim.

Before the making of the agreement of 10th April 1899 the appellants as beneficiaries under the will of Hester Kingston had an equitable title to her interest under the will of Sir George Kingston in the lands dealt with by that agreement. The equitable title to those lands acquired by Mrs. Kingston under that agreement was, therefore, subsequent in point of time to the equitable title of the appellants. The judgment in the former action rested on the agreement, and did no more than compel Mrs. Kingston to perform the agreement that she had made, and to accept the legal title to the land to which she had an equitable title under the agreement. Immediately upon the execution of the agreement her equitable interest in the lands in question under that agreement was subject to the equitable interest of the beneficiaries under Hester Kingston's will including the appellants. How then did the judgment operate to reverse that position? The mere acquisition of the legal estate by Mrs. Kingston gave her no priority, for she had notice of the trust when she entered into the agreement. "The order of priority between ... equitable titles ... is governed by order of time—unless there has been some act or omission on the part of the owner of an equitable title prior in point of time, such as to cause that title to be postponed to a subsequent equitable interest" (per *Stirling* L.J. in *Taylor v. London and County Banking Co.*[2]). In *Cory v. Eyre*[3] *Turner* L.J. says that this rule is founded on the principle that the creation of a trust vests an estate in the subject matter of the trust in the person in whose favour the trust is created; and that, where it is sought to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced, and, while there may be cases so strong as to justify this being done, a vested estate or interest ought not to be disturbed on light grounds.

In the present case the appellants were at the date of the judgment in question infants, and neither they, nor the estate of Hester Kingston, under whom they claim, was represented in the action. There was, in fact, no act or omission of any kind on their part, and, as they were infants, it is difficult to see how they could prejudice their position by any act or omission. Moreover, the equitable interest of Mrs. Kingston was acquired with notice of the prior equitable interest of the beneficiaries under Hester Kingston's will.

In these circumstances I see nothing to justify the postponement of the prior equitable interest vested in the appellants to that acquired by Mrs. Kingston under the agreement or to the legal estate acquired by her under the subsequent conveyance.

In my opinion, therefore, the appellants are entitled to succeed in respect of Sec. 489A Hundred of Noarlunga.

In respect of "Marino" it is necessary to consider the effect of the *Real Property Act 1886*.

By sec. 69 of that Act it is provided that the title of every registered proprietor of land shall, subject to such encumbrances, liens, estates or interests, as may be notified on the certificate, be absolute and indefeasible subject to certain qualifications of which one only need be mentioned, namely:—"In the case of fraud, in which case any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this Act: Provided that nothing included in this sub-section shall affect the title of a registered proprietor who has taken bona fide for valuable consideration, or of any person bona fide claiming through or under him." Sec. 70 provides that in all other cases the title of the registered proprietor shall prevail notwithstanding the existence in any person of any estate or interest which but for the Act might be held paramount or to have priority. Sec. 71 provides that nothing in secs. 69 and 70 shall be construed to affect the rights of a cestui que trust where the registered proprietor is a trustee, whether the trust be express, implied or constructive, provided that no unregistered estate, interest or trust shall prevail against the title of a registered proprietor taking bona fide for valuable consideration. Sec. 72 provides that knowledge of the existence of any unregistered interest or trust shall not of itself be evidence of want of bona fides so as to affect the title of any registered proprietor. Sec. 186 is in the following terms:—"No person contracting or dealing with, or taking or proposing to take a transfer or other instrument from the registered proprietor of any estate or interest in land, shall be required, or in any manner concerned to inquire into or ascertain the circumstances under, or the consideration for, which such registered proprietor or any previous registered proprietor of such estate or interest is or was registered, or to see to the application of the purchase-money, nor be affected by notice direct or constructive of any trust or unregistered interest, any law or equity to the contrary notwithstanding." Sec. 187 excludes from the protection of sec. 186 any person who has acted fraudulently or been a party to fraud, but provides that contracting, dealing, taking or proposing to take a transfer or other instrument with actual knowledge of any trust, charge, or unregistered instrument shall not of itself be imputed as fraud. Sec. 249 is in the following terms:—"Nothing contained in this Act shall affect the jurisdiction of the Courts of law and equity in cases of actual fraud or over contracts or agreements for the sale or other disposition of land or over equities generally. And the intention of this Act is that, notwithstanding the provisions herein contained for preventing the particulars of any trust from being entered in the Register Book, and without prejudice to the powers of disposition or other powers conferred by this Act on proprietors of land, all contracts and other rights arising from unregistered transactions may be enforced against such proprietors in respect of their estate and interest therein, in the same manner as such contracts or rights may be enforced against proprietors in respect of land not under the provisions of this Act: Provided that no unregistered estate, interest, contract, or agreement shall prevail against the title of any bona fide subsequent transferee, mortgagee, lessee, or encumbrancee, for valuable consideration, duly registered under this Act."

It is, I think, a necessary corollary from decisions on corresponding provisions of Acts of New South Wales, Victoria and New Zealand—especially the decisions in *Assets Co. v. Mere Roihi*[4], *Butler v. Fairclough*[5] and *Wicks v. Bennett*[6]—that the word "fraud" in secs. 69 and 187 of the South Australian Act is to be construed as meaning something more than mere disregard of rights of which the person sought to be affected had notice, and as importing something in the nature of

personal dishonesty or moral turpitude. But I cannot find in either the New South Wales, the Victorian or the New Zealand Act any provisions corresponding to secs. 71, 72 and 249 of the South Australian Act, and it is on the true construction of these sections that the controversy in the present case turns.

By force of the provisions of secs. 69 and 70 if they stood alone, Mrs. Lucy Kingston as registered proprietor would, unless she had been guilty of dishonesty in acquiring her title, have been protected against the unregistered interest of the appellants. But sec. 71 introduces an exception by providing that the protection afforded to the registered proprietor by secs. 69 and 70 shall not extend to a registered proprietor who is a trustee—express, implied or constructive—so as to affect the rights of his cestuis que trust, unless such registered proprietor took the land bona fide for valuable consideration; and sec. 72 excludes as evidence of want of bona fides mere knowledge of the existence of a trust or unregistered interest. Mrs. Lucy Kingston by taking "Marino" with knowledge of the trust became a constructive trustee of it. She is, therefore, within the exception enacted by sec. 71 (v.). But the question remains whether she took "Marino" bona fide—admittedly she gave valuable consideration; and in considering this question knowledge of the existence of the trust or of the interest of the beneficiaries is not of itself to be regarded as evidence of want of bona fides. Giving due weight to this provision, I think the expression "bona fide" in sec. 71 must be construed as meaning "honestly," and as importing an absence of dishonest intention on the part of the person becoming registered proprietor and an absence of knowledge on his part of any dishonest intention on the part of his vendor towards the persons entitled to the unregistered interest. On this view of the meaning of secs. 71 and 72 I think Mrs. Lucy Kingston took "Marino" bona fide, and that when she became the registered proprietor she was within the protection of the proviso to sec. 71. It is true that when she took the transfer of "Marino" from the registered proprietors she knew that they held the land as trustees and knew also facts which, in my opinion, made the agreement out of which the transfer arose a breach of trust. She participated in the breach of trust committed by the trustees in entering into the agreement. But, having entered into the agreement, she refused to perform it until compelled by the judgment of the Supreme Court in the action for specific performance. Having regard to the proceedings in that action, to the part taken by Mrs. Kingston as a defendant, and to the fact that after an exhaustive inquiry the Master found that the transaction was beneficial to the appellants—and inferentially to the trust estate—I think it is impossible to hold that Mrs. Kingston acted otherwise than honestly and bona fide in taking the transfer of "Marino."

Apart altogether from secs. 71 and 72 I think that in respect of "Marino" Mrs. Kingston was within the protection of secs. 186 and 187 of the Act as transferee from the registered proprietor. In the circumstances above referred to she cannot be said to have "acted fraudulently or been a party to fraud" within the meaning attributed to the word fraud by the decisions to which I have referred. It was, however, argued for the appellants that the protection afforded by these sections was withdrawn by the provisions of sec. 249 of the Act. I cannot assent to this contention. The section is clumsily expressed; but I think it is reasonably clear, especially having regard to the terms of the proviso, that it was designed to do no more than insure the preservation against a registered proprietor of rights or equities affecting the land which came into existence after he had been registered as proprietor, and would, if the land had not been under the Act, have been enforceable against him at law or in equity. In effect, it appears to be a statutory adoption of the decision in *Cuthbertson v. Swan*[7], which overruled the decision in *Lange v. Rudwolt*[8]. In any event, I think it is clear that the word "subsequent" in the proviso can only be read as applying to a transfer, &c., subsequent in date to the creation of the unregistered estate, interest, contract or agreement, and, reading it thus, Mrs. Kingston taking bona fide for value by transfer made after the creation of the equitable interest of the appellants is within the protection of the proviso. As to "Marino," therefore, the appeal, in my opinion, fails.

The question how the costs of the litigation in the Supreme Court and in this Court are to be borne remains to be dealt with. The plaintiffs have succeeded in part and failed in part; the property in respect of which they have succeeded is of small value compared with that in respect of which they have failed. A breach of trust resulting in considerable loss to the trust estate was committed by Ludovina Kingston and Charlotte Giles, the former trustees of the will; Ludovina's estate is not represented in this action. Both these ladies and Lucy May Kingston, who participated in the breach of trust, and whose estate is represented in this action by the Public Trustee, acted under the direction of the Supreme Court in carrying out and giving effect to the transaction which is now held to be a breach of trust, and Mrs. Lucy Kingston was compelled by the decree in the former proceedings to complete that transaction. Under these circumstances I think the proper course is to make no order as to the costs of the action or of the appeal except that the plaintiffs are to have their costs of the action and appeal out of the estate of Sir George Kingston.

Higgins J.

At the date of the agreement, 10th April 1899, the position was that the five children of Sir George Kingston were entitled under his will, each to one-fifth share of the net proceeds of the sale, conversion and collection of his real and personal estate. The children were Ludovina, Hester, Charlotte, Strickland and Charles. Ludovina and Hester as executors had proved the will in 1884. Hester had died in 1893; and on 23rd April 1897 Charlotte (who was married to Mr. Giles) had been appointed in place of Hester as co-trustee with Ludovina. Under the will of Hester, all income was to be paid to Ludovina for life, then to Charlotte for life, and the corpus of the share was then to go to the plaintiffs, the children of Strickland. Ludovina had proved this will as executrix. Strickland had died intestate in 1897, leaving a widow—the present defendant Kathleen Pittar Kingston—as well as two daughters, infants; and all were entitled to share in his estate under the *Statute of Distributions*. But Strickland had mortgaged his interest. He had assigned his fifth interest to the Bank of South Australia, to secure his overdraft of £3,780, and a debt of £6,926 owing by the firm of Kingston & Kingston (Strickland and Charles constituted this firm). This mortgage was transferred to the Union Bank in 1892, when that Bank took over the business of the Bank of South Australia; and, as the account was worthless, the Union Bank had sold the mortgage on 31st October 1893, to Charles Kingston for £300, and assigned it by his direction to Mr. Roberts, a solicitor, who apparently had helped the Charles Kingstons to find the purchase-money; and eventually the mortgage was assigned to Mr. Knox, a solicitor, on behalf of Mrs. Kingston. It does not really matter whether Charles Kingston or his wife Lucy was the true owner of the mortgage. Charles Kingston had also mortgaged his interest to the trustees, Ludovina and Hester, on 17th January 1889, to secure £12,375. He had previously agreed with them to buy the Grote Street property, the city residence of the testator, but had failed to pay either principal or interest; he had then agreed to relinquish all claim as purchaser; but the trustees were at liberty to sell Grote Street, crediting Charles with the purchase-money as against his debt. He lived with his wife Lucy at Grote Street, as a monthly tenant; in fact he was in default as to the rent, but would not quit the residence. Charles had also effected a second mortgage over his interest to the Bank to secure his own overdrawn account, the partnership account, and the overdrawn account of Strickland. He had been released by the Bank on 5th December 1898 on payment of £1,500.

The principal properties in the estate of the testator were Grote Street and certain land, including a seaside residence thereon, at "Marino," and Sec. 489A Hundred of Noarlunga. Both Grote Street and "Marino" had been mortgaged by the testator; and at the date of the agreement the amount owing by the estate under the mortgages on Grote Street was £3,000 and on "Marino" over £500. Charles Kingston had accused the trustees of waste as to "Marino," in letting the place as a cow-yard, piggery, &c.

I am stating such only of the complicated facts as seem to me to be material. The persons interested in the estate on 10th April 1899 were, therefore, (1) Ludovina; (2) Ludovina as Hester's executrix; (3) Charlotte; (4) the widow and two infant children of Strickland, as to Strickland's share, but subject to a mortgage now held by Lucy Kingston for over £10,000 with interest and half-yearly rests; (5) Charles, but subject to his debt to the trust estate of £21,486. As values stood at the time, Grote Street was treated as worth, if free from encumbrances, about £5,000, and "Marino" as worth about £1,500. It is obvious that the equities of redemption, as to the interests of Strickland and Charles under the will, seemed to be worth nothing, but the interest of Hester, and, therefore, of those entitled under Hester's will, still remained.

Under these circumstances, the agreement of 10th April 1899 was made. It has been already set out in the judgment of the Chief Justice.

It will be noted that the agreement is not described as a purchase, but as an agreement "in order to settle family differences." Lucy Kingston was, under the agreement, to take "Marino" and Sec. 489A Noarlunga subject to the mortgage for £550; to pay £270, to release the trustees (Ludovina and Charlotte) from all claims under the will of the testator or otherwise in respect of his estate. This release would cover the claim for past rents as to "Marino" and a claim for moneys of the estate alleged to have been used by the trustees for their own benefit; but it would also release the trustees from accounting to Lucy Kingston in respect of the share of Strickland in the estate, and from accounting in respect of the share of Charles. It is obvious that the release given by Charles and by his wife would only apply to the interest of Strickland (to the extent of the mortgage thereof held by Lucy over that interest), and to the interest of Charles subject to his mortgage to the trustees. One great object achieved by the trustees was that the Charles Kingstons were to leave Grote Street, and thus enable the trustees to sell the property to the best advantage. On the other hand, the trustees were to release Charles from all claims—claims for his large mortgage debt to the trustees—and for arrears of rent; Charles was to have the estate books at Grote Street, and any other personal property of the testator there; an advertised sale of Grote Street was not to take place till after 21st May following; and the trustees guaranteed that a certain tenancy of "Marino" was terminable by a half-year's notice, &c. At the time of the agreement it is clear that the equity of redemption in Strickland's share, to which Strickland's wife and infant children were entitled as part of his estate, as well as the equity of redemption in Charles's share seemed, as the values then stood, worth nothing; but the "Marino" property has increased since very considerably in value.

Now, the agreement between the trustees and the Kingstons was not a sale of "Marino" within the powers of the trustees under Sir George Kingston's will. There was a trust to sell; but a sale means a transaction for money payment; and this agreement was not a sale of "Marino," or of Sec. 489A Noarlunga. It was, as expressed in the agreement itself, an agreement "to settle family differences," and it covered considerations quite different from money payments. It is not pretended that the £270 to be paid by Lucy was treated as the money value of "Marino"; it was only a payment in addition to the other considerations for the transfer. The whole of the considerations on one side have to be taken as against the whole of the considerations on the other; it is impossible to sever that portion of the agreement which relates to "Marino" from the agreement as a whole. The agreement was, to say the least, a breach of trust on the part of the trustees; and it was not binding on those who were not parties to the agreement—not binding on the widow and children of Strickland, who were entitled to Strickland's share subject to his mortgage liability; and, what is more important, not binding on the plaintiffs who were entitled, after the deaths of Ludovina and Charlotte to the corpus of the estate of Hester. These children of Strickland, the present plaintiffs, were entitled to that corpus, but not entitled in possession until the death of Charlotte; and the death of Charlotte did not take place until 30th May 1913. The plaintiffs have taken out administration to the estate of Strickland, their father, and the plaintiff Mrs. Stuart is the administratrix of the estate of Hester also.

What then is the position on these facts? The plaintiffs are entitled to have the trusts of the will of Sir George Kingston carried into execution. Prima facie, they are entitled to inquiries and accounts as to the estate, to realization of the estate, and payment of what is due to Hester's share, as well as to payment of anything that may remain after the mortgage in respect of Strickland's share. If, however, it be found that "Marino," for any of the reasons urged by counsel for McCarthy (who has been added as a defendant to represent those interested in Lucy Kingston's estate) cannot be recovered from that estate, the trustees who concurred in the transfer of "Marino" (Ludovina and Charlotte) are liable, jointly and severally, for the value of "Marino" as it stands to-day. This liability of the trustees must not be forgotten; although, as the estates of the two trustees, who were parties to the agreement of 10th April 1899, are treated as worthless, the chief stress of the argument has been naturally laid on the right to recover "Marino" from Mrs. Kingston's estate. The position taken up in the statement of claim is that the agreement was a breach of trust, and is not and never was binding on the plaintiffs (par. 1 of the prayer). There is also a prayer that the agreement should be delivered up to be cancelled, but this is not strictly a proper mode of relief, from the point of view of the plaintiffs. Whether the agreement is binding or not as between the two trustees who were parties thereto and the Kingstons does not really concern the plaintiffs: the position is that it is not binding on the plaintiffs; and the judgment should, in my opinion, be on the basis that the plaintiffs are entitled to execution of the trusts notwithstanding the agreement. The trustees of 1899 transferred "Marino" to Mrs. Kingston without any authority to do so under the trusts; and the usual consequences follow—"Marino" must be restored, or, if the trustees cannot get it restored, they must account for its value. It is true that the trustees are dead; but the defendant Kathleen Pittar Kingston is sued as the sole surviving executrix of Charlotte, who was the sole surviving trustee of Sir George Kingston, and Charlotte's estate is liable. It appears that the same defendant has also been appointed the trustee of Sir George Kingston, so that there is nothing to hinder the execution of the trusts of Sir George Kingston, so far as they remain to be executed. So far, there is nothing to prevent an order directing the defendant the Public Trustee, who is the administrator *c.t.a.* of Mrs. Kingston's estate, as well as the administrator of the estate of Charles left unadministered, to retransfer "Marino" to the trust estate, with all its increment of value.

But there are two main objections raised on behalf of Lucy Kingston's estate—(1) under a judgment in an action of 1899; (2) under the *Real Property Act*.

(1)
The trustees, Ludovina and Charlotte, issued a writ on 4th July 1899 against Charles and Lucy Kingston, claiming specific performance of the agreement of 10th April 1899. Knox, as trustee for Mrs. Kingston of the assignment of mortgage of Strickland's share in the estate and as one of the signatories of the agreement, was joined as a defendant to that writ; but there was no representative of Hester's estate, or, indeed, of Strickland's estate, or of the infant children of Strickland, the present plaintiffs. As is proper in a specific performance action, the proceedings were confined to the parties to the agreement. By the judgment of *Boucaut* J. (24th October 1899) the defendants were ordered to specifically perform the agreement; Charles was ordered to give up possession of Grote Street; Charles and his wife Lucy were ordered, in accordance with clause 4 of the agreement, to release the trustees from all claims under the will of Sir George Kingston; Lucy was ordered to pay to the trustees the £270 on transfer to and possession by her of "Marino" subject to the existing mortgage of £550, and Charles and Lucy were ordered to pay the trustees' costs of the action. But, of course, this judgment, though binding on Charles and his wife, was not in any way binding on Hester's estate, or as to any possible equity of redemption as to Strickland's interest. A judgment is not binding on any person other than the parties to the judgment or their privies in estate; and this judgment, though it involved the transfer of "Marino" to Mrs. Kingston, does not in any way affect the rights of those interested in Hester's share or in Strickland's ultimate equity in his share. The position is that Hester's administrator (the plaintiff Mrs. Stuart is now Hester's administrator) and

Hester's beneficiaries (the two plaintiffs are now the beneficiaries entitled to Hester's interest, under her will) are entitled to have the trusts of the will of Sir George Kingston carried into execution as if the agreement did not exist. If "Marino," apart from the agreement and the judgment for the specific performance thereof, has not been validly transferred to Mrs. Kingston, it must be retransferred to the trustees of the estate of Sir George Kingston; if it has been validly transferred to Mrs. Kingston, so that her administrator (the Public Trustee) cannot be compelled to retransfer it, the plaintiffs are, in theory at least, entitled to make the trustees of Sir George Kingston's estate who transferred "Marino" to Mrs. Kingston account for the present value of "Marino." It is not necessary to consider whether the judgment was right or wrong; as there was no appeal, the judgment is binding on all the parties to the action; but it is not binding on the plaintiffs in this action as they were not parties to the former action. The plaintiffs in this action can neither take the benefit, nor bear the burden, of the former action. The principle is fundamental in the administration of justice by British Courts, whether of law or of equity, that "no proceedings shall take place with respect to the rights of anyone except in his presence. Thus a decree of the Court of Equity binds no one who is not to be regarded ... either as a party, or else as one who claims under a party to the suit" (*Calvert on Parties in Equity*, 2nd ed., p. 2).

It has been urged, indeed, that the trustees, Ludovina and Charlotte, represented in the former suit the infants interested in Hester's estate. This view is, in my opinion, obviously mistaken. The trustees, in enforcing the agreement, were enforcing, amongst other things, their personal interest as against the estate—including their interest in getting a release of their alleged liabilities for waste as to "Marino," and for improper use for their own purposes of the moneys of the estate; and they were enforcing the agreement which was made, as stated therein, "in order to settle family differences" —differences with the Charles Kingstons. The transactions the subject of the agreement enforced included transactions between the trustees having certain alleged personal liabilities on the one side and only two persons interested in the trust estate on the other. The old rule of Chancery that all persons interested must be parties so as to be bound by any decree has been relaxed of recent years by certain Acts and Rules; but these Acts and Rules prescribe the limits of the relaxation; and there is no pretence for saying that any Act or Rule applies to this case so as to make the plaintiffs bound. As *Farwell* L.J. stated in *Brydges v. Brydges*[9], "the Court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction (e.g., persons served with notice of an administration decree or in the same interest with a defendant appointed to represent them), or persons coming in and submitting to the jurisdiction of their own free will, to the extent to which they so submit (e.g., creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity). But the Courts have no jurisdiction to make orders against persons not so before them merely because an order made, or to be made, may or will be ineffectual without it."

There is, indeed, a power, in certain cases, for the Courts to adjudicate without making some persons interested parties; but the absent parties are not bound by the judgment (*Doody v. Higgins*[10]). Under the South Australian *Rules of Court* 1893 there is also a special provision under the head of "Administration and Trusts" and relating to originating summonses (Order LXXIII., r. 14): "Where a compromise is proposed between some of the beneficiaries under a trust, or some of the persons interested in the estate of a deceased person, and a trustee executor or administrator sought to be charged, the Court or a Judge may, if they or he consider the compromise to be for the benefit of all such beneficiaries and persons who are concerned, order that the compromise shall be binding upon any of such beneficiaries or persons who are not before the Court." But in the first place, this provision, though applicable to proceedings for the administration of estates or execution of trusts, is not applicable to specific performance suits. The rule relates only

to charges against trustees. In the second place, such an order, expressed to be binding on the beneficiaries not before the Court, was not made by *Boucaut* J. It is true that by an order of that learned Judge, made on 1st August 1899—(we have not been shown that there was any power to make such an order, particularly in a specific performance suit)—it was referred to the Master to inquire and report as to the infants' interests; and that the Master reported that the plaintiffs, the infant children of Strickland, were interested in the "agreement for compromise" then sought to be enforced, interested by virtue of the will of Hester; that the infants were benefited by the agreement; and that no parties were necessary to the action in respect of Hester's share; and that in any event the interest of the infants required the possession of the Grote Street property to be given up by Charles and his wife to the plaintiffs. But counsel have not suggested that any Act or Rule of South Australia makes this finding in any way binding on the plaintiffs. The former action still remains an action to which the plaintiffs were not parties, and the judgment remains a judgment which is not binding on the plaintiffs.

(2)
But there is claimed for the estate of Lucy Kingston the protection of the *Real Property Act 1886*, which expresses the South Australian law as to the Torrens system of registration; and this is by far the most serious contention. In pursuance of the agreement of 10th April 1899, and of the judgment in the action for specific performance of that agreement in 1899, "Marino" was transferred to Lucy Kingston, and she became registered as proprietor (29th May 1900); and Sec. 489A Noarlunga was conveyed to her under the old law on 3rd May 1900. The question is, as to "Marino," does the fact that Lucy became registered proprietor make her title thereto indefeasible and unimpeachable, even though the plaintiffs have been wronged. The defendant, the Public Trustee, as her administrator *c.t.a.* became registered proprietor 21st August 1920. The answer depends on the South Australian *Real Property Act 1886*.

The Torrens system of registration of titles to land was first adopted in this very State of South Australia; and it has been copied, with variations, in all the States of Australasia and in Canada, in the Malay States, and elsewhere. The objects, as stated in sec. 10 of this Act, are "to simplify the title to land, and to facilitate dealing therewith, and to secure indefeasibility of title to all registered proprietors, except in certain cases specified in this Act." Text-writers seem to treat the system as one consistent system everywhere, and the decisions under the Acts in one country as applicable to other countries; but it has to be remembered that decisions under the analogous Acts elsewhere must yield here to the words of the South Australian Act. We have to apply the South Australian Act, and that Act only. It is urged before us that Lucy Kingston's title as registered proprietor of "Marino" prevails over the interests of all the other persons interested under the will of Sir George Kingston. That is to say, even though Mrs. Kingston knew fully the contents of the will and of the interest of Hester thereunder, and of the interest of the plaintiffs under Hester's will; even though Mrs. Kingston knew all the contents of the agreement, and knew that in taking over "Marino" in pursuance of the agreement she was taking land in which the plaintiffs were interested as well as all the other beneficiaries under Sir George Kingston's will—her title cannot be disturbed. This argument makes it necessary to consider the Act very closely. The argument does not apply to Sec. 489A Noarlunga, which is under the old law.

Before examining the Act, however, I should say that it is, in my opinion, quite clear that Mrs. Kingston had, at the time of the transfer to her of "Marino," all the knowledge to which I have referred. The whole of the position as to the interests in Sir George Kingston's estate was set out in the statement of claim in the action of *Kingston v. Kingston*. Mrs. Kingston did not put in any defence; but she gave evidence personally before the learned Judge, and argued before him, and did not in the least dispute any of the allegations made by the plaintiffs in that action. Her husband had

put in a defence, not denying any of the allegations in the statement of claim, but submitting that the agreement was in breach of trust. He alleged the waste on the part of the trustees as to "Marino," the use of moneys of the estate by the trustees for their own benefit, stated that the agreement provided for a release of the trustees from their personal liability in consideration of trust property, "Marino." in the estate, and that the plaintiffs were unable to make a good title to "Marino" "unless with the consent of all the beneficiaries under the said will including the children of Strickland Gough Kingston deceased, which consent had not been obtained." Mrs. Kingston was represented before the Master by counsel, who took on her behalf the same objection as was urged by Charles Kingston. The agreement itself was prepared by a solicitor for Mrs. Kingston (Mr. Stow) and by a solicitor (Mr. McLachlan) for Charles Kingston and Knox; it was brought round by these solicitors to the solicitor for the trustees at 10 o'clock one night, and was signed the next morning. The agreement was in fact proposed by Charles and Lucy Kingston and accepted by the trustees. It is not necessary to attribute to Mrs. Kingston the knowledge which her husband had, as a matter of mere probability; for the actual knowledge is clearly brought home to her and her solicitor. The knowledge of the solicitor is to be treated as knowledge of the client (*Rolland v. Hart*[11]).

Now, secs. 186 and 187 of the *Real Property Act 1886* do not, in my opinion, protect Mrs. Kingston or her estate from the claim of the plaintiffs to get back "Marino" to the estate of Sir George Kingston. These sections provide for the protection of persons dealing with a registered proprietor. They protect persons to whom title moves from the registered proprietor; whereas secs. 69-72 protect the registered proprietor himself, statically. Sec. 186 provides that "no person contracting or dealing with, or taking or proposing to take a transfer or other instrument from the registered proprietor of any estate or interest in land, shall be required ... to inquire into ... the circumstances under ... which such registered proprietor ... was registered, ... nor be affected by notice direct or constructive of any trust or unregistered interest." It is enough to say that when Mrs. Kingston contracted with the trustees, 10th April 1899, the trustees were not "registered proprietors." The land was not brought under the *Real Property Act* at all, in the trustees' names or otherwise, until 6th June 1899—after the agreement was made. Mrs. Kingston, therefore, in contracting and dealing with the trustees by the agreement was not contracting or dealing with them as registered proprietors; for they were not then registered proprietors, and there was no "taking or proposing to take" the transfer apart from the agreement. Sec. 187 says that sec. 186 "shall not protect any person who has acted fraudulently or been a party to fraud, but the contracting, or dealing, or taking, or proposing to take a transfer ... with actual knowledge of any trust, charge, or unregistered instrument, shall not of itself be imputed as fraud." This section qualifies sec. 186; and, as sec. 186 does not apply to the case, sec. 187 does not; and if Mrs. Kingston or her representative is to succeed in holding this land, it must be by force of some other section.

But secs. 69-72 have also to be considered. Under sec. 69 the title of every registered proprietor is absolute and indefeasible, subject to certain qualifications. One is "in the case of fraud, in which case any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this Act: Provided that nothing included in this sub-section shall affect the title of a registered proprietor who has taken bona fide for valuable consideration, or any person bona fide claiming through or under him." It may be that this provision applies only to persons who take bona fide from the person who has been registered by fraud to which that person was a party; for otherwise the proviso seems to be unnecessary and unmeaning; and this view is strengthened by a consideration of "qualifications" II., III., VI., VII. But I shall assume, in favour of the defendants, that this view of sec. 69 is inadmissible. Sec. 71, however, excepts from the operation of sec. 69 the operation of the law as to trusts: "Nothing in the two preceding sections" (secs. 69 and 70) "contained shall be construed so as to affect any of the following rights or powers, that is to say, ... v. The rights of a cestui que trust where the registered proprietor is a trustee, whether the trust shall be express, implied, or constructive."

Now, Mrs. Kingston, acquiring for value "Marino," which was subject to a subsisting trust, became, according to equitable principles, a trustee of "Marino" for the purposes of the trust, because she had notice of the trust (*Saunders v. Dehew*[12], *Rolfe v. Gregory*[13] and other cases cited in *Halsbury's Laws of England*, vol. XXVIII., p. 88). This doctrine was one of three grounds on which the Judicial Committee decided *Loke Yew v. Port Swettenham Rubber Co.*[14]. There is nothing in secs. 69-72 to qualify this rule as to trusteeship. There seems to be some difference of opinion as to the propriety of calling the trust "express" or "constructive" which is imposed on the taker of the property (*Barnes v. Addy*[15]; *Soar v. Ashwell*[16]; *In re Dixon; Heynes v. Dixon*[17]); but sec. 71 covers both kinds. There is, however, a proviso to section 71: "Provided that no unregistered estate, interest, power, right, contract, or trust shall prevail against the title of a registered proprietor taking bona fide for valuable consideration, or of any person bona fide claiming through or under him"; and sec. 72 says "Knowledge of the existence of any unregistered estate, interest, contract, or trust shall not of itself be evidence of want of bona fides so as to affect the title of any registered proprietor." It is to be noticed that the word "fraud" is not here used. I rather infer from the difference in language between secs. 71 and 72, and secs. 186 and 187, that the Act did not mean to give to a registered proprietor who has taken under circumstances which would make him ordinarily a trustee the same impregnable position as is given by secs. 186-187 to persons contracting with a registered proprietor. The Legislature, probably, meant to draw some distinction between fraud to which the transferee from the registered proprietor is an active party, and want of bona fides, as where a person becomes registered proprietor through a dealing which *must*, to his knowledge, do wrong to an outsider. If the dealing is such that it *may* do such wrong, there is not necessarily want of bona fides; as the person who becomes registered proprietor may be entitled to assume that the party with whom he is dealing will do what is just to the outsider. I adhere to what I said in *Wicks v. Bennett*[18] on this subject, and as to the case of *Oertel v. Hordern*[19], under the New South Wales Act.

But I shall assume, again in favour of the defendants, that the want of bona fides referred to must amount to actual fraud. Sec. 72 merely says that knowledge of the existence of any trust shall not *of itself* be evidence of want of bona fides; but such knowledge combined with the nature of the transaction and other circumstances may amount to "want of bona fides," or to fraud. But, whatever may be the true effect of secs. 69-72, I find here actual fraud in the agreement—fraud to which Mrs. Kingston was an actual party. For my part, I am unable to call a transaction anything but fraudulent where, as in this case, trustees discharge claims made against them personally by transferring to the claimant a portion of the trust estate, or where (taking another aspect) the claimant—a beneficiary under the trust—induces the trustees to convey to her an asset of the trust, as well as to release her husband from his debt to the trust, in consideration of her releasing the trustees from claims which she made against the trustees in the interest of the estate. It has been urged that actual fraud must involve a malicious motive to injure some person, as distinguished from a mere motive to benefit oneself; and there are some dicta which seem to favour this view. I cannot accept it. A bank clerk is guilty of fraud if he take money from the till, intending to return it, and not intending to injure the bank. In *Rolfe v. Gregory*[20] G. borrowed money from B. and gave B. a promissory note for £600 with interest; B., by his will, gave the debt to S. for life and to her children afterwards, and made R. his trustee. R. became indebted to G.; and, in discharge of his debt, delivered the note to G., and got credit from G. for the principal and interest due on the note. It was held by Lord *Westbury* that this was fraud on the part of R. to which G. was a party, and that even lapse of time did not prevent S. and her children from recovering the £600 from G. (see also *M'Leod v. Drummond*[21]). As *Grant* M.R. said in *Hill v. Simpson*[22], "it is not just, that one man's property should be applied to the payment of another man's debt." In that case, bankers took a security from the executor over stock of the testator to secure the executor's own debt. There was no actual fraud on the part of the bankers, as they believed the executor to be entitled to the stock under the will; but the Master of the Rolls said it would be "direct fraud" if they knew that the stock belonged to the wife, not to the

executor. There is also much in favour of the view taken by *Stawell* C.J. of the similar exception of "fraud" in the Victorian Act: as the section "is to a great extent restrictive of the rights of persons at law and in equity it should, I think, be construed strictly, and the exception liberally; the word fraud there means fraud on the part of either party, and not necessarily of both." But to my mind, there is no need to balance the provisions of the Act so finely—the fraud here is so direct and obvious. A bona fide dealer for value with trustees as to land of the trust would surrender to the trust estate money or other valuable consideration as an equivalent for the land transferred to him; whereas here Mrs. Kingston, as part of the consideration which she gave for "Marino," releases claims which, if successful, would increase the trust estate—makes the trust estate pay for what the trustees transfer to her. It was actual fraud—dishonesty—on the part of the trustees to get rid of their personal liabilities to the estate, to close the mouth of the person impugning their conduct of the trust, by agreeing to transfer and transferring to that person part of the property of the estate; and that person participates in the fraud by concocting such an agreement and urging it on the trustees. There was more here than a mere knowledge on the part of Mrs. Kingston of the existence of some unregistered interest or trust behind the trustees, an interest or a trust which did not concern her; she was interested herself under the trust, and induced the trustees to give her an advantage which was unfair to the plaintiffs. The trustees and Mrs. Kingston are dead; and it is a relief to be able to say that there is no evidence of any deliberate motive to injure the infant children of Strickland. The motive of the parties was chiefly to get rid of their own burdens, but by means of what was in fact, as they knew, a fraud on the children. But, just as in the case of a fraudulent statement in an action for deceit, "if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made" (per Lord *Herschell* in *Derry v. Peek*[23]; and see per Lord *Cairns* in *Peek v. Gurney*[24]). The intentional misappropriation of property in which others were interested, for the mutual benefit of the trustees and the Kingstons, was a fraud—a fraud whether committed with full realization of the position in its naked delinquency or not, whether committed by persons of keen minds or of dull; and yet it has to be remembered that in this case all parties acted under the guidance of solicitors, and that Charles Kingston was himself a solicitor. *Crescit in orbe dolus*, and it may be impossible to give a final definition of the fraud; but this case comes within the words of *Romilly* M.R. in *Green v. Nixon*[25]: "Fraud is the same in all Courts, but such expressions as constructive fraud are ... inaccurate;" but "fraud ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to." The knowledge of Mrs. Kingston's solicitor, Mr. Stow, must be treated as Mrs. Kingston's knowledge, and it is not pretended that he did not know the rights of the various beneficiaries under Sir George Kingston's will and the effect of the agreement. Mr. Stow, the solicitor for Mrs. Kingston, was not called as a witness; nor was Mr. McLachlan, the solicitor for Kingston. If "Marino" had belonged beneficially to Hester alone, the fraud would be obvious; and the transaction is none the less a fraud because the interests are complicated.

That Kingston and his wife both realized the nature of the agreement is clear from the defence which he filed in the action for specific performance, and which she adopted. It is said that there can be no fraud on the part of a person who is not conscious of the fraud. But here such consciousness is proved to the hilt. As Charles Kingston said in his defence to the action for specific performance—a defence adopted by Mrs. Kingston—"the alleged agreement to sell" ("Marino") "provided for a release of the plaintiffs" (the trustees) "from such personal liability" (for waste and for misuse of the funds) "in consideration of trust property in the estate." The Charles Kingstons, therefore, saw fully the fraudulent character of the bargain which they got the trustees to make with them. It must be noticed that Mrs. Kingston's adoption of her husband's defence was not out of any regard for justice to the infants. Mrs. Kingston had learnt that the trustees personally had received more than she had received from the estate; and she said in her evidence that the proposed compromise (the agreement of 10th April 1899) was not fair to her, as it would mean that she would only receive £1,100 as her

share as against £2,000 received by each of the two other beneficiaries. It was on this ground that she refused to comply with the terms of the compromise. She submitted that she should not be forced to abide by an agreement when she was satisfied that the accounts placed before her were incorrect.

Perhaps I ought to say something as to the suggestion that the Kingstons' complaints against the trustees for waste and misappropriation of moneys were mere "bluff." There is not any evidence in support of the suggestion; but probably there could be no better evidence to the contrary than the trustees' own opinion of the complaints at the time. In the statement of their case for the opinion of their own counsel (June 1899), it is stated that Miss Kingston (Ludovina) and Miss Hester "have drawn upon the funds of the estate for their living expenses considerably more than has been paid in respect of the other shares, and are, of course, liable to account." Further—"the trustees desire to enforce this agreement and thereby avoid accounting and all questions which may be raised as to waste. ... As although Mr. Kingston alone is responsible for ... any waste that has occurred, that will be no answer to a suit by Mrs. Lucy Kingston and her husband." The details of the waste are set out graphically by Kingston in letters from him to the solicitors for the trustees, dated 7th January 1898 and 16th September 1898.

Whether the specific performance of the agreement ought to have been ordered or not is now irrelevant: there was no appeal, and all the parties to the judgment are bound by it conclusively. But the plaintiffs are not bound—they were not parties; and they are entitled to seek due execution of the trusts of the will.

It is urged that it is hard on Mrs. Kingston or her estate to be called on to give back property which she took under a judgment that she resisted (not in the infants' interest, but in her own). But the judgment was the consequence of the agreement which Mrs. Kingston signed; and she had herself to blame for proposing and signing an agreement, which was in fact a fraud on the infants. As the solicitor for the trustees said, Mrs. Kingston took the chance of getting a better price than the trustees put on "Marino." That chance has become a certainty, and the infants—not Mrs. Kingston—ought to reap the benefit.

In addition, there is sec. 249. This section, from its very terms, is an overriding section. It shows that whatever inferences might be drawn from the other sections of the Act, the jurisdiction of the Court continues "over equities generally," and that it is subsequent transferees, &c., only—transferees from Mrs. Kingston—that are protected, not Mrs. Kingston herself. I am not sure that sec. 249 is not a sufficient answer to the Public Trustee in itself; but the point is unnecessary to decide.

I ought to refer briefly to certain other grounds which have been suggested for upholding the agreement. (1) It is contended that the agreement may be treated as an appropriation of a specific asset—"Marino"—to the satisfaction of the money payable in respect of the share of Strickland. The principle as stated by *Buckley* J. in *In re Beverly; Watson v. Watson*[26] is that where the trustee is directed (as he is directed by Sir George Kingston's will) to sell or convert and to pay the beneficiary money, "it must be competent for him to agree with the beneficiary that he will sell the beneficiary the property against the money which otherwise he would have to pay to him; but it is not necessary to go through the form of first converting the property and then giving the beneficiary the money which the beneficiary may be desirous immediately to reinvest in the property which has just been sold." But, apart from other objections, there is not the slightest indication of any such agreement of the trustees with Mrs. Kingston to sell "Marino" to her. If there is a sale there must be a price in money: what was the price in money? What was the amount of money payable by the trustees in respect of the share of Strickland? What amount of that money was to be satisfied by the

transfer of "Marino"? What sums were to be set off? There is nothing in the agreement that binds Mrs. Kingston to treat any sum as being the value of "Marino," and as being satisfied by the transfer of "Marino." I may add that Mrs. Kingston was not the sole person interested in Strickland's share—she was merely mortgagee of the share, without even power of attorney to receive the share; and the beneficiaries interested subject to the mortgage did not agree to the appropriation. (2) Then it is said that if it was not an appropriation it was a compromise or family arrangement. But a compromise or family arrangement could not be binding on any who are not parties thereto—for instance, the children of Hester. (3) Sec. 21 of the *Trustee Act 1893* has been referred to as supporting the defendant's argument. But that section related to compromises as between the trust estate and debtors, &c., to the trust estate, or other such outsiders; it does not relate to compromises by which trustees personally get freed wholly or partially from liabilities to the trust estate for waste or misapplication of moneys—more particularly by getting rid of their personal liability at the expense of the estate.

For these reasons, my opinion is that the Public Trustee—Mrs. Kingston's administrator with her will annexed—should be ordered to retransfer "Marino" as well as Sec. 489A Noarlunga to the estate of Sir George Kingston; and that the appeal should be allowed.

Starke J.

Sir George Kingston died in 1880, leaving a will whereby he devised his freehold and leasehold estates, and bequeathed his personal estate to trustees to sell and convert, invest, and hold the aggregate fund upon certain trusts, and ultimately, at the period of distribution, specified in the will, to stand possessed of the aggregate fund and accumulations therefrom in trust for his child or children then living. Sir George left him surviving five children, all of whom were of age when he died, and were also alive at the period of distribution. The children were: (1) Ludovina Cameron, (2) Hester Holland, (3) Charlotte Julian, (4) Strickland Gough and (5) Charles Cameron. The daughters Ludovina and Hester were executors and trustees of this will, and so acted until 1893, when Hester died. Charlotte was appointed a trustee of the will in 1897, in the place of Hester. Ludovina died in 1908 and Charlotte in 1913. The defendant Kathleen Pittar Kingston is the sole surviving executrix of the will of Charlotte, and becomes in that capacity the legal personal representative of the estate of Sir George Kingston. The son Strickland Gough died intestate in 1897, leaving him surviving his widow Kathleen Pittar Kingston and two daughters, the plaintiffs, Kathleen Molly Stuart and Dorothy Kingston, of whom the former attained the age of twenty-one years in 1901, and the latter in 1902. In 1921 these two daughters obtained a grant of letters of administration to their father's estate. Strickland Gough had, however, in 1883, assigned to the Bank of South Australia by way of mortgage his one-fifth interest in his father's estate. And this interest, by various subsequent assignments, became vested in 1900 in the defendant Lucy Kingston, the wife of Sir George's son Charles Cameron. The son Strickland Gough was heavily in debt, and died, in truth, insolvent; and it was stated at the Bar by the learned counsel appearing for the plaintiffs in this action that the equity of redemption in his share, which devolved upon them as his administrators, was valueless. The daughter Hester, however, left a will and codicil whereby she devised and bequeathed the whole of her real and personal estate (which included the one-fifth share in her father's estate) upon trust for sale and conversion, and upon trust to pay the income to Ludovina for life and upon her death to Charlotte for life, and upon the death of Charlotte to hold the proceeds in trust for such of the nieces of Hester as were daughters of Strickland Gough, on attaining the age of twenty-one years. The life interests having fallen in, the plaintiffs are beneficiaries under this trust. The plaintiff Kathleen Molly Stuart also obtained, in 1919, a grant of administration *c.t.a.* of the goods left unadministered in the estate of Hester. Charles Cameron died in 1908, leaving his widow Lucy him surviving; but she died in 1919. The defendant the Public

Trustee is the legal personal representative of the estates of both Charles Cameron and Lucy Kingston.

Sir George at his death was possessed of several pieces of land in South Australia. This action, however, is concerned with transactions relating to three only of those pieces, namely that known as Grote Street and that known as "Marino," and an allotment described as Sec. 489A in the Hundred of Noarlunga. Grote Street had been the principal home of Sir George Kingston, and "Marino" was his seaside residence near Adelaide. In 1882 the trustees of Sir George sold the Grote Street property to Charles Cameron, and he was to pay £11,000 for it. Apparently he took, or perhaps was already in, possession of the property, but had neither the means nor the inclination to pay for it. Default was made, and the trustees hoped, I suppose, to have more control of the property if Charles Cameron became their tenant, so in 1888 an agreement for a lease was entered into. Charles Cameron, however, did but little. In 1889 he signed an indenture agreeing to give up possession of Grote Street, and empowering the trustees of Sir George to sell the property and credit him with the proceeds of sale against the purchase-money. By the same document he assigned his one-fifth share in his father's estate to secure the balance of purchase-money and interest thereon, then computed at £12,375. At the end of 1898 a considerable sum for rent was owing, and the purchase-money on Grote Street was still outstanding. Notice to quit was therefore given. Charles Cameron clung, nevertheless, to Grote Street, and he was not out of possession on 10th April 1899, on which date another agreement was made that is the central feature of this action. By this agreement Charles Cameron and his wife were to give up possession of Grote Street to the trustees, and he was released from all claims. On the other hand, the trustees were to transfer to the wife of Charles Cameron the property known as "Marino," and also Sec. 489A, on payment of £270, and the Kingstons were on their part to release the trustees from all claims. Still Charles Cameron and his wife remained in possession of Grote Street, and the trustees were compelled to consider the propriety of legal action. They consulted their advisers in 1899, with a view to enforcing the agreement of April of that year, and thus avoiding the necessity of taking accounts in Sir George's estate, and defending their administration of that estate. In truth, the trustees and their advisers, as I follow the facts of the case, feared attacks from Charles Cameron and his wife, not so much because of their personal liability but rather because of the delay that would be occasioned in obtaining and enforcing their rights in respect of Grote Street. Charles Cameron, in a letter dated 16th September 1898, detailed the character of certain waste he alleged against the trustees, but there is no direct evidence in the case to support these statements, and I should not be surprised if they were exaggerated.

In July of 1899 the trustees commenced their action against Charles Cameron and his wife, seeking specific performance of the agreement of April 1899, and possession of the Grote Street property, also other ancillary relief. The trustees were not mistaken as to the attitude of Charles Cameron. He immediately pleaded that the agreement of April 1899 was a breach of trust, which ought not to be enforced by the Court. In reliance upon this defence, he asserted that the trustees were guilty of waste and conversion of Sir George's estate, for which both were, or one of them was, responsible; and were seeking to enforce the agreement for the purpose of relieving themselves of their personal liability, and, further, that the trustees were unable to make title to "Marino" and the Section in the Hundred of Noarlunga without the consent of the daughters of Strickland Gough—the present plaintiffs. The trustees applied for an order under Order LXIX. of the *Rules of Court 1893*, for immediate relief on their statement of claim, but *Boucaut* J. ordered that it be referred to the Master to inquire whether the infant children of Strickland Gough were interested in the agreement for compromise sought to be thereby enforced, and, if so, whether they were benefited or prejudiced, and whether any and what other persons were necessary parties in respect of Hester's share in the estate of Sir George, and also whether in any event the interests of the infants required that possession of Grote Street should be given up by the defendants. I do not understand the object of

this order. It may have been for the purpose of aiding the Court to exercise what discretion it had in the action for specific performance. Quite rightly the infant children had not been made parties to such action, and no provision was made for their representation on the inquiry directed under the order of *Boucaut* J., nor was any person appointed to represent them on that inquiry. The inquiry was held, and the Master reported that the plaintiffs were, by virtue of the will of Hester, interested in the agreement sought to be enforced, that the infants were benefited by the agreement, that no parties were necessary in the action in respect of Hester's share in the estate, and that in any event the interest of the infants required that possession of Grote Street be given to the trustees. The action came again in October 1899 before *Boucaut* J. Charles Cameron, without withdrawing his defence, submitted to the judgment of the Court; which simply meant that he did not further argue the case. His wife, however, appeared in person and opposed a decree, mainly on the ground that the agreement of April 1899 was not fair to her. But ultimately a decree for specific performance of the agreement was made. An order was also made that Charles Cameron and his wife give up possession of Grote Street and release the trustees, and that Lucy, the wife, pay £270 to the trustees upon a transfer of "Marino" and of Sec. 489A in the Hundred of Noarlunga. Some time still went by, but ultimately the trustees got possession of Grote Street, and "Marino" was transferred to Lucy on 27th April 1900 and Sec. 489A was conveyed on 3rd May 1900.

The plaintiffs, twenty years having gone by, reopen, by the present litigation, this unfortunate family dispute. "Marino" and the Section in Noarlunga have greatly increased in value. Indeed, their counsel in the Court below suggested that the value was now some £40,000, as compared with about £5,200 at Sir George's death, and a valuation of about £1,900 at the time of the April agreement. A great advantage will thus enure to the plaintiffs if they can destroy that agreement, and the transfer and conveyance of "Marino" and the allotment, made pursuant to it. Consequently they assert that the whole arrangement was in breach of the trusts of the will of Sir George Kingston, and that "Marino" and the allotment at Noarlunga were in the hands of Lucy, the wife of Charles Cameron Kingston, inconsistently with those trusts. If this proposition be true, I apprehend that Lucy was, and her representative is, in the position of a trustee for the persons entitled under the trust, unless some countervailing circumstances can be established.

A contention made at the Bar was that the will of Sir George authorized the agreement of April. But that will devises the freehold and leasehold estates of the testator to the trustees "upon trust ... to sell my said estates or any part thereof together or in parcels by public auction or private contract." A sale predicates purchase-money, and in the present transaction this principal element of a sale is wholly wanting. Indeed, the document of April states on its face the real character of the transaction, namely, an agreement "in order to settle family disputes." Nor can the transaction be supported on the principle upon which the executors and trustees have power to appropriate assets towards satisfaction of a share in an estate (*In re Lepine; Dowsett v. Culver*[27]; *In re Beverly; Watson v. Watson*[28]; *Wigley v. Crozier*[29]). That power is "to sell the particular asset to the legatee, and to set off the purchase-money against the legacy." Nothing of the sort took place or was intended in the present case.

Some attempt was also made to show that Charles Cameron and his wife entered into the transaction and acquired the property for valuable consideration without notice that the acquisition was a breach of trust. So far as this argument is concerned, the facts make it clear enough that both Charles Cameron and his wife had knowledge of the contents of the will of Sir George and of the interests of the plaintiffs thereunder. It is sufficient in this connection to refer to exhibits G, H and R,[30] and to the proceedings before *Boucaut* J. and the Master in respect of the action to enforce specific performance of the April agreement. Therefore I pass by this suggestion, and come now to three further contentions which were relied upon in answer to the plaintiffs' claim.

The *first* was that the agreement of April could be supported as a family arrangement, notwithstanding the provisions of the will of Sir George Kingston. Perhaps it could, so far as the parties to it are concerned; but how does it bind the plaintiffs, who were infants at the time of its execution, and who were not parties to it and have given no assent to its terms? The argument is, in my opinion, untenable, and must be rejected.

The *second* was that a transfer taken pursuant to the decree made by the Supreme Court of South Australia on 8th October 1899 for specific performance of the agreement of April 1899 could not be challenged by the plaintiffs. Charles Cameron and Lucy were compelled, under this decree, to give up Grote Street, and Lucy was ordered to pay £270 in cash on transfer of possession of "Marino" and the Section in Noarlunga. No doubt the parties to the contract were the proper parties to the action for specific performance, and if the agreement had been authorized by the will of Sir George Kingston no question could arise. As it was not, then the question is whether Charles Cameron and his wife obtained a good title, and whether the beneficiaries are estopped from impeaching the agreement and insisting that the decree is not binding upon them. Unless a person is a party to a suit, or is properly represented in the suit, a decree in that suit does not bind him (*Templeton v. Leviathan Proprietary Ltd.*[31]). The plaintiffs were not parties to the suit, and the critical question is whether they were properly represented in it. It is not possible, in my opinion, to sustain the proposition that the trustees represent their beneficiaries in a suit in respect of a transaction wholly beyond their authority as trustees (*In re De Leeuw; Jakens v. Central Advance and Discount Corporation*[32]). Then, do the findings of the Master, upon which the decree for specific performance was based, affect that result? It will be remembered that the Master, pursuant to an order for inquiry made by the Court, reported that the agreement of April was for the benefit of the plaintiffs who were infants, and that no parties were necessary in that action in respect of their aunt Hester's share in the estate of Sir George Kingston. As already stated, I do not profess to understand this inquiry, but if it were intended as a method of obtaining the sanction of the Court to the agreement on behalf of the infants, then it wholly failed in effect, for the representation of these infants was wholly neglected. In point of fact, however, the Court did not sanction or purport to sanction the agreement on behalf of the infants, and, if it had, I take leave to doubt whether such an exercise of jurisdiction could have been sustained. Therefore the decree for specific performance does not stand in the way of the relief claimed by the plaintiffs in this action. It is perhaps a matter for regret that a transaction carried out under the decree of a Court of justice can be challenged after many years by persons who were not parties to the action nor bound by the decree, but it must be admitted that otherwise their interests might be destroyed.

The *third* contention was that Lucy the wife of Charles Cameron Kingston became registered as the proprietor of the lands comprising "Marino" under the provisions of the *Real Property Act 1886 of South Australia*, and thereby acquired an absolute and indefeasible title to the same. This argument has no application to Sec. 489A Noarlunga, for that piece of land is subject to the general law relating to property, and not to the provisions of the *Real Property Act*. But "Marino," which is of much the greater value, is under the Act. An application, so we are informed, was made in 1898 to bring the "Marino" land under the Act. At all events, a certificate of title covering the land was issued to Ludovina and Charlotte, the trustees of Sir George Kingston. on 6th June 1899. And by an instrument dated 27th April 1900, the trustees transferred the land to Lucy, the wife of Charles Cameron Kingston, pursuant to the decree, and she was registered as the proprietor of the land on 8th May 1900, and so remained until the time of her death. The title is now in the name of the Public Trustee as her personal representative. Now, sec. 69 of the *Real Property Act* enacts that the title of every registered proprietor of land shall, subject to interests notified on the certificate, be absolute and indefeasible, with certain qualifications. One of these qualifications is the case of fraud. This is a leading principle of the Acts based upon the Torrens system of registration, and though the South Australian Act differs in some respects from the Acts of other States and countries

based on the same system, still, as regards this principle, they all seem to be identical. Consequently there is a considerable body of authority to aid us in the construction of the Act of South Australia. It is no longer in doubt that the fraud which can invalidate a registered title under these Acts is *actual fraud* on the part of the person whose title is impeached. And actual fraud is "fraud in the ordinary popular acceptation of the term," *i.e.*, "dishonesty of some sort," "fraud carrying with it grave moral blame, and not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eye of a Court of law or a Court of equity" (*Assets Co. v. Mere Roihi*[33]; *Butler v. Fairclough*[34]; *Battison v. Hobson*[35]). It seems to me both wrong and unjust to attribute fraud, in this sense, to Charles Cameron Kingston and his wife in connection with the transfer to the wife of the property known as "Marino."

At the outset, it must be conceded that both Charles Cameron and Lucy had knowledge of the contents of Sir George's will, and of the interests of the plaintiffs under the trusts of that will. If they reasoned correctly, as apparently they did, then the material before them established the transaction as a breach of those trusts. But is this, in the peculiar circumstances of this case, actual fraud? The plaintiffs' right was to a one-fifth share in the aggregate fund arising from the conversion of the assets of Sir George's estate. I put on one side the share of their father (Strickland Gough), for that was mortgaged for its full value to Lucy, the wife of Charles Cameron. On the other hand, Lucy was entitled to a one-fifth share in the aggregate fund in respect of Strickland Gough's share assigned to her by way of mortgage. Charles Cameron also had a one-fifth share in his father's estate, but he in substance released it for the other beneficiaries in the estate, partly by the agreement of April 1899, and partly by the mortgage which he executed to the trustees to secure any loss sustained by reason of the fact that he had not carried out his contract for the purchase of Grote Street. Further, the more valuable asset, Grote Street, subject to a mortgage subsisting over the same, was made available for payment of the daughters' shares. And Ludovina and Hester during their lives had apparently received, on account of their shares, the sums of £1,328 and £822 respectively. Charlotte's share was settled, and the evidence does not, I think, enable us to say whether any sum has been paid on account of her share or not. The transaction of 8th April 1899 did not so deplete the assets of Sir George Kingston that the plaintiffs were necessarily shut out from any share in his estate. Indeed, the Master's report suggests that the transaction benefited the infants and that Grote Street was sufficient to provide for their shares, and the evidence adduced seems to sustain that conclusion. But add to these facts that the Supreme Court of South Australia forced the transaction upon Charles Cameron and his wife and compelled its execution, then any lingering doubt on the question whether fraud existed is, in my opinion, obliterated. I do not forget that the transaction was initiated by Charles Cameron and his wife. But we must look the facts in the face. Charles Cameron was compelled, and rightly compelled, to quit Grote Street, but he and his wife had an interest in the estate, and they needed a home. What, then, was more natural than a transaction which should at once give them their share in Sir George's estate and secure them a home, while at the same time freeing Grote street and other assets for the other beneficiaries? And this, as the evidence shows, was the real nature of the agreement of April 1899, contrary as it was to the rules of a Court of equity, and irregular as were the proceedings taken to enforce it in the Supreme Court of South Australia. There was no intention on the part of Charles Cameron and his wife to exclude the plaintiffs from their share in Sir George Kingston's estate, or to injure or destroy that interest, and no knowledge that the transaction would so exclude or injure them. It was a transaction far removed, in my opinion, from actual fraud. Conscious dishonesty and fraud were wholly absent.

But we must now consider the effect of sec. 71 of the *Real Property Act*, which provides that nothing in sec. 69 shall be construed so as to affect the rights of a cestui que trust where the registered proprietor is a trustee, whether the trust shall be express, implied or constructive. Lucy took "Marino," it is said, with knowledge of the trusts of the will of Sir George Kingston, and of the

interests of the plaintiffs in those trusts, and with the knowledge or the means of knowledge that the transaction under which she acquired the property was a breach of those trusts. She was, therefore, a trustee, express or constructive (*Soar v. Ashwell*[36]). The argument is but an application of the doctrines of the Court of Chancery as to notice, and ignores other provisions of the *Real Property Act* which considerably modify them. Thus sec. 186 provides that "no person ... taking ... a transfer ... from the registered proprietor of any estate ... in land shall ... be affected by notice direct or constructive of any trust ... any law or equity to the contrary notwithstanding." But sec. 187 enacts that this provision "shall not protect any person who has acted fraudulently or been a party to fraud, but the ... taking ... a transfer ... with actual knowledge of any trust ... shall not of itself be imputed as fraud." Again, in sec. 71 itself we find a proviso that "no unregistered ... interest, ... right, ... or trust shall prevail against the title of a registered proprietor taking bona fide for valuable consideration"; and in sec. 72 it is declared that knowledge of the existence of any unregistered estate or trust shall not of itself be evidence of want of bona fides. The equitable doctrine of notice, actual and constructive, is founded upon the view that the taking an estate after notice of a prior right is a species of fraud (*Le Neve v. Le Neve*[37]). Under the Act, taking property with actual or constructive notice of some trust is not of itself sufficient reason for imputing fraud. The imputation of fraud, therefore, based upon the application of the doctrines of the Court of Chancery as to notice, cannot any longer be sustained in the case of titles registered under the Act. "The difficulty lies," as Mr. *Hogg* points out (*Registration of Title to Land throughout the Empire*, p. 142), "in the demarcation of the line between knowledge or notice that is not to be treated as fraud, and notice that under particular circumstances must be treated as fraud." Cases must necessarily arise in which opinions will differ as to whether the conduct proved is or is not fraudulent. No definition of fraud can be attempted, so various are its forms and methods. But we may say this: that fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of a person who acquires it by dishonesty, by fraud (sec. 69), by acting fraudulently (sec. 187), or by being a "party to fraud" (sec. 187), in the plain ordinary and popular meaning of those words, is not protected by reason of registration under the Act. And to titles so acquired the equitable obligations imposed by the law of trusts are as applicable as formerly.

There remains for consideration the important case of *Loke Yew v. Port Swettenham Rubber Co.*[38]. That was a case of "deliberate fraud"[39], but the Judicial Committee stated that there was another ground upon which the defendant was entitled to succeed. By the *Specific Relief Enactment 1903 of the Federated Malay States* a "trustee" includes every person holding expressly, by implication, or constructively, a fiduciary character[40]. An illustration was given in the Act which read as follows: "A buys certain land with notice that B has already contracted to buy it. A is a trustee within the meaning of this enactment for B, of the land so bought." Upon which their Lordships observed[41]:—"The present is an even stronger case, inasmuch as the plaintiff company through Glass, their trustee and agent in the transaction, were aware that Haji Mohamed Eusope had actually granted away these lands and been paid for them. The plaintiff company, therefore, are trustees for the defendant for all the rights of which they thus had notice." Now the decision was pressed upon us as an authority for the position that in all cases in which a person took a registered title with notice of some prior unregistered right in another, then he was for the purposes of the *Real Property Act*, sec. 71, a trustee for that other person. But, in my opinion, that was not the point of view which their Lordships were considering. An order had been made by the Court of first instance that the company, on the footing of being trustees for Loke Yew, should execute and register in his favour a grant of certain land[42]. The argument was that the registered title was indefeasible, and that no such order could be supported. To this their Lordships gave three answers, each of which rendered the argument untenable: (1) There was fraud[43]; (2) there was power and duty in the Court to direct rectification—"A wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong"[44]; (3) there was evidence which established a fiduciary

position between the parties[45]. The fiduciary position was clear enough, for their Lordships held that Loke Yew had been deprived of his property by the deliberate fraud of the agent of the company. But their Lordships were not, I apprehend, attempting to define the knowledge or notice of prior rights that would impose upon a registered proprietor the obligations of a trustee, or mark it off from that which would not impose upon him any such obligation. Apparently there are no provisions as to notice in the *Registration of Titles Regulations* of the Federated Malay Straits corresponding with those in the South Australian Act (see *Law Quarterly Review*, vol. 31, p. 399), but it is quite unnecessary to consider whether that fact has any bearing upon the question here involved.

In an earlier portion of this opinion I assigned reasons for concluding that Charles Cameron Kingston and his wife were not guilty of fraud or dishonesty in acquiring a registered title to "Marino." It follows, in my view of the case, that Lucy, the wife, never became a trustee of that property for the plaintiffs or for the trustees of Sir George Kingston's estate. The action substantially fails.

But a decree must be made as to Sec. 489A Noarlunga, which is not protected by the provisions of the *Real Property Act*; and, to that extent, the appeal succeeds and the order below must be varied.

Appeal allowed. Judgment of the Supreme Court discharged. Declare that the agreement dated 10th April 1899 in the pleadings mentioned was a breach of trust and not binding on the plaintiffs. Declare that the Public Trustee holds the land described as Sec. 489A Hundred of Noarlunga on the trusts of the will of Sir George Kingston deceased. Declare that the Public Trustee holds the land described as "Marino" free from the trusts of the said will by virtue of the provisions of the *Real Property Act 1886*. Order the Public Trustee as administrator of the estate of Lucy May Kingston to convey Sec. 489A to defendant Kathleen Pittar Kingston as sole surviving executrix of the last surviving trustee of the will of Sir George Kingston. Declare that the trusts of the will of the late Sir George Kingston ought to be performed and carried into execution under the direction of the Supreme Court of South Australia and order accordingly. Remit the cause to the Supreme Court of South Australia to do what is right in accordance with this order, reserving to all parties liberty to apply to that Court for such orders, accounts and inquiries, and for such relief against any trustee of the estate of any deceased trustee of the will of Sir George Kingston, as they may be advised. No order as to costs of the action in the Supreme Court or of this appeal except that plaintiffs are to have their costs out of the estate of Sir George Kingston deceased.

Solicitor for the appellants, H. G. Alderman.

Solicitors for the respondents, Badger & Hicks; Isbister, Hayward, Magarey & Finlayson; Cleland, Holland & Teesdale Smith.

[1] [1776] EngR 16; (1776) 1 Leach, 146.

[2] (1901) 2 Ch., 213, at p. 260.

[3] [1863] EngR 204; (1862-63) 1 DeG. J. & S., 149, at p. 167.

[4] (1905) A.C., at pp. 211-212.

[5] [1917] HCA 9; (1917) 23 C.L.R., 78.

[6] [1921] HCA 57; (1921) 30 C.L.R., 80.

[7] (1876-77) 11 S.A.L.R., 102.

[8] (1872) 6 S.A.L.R., 75.

[9] (1909) P., 187, at p. 191.

[10] (1852) 9 Ha., App. xxxii.

[11] (1871) L.R. 6 Ch., 678.

[12] [1692] EngR 45; (1692) 2 Vern., 271.

[13] [1865] EngR 136; (1864-65) 4 DeG. J. & S., 576.

[14] (1913) A.C., 491, at p. 505.

[15] (1874) L.R. 9 Ch., 244.

[16] (1893) 2 Q.B., 390.

[17] (1900) 2 Ch., 561.

[18] (1921) 30 C.L.R., at pp. 94-95.

[19] (1902) 2 S.R. (N.S.W.) (Eq.), 37.

[20] [1865] EngR 136; (1864-65) 4 DeG. J. & S., 576.

[21] (1805-07) 14 Ves., 353; (1810) 17 Ves., 152.

[22] (1802) 7 Ves., 152, at p. 169.

[23] [1889] UKHL 1; (1889) 14 App. Cas., 337, at p. 374.

[24] (1873) L.R. 6 H.L., 377, at p. 409.

[25] [1857] EngR 394; (1857) 23 Beav., 530, at p. 535.

[26] (1901) 1 Ch., at p. 685.

[27] (1892) 1 Ch., at p. 219.

[28] (1901) 1 Ch., 681.

[29] (1909) 9 C.L.R., at p. 438.

[30] Indenture of mortgage dated 8th September 1883 — Strickland Gough Kingston to John Currie, manager of the Bank of South Australia; indenture of assignment dated 23rd March 1896 — Alfred Jabez Roberts to Nathaniel Alexander Knox; and indenture of mortgage dated 17th January 1889—Charles Cameron Kingston to trustees of the estate of Sir George Kingston.—Ed. C.L.R.

[31] [1921] HCA 55; (1921) 30 C.L.R., 34.

[32] (1922) 2 Ch., 540, at pp. 550-552.

[33] (1905) A.C., at p. 210.

[34] (1917) 23 C.L.R., at pp. 90, 97.

[35] (1896) 2 Ch., 403, at p. 412.

[36] (1893) 2 Q.B., 390.

[37] 2 Wh. & Tud. L.C. (7th ed.), 175.

[38] (1913) A.C., 491.

[39] (1913) A.C., at p. 503.

[40] (1913) 82 L.J. P.C., 89.

[41] (1913) A.C., at p. 505.

[42] (1913) A.C., at p. 495.

[43] (1913) A.C., at p. 504.

[44] (1913) A.C., at p. 504.

[45] (1913) A.C., at p. 505.
