administratrix must pay the costs of the appellants and of the infant defendants of this appeal.

Isaacs pointed out that a sum of £269 of the personal property of administratrix had been paid by her into the estate account, and had been with her consent included in a declaration, that it, with other moneys so paid, should be considered as belonging to the estate, and asked that this declaration might be varied so as to enable her to apply that sum in payment of the costs ordered to be paid by her.

Vasey for the infant respondents.

Per curiam. The judgment will be also varied by excepting the sum of £269 from the declaration.

Appeal allowed with costs. Judgment of à Beckett J. restored with certain variations.

Solicitors, for appellants, *Crawford, Ussher & Thompson*, Melbourne.

Solicitors, for respondent Kate Black, *Lamrock, Brown & Hall*, Melbourne.

Solicitor, for infant respondents, *Eales*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

GEORGE ALEXANDER DARBYSHIRE AND OTHERS . . . . . } APPELLANTS;

PLAINTIFFS,

AND

ELIZABETH WHITE DARBYSHIRE AND OTHERS . . . . . } RESPONDENTS.

DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *August* 18, 21, 22, 28.

Griffith C.J., Barton and O'Connor JJ.

Registration of Deeds—6 Geo. IV. No. 22 (N.S.W.), secs. 1, 4 [Real Property Act 1890 (Victoria) (No. 1136), sec. 4]—Memorial—Signature by party before all particulars inserted in memorial—Validity of registration—Sufficiency of

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particulars—Verification of memorial—"Competent person," who is—Effect of registration—Priority of equitable over legal title.

At the time when a memorial of a deed intended to be registered pursuant to 6 Geo. IV. No. 22 (N.S.W.), was signed, as required by that Act, by one of the parties to the deed, the day and the month of the execution of the deed and the name of the attesting witness had not been written upon the parchment, but were inserted after the signature was affixed and before registration.

Held, that the memorial was signed by a party to the deed within the meaning of sec. 4 of that Statute, and that to that extent the registration was valid.

Decision of the Supreme Court of Victoria (*Hood J.*) (*Darbyshire* v. *Darbyshire*, [1905] V.L.R., 239 ; 26 A.L.T., 128), reversed.

By *Griffith* C.J.—It is sufficient that the memorial, when delivered to the Registrar, contains the particulars required by sec. 4 of 6 Geo. IV. No. 22, and bears the signature of one of the parties to the deed.

By *Barton* J.—If the memorial when signed by a party to the deed contained such particulars as would identify the memorial with the deed, and the other particulars required by sec. 4 of 6 Geo. IV. No. 22 were inserted afterwards and before the memorial was delivered to the Registrar, the memorial is a good one.

By *O'Connor* J.—If the memorial was signed by a party to the deed when it was substantially a memorial of that deed, the other particulars being afterwards inserted, the memorial is a good one.

The description of an instrument as an "agreement for a marriage settlement" is a sufficient statement of the nature of the instrument within sec. 4 of 6 Geo. IV. No. 22, and it is not necessary to set out the limitations of the intended trusts.

The "competent person" by whom the memorial is, by sec. 4 of 6 Geo. IV. No. 22, required to be verified, is a person who is able to swear that the particulars set out in the memorial agree with those appearing in the instrument of which it is a memorial, and not necessarily a person able to swear to the truth of those particulars.

The priority given by sec. 1 of 6 Geo. IV. No. 22 to instruments registered under that Act, applies to equitable as well as to legal titles.

Held, therefore, that the registration of an instrument conferring an equitable estate in land gave priority to the person entitled to that estate over a subsequent purchaser of the legal estate for value without notice.

Wharton v. *Greville*, 1 V.L.T., 76; and *Mill* v. *Hill*, 3 H.L.C., 828, followed.

APPEAL from the Supreme Court (*Hood* J.)

An action was brought in the Supreme Court of Victoria by George Alexander Darbyshire and the eleven other children of John Darbyshire, deceased, and of his wife, Elizabeth White Darbyshire, against the said Elizabeth White Darbyshire, The National Trustees, Executors and Agency Co. of Australasia, Limited, executor of John George Dougharty, deceased, and Thomas Byrne, the Registrar of Titles. By the statement of claim the following allegations were made:—That on 10th March, 1862, John Darbyshire, who was then the owner in fee simple of certain lands, by indenture between himself and the defendant Elizabeth White Darbyshire (then Irwin), in consideration of the intended marriage between them, agreed to settle certain lands, including the land in question, upon Elizabeth White Darbyshire for life, and after her death, on the children of the then intended marriage, and their heirs, in equal shares as tenants in common: That such marriage was celebrated on 12th March, 1862: That on 2nd December, 1863, the indenture above referred to was duly entered and registered in the office of the Registrar of the Supreme Court of the Colony of Victoria: That John Darbyshire on 29th January, 1870, without the knowledge or consent of his wife, mortgaged the land in question to Alfred Evans: That John Darbyshire died on 19th June, 1880: That Alfred Evans, on 2nd February, 1883, under the powers contained in the mortgage, sold the land in question to John George Dougharty, who died on 14th November, 1889, and of whose estate the defendant company became representatives. The plaintiffs claimed (*inter alia*) specific performance of the agreement for a marriage settlement, and a declaration that the plaintiffs were entitled to an estate in fee-simple reversionary on the death of Elizabeth White Darbyshire.

One of the defences of the defendant company was a denial that the indenture of 10th March, 1862, was duly registered.

At the trial before *Hood J.*, evidence was given by Alfred Ford, a notary, who was in 1862 a law clerk and who had verified upon oath the memorial of the indenture, that, when he received the memorial, it was signed by John Darbyshire, but that the day and the month of the execution of the indenture and the name of the witness thereto were then omitted, and that he (Ford) himself

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inserted those particulars in the memorial, and, having verified the memorial, delivered it for registration to the Acting-Registrar of the Supreme Court. In this memorial the indenture was described in the column headed "nature of instrument," as an "agreement for a marriage settlement."

Counsel for the plaintiffs then tendered the memorial in evidence, but counsel for the defendant company contended that the memorial was not admissible in evidence, or, if admissible, that the registration was invalid.

Hood J. held that there was no proper registration of the indenture, and, as the plaintiff was unable to proceed further in face of this decision, he gave judgment for the defendant company with costs: *Darbyshire* v. *Darbyshire* (1).

From this judgment the plaintiffs now appealed to the High Court.

Isaacs A.G. (with him *Sanderson*), for the appellants. The requirement of 6 Geo. IV. No. 22, sec. 4, that one of the parties to the instrument to be registered shall sign the memorial, is satisfied if everything substantial was in the memorial when the signature of one of the parties is placed upon it. Here everything material was in the memorial when it was signed, viz., the nature of the deed, the names of the parties to it, and the land concerned. The date of the deed and the names of the witnesses were not material. The section, when it says that one of the parties shall sign the memorial, means that he shall put his signature upon it. The inference is that he authorized the insertion of those things which were omitted from the memorial when he signed it. A deed is good although it is not in a complete form when it is signed. When the memorial was delivered to the Registrar it was absolutely perfect, and, if the Act is read literally, it was complied with.

[GRIFFITH C.J.—Unless this is a good registration the Act would be a mere trap. Priority of registration would always be open to be impeached by extrinsic evidence. Does not the maxim *omnia præsumuntur rite esse acta* apply ?]

As to the validity of the registration, see *Blackwood* v. *London Chartered Bank of Australia* (2).

(1) (1905) V.L.R., 239; 26 A.L.T., 128. (2) 9 N.S.W.R. (Eq.), 101.

The Act 5 Vict. No. 21, provides for an agent signing in place of one of the parties. That shows that all that was wanted was the signature of a responsible person.

The party who signs, having seen that all the material things are inserted, can authorize another person to put in the rest. As to 5 Vict. No. 17, see *In re Close, ex parte The New Zealand Loan & Mercantile Agency Co. Ltd.* (1). It has been the general practice of solicitors to carry out registrations as this was done, and the Court will regard that practice: *Hardcastle on Statutes*, 3rd ed., p. 95. An interpretation reversing that long practice would be unreasonable.

[GRIFFITH C.J.—The principle that the Act should be interpreted *ut res magis valeat quam pereat* seems applicable here.]

Cussen and *Lewis*, for the respondent company. The principles referring to unreasonableness have no application, for the Statute is clear, and the Court should carry it into effect regardless of the practice and of the consequences. The terms of the Proclamation of 1817 show the necessity of identifying the party causing the document to be registered. Under the Proclamation he had to come himself to be identified. That was because the legislature thought it important that the matters connected with registration should not be done by agents. When they wish to provide for agency they do so specifically. See sec. 12 of 5 Vict. No. 21. In addition to the presence of one of the parties, one of the attesting witnesses was required to verify the memorial. These provisions of the Proclamation having become very burdensome, the Statute 6 Geo. IV. No. 22 was passed, by which, instead of the presence of one of the parties being required, one of the parties was required to sign a memorial of the instrument containing certain particulars. Those particulars cannot be divided into those which in the opinion of the Court are important, and those which are unimportant. All are placed in one group by the legislature. If one particular can be omitted at the time of signature, all can be omitted and filled in after signature. The date of the deed, which is one of those particulars, may be a very important matter. The memorial is not the piece of paper, but it is the particulars

(1) [1901] 1 S.R. (N.S.W.) (B. & P.), 7, at p. 10.

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set out on the piece of paper. A person does not sign the memorial by signing one portion of it. It is a necessary consequence of the argument for the appellants that none of the particulars need be inserted at the time one of the parties signs, and that the whole document may be written after that signature. The practice has not been to fill in some of the particulars after signature, and there is no evidence of such a practice.

[GRIFFITH C.J.—Why should the memorial of a deed stand on a different footing from the deed itself? The deed would not be invalidated by the omission or subsequent insertion of the date.]

The Act of Parliament puts the memorial on a higher footing. By sec. 12 of 5 Vict. No. 21, an agent cannot fill in the memorial without getting the permission of a Judge. Could it be contended that one of the parties could sign his name on a blank piece of paper and send it to a friend asking him to write the memorial on it? That is a necessary consequence of the contention for the appellants. The late *Sir Robert Molesworth* in his work on *The Registration Law of Ireland*, at p. 6, refers with approval to the case of *Lessee of Sullivan* v. *Walsh* (1), where it was held that a registration was avoided by the omission of the day of the date from the memorial. If the signature is not to be put to the completed document, there is no reason why the party should be required to sign at all. His signature would be useless. As to the necessity of personal signature, see *Hyde* v. *Johnson* (2); *Williams* v. *Mason* (3); *R.* v. *Justices of Kent* (4). A signature before all the particulars are filled in is equivalent to a signature by an agent. See also *Swift* v. *Jewsbury* (5); *Toms* v. *Cuming* (6). The signature is to authenticate the particulars set out in the memorial: *Sutton* v. *Wade* (7). Under the *Wills Act*, if an alteration is made after signature, there must be a new signature. The contention for the respondents is that the memorial containing the particulars must be signed by one of the parties, while that for the appellants is that a memorial containing the signature of one of the parties and the particulars is to be registered. The first view does no violence to the language of the Statute, the

(1) Jones, 264.
(2) 2 Bing. N.C., 776.
(3) 28 L.T. N.S., 232.
(4) L.R. 8 Q.B., 305.
(5) L.R. 9 Q.B., 301.
(6) 7 Man. & G., 88.
(7) (1891) 1 Q.B., 269.

second view does violence to that language. The legislature requires one of the parties to authenticate the facts by his signature, and he does not authenticate the facts by putting his signature on a piece of paper.

[*Isaacs* referred to *Ex parte Lancaster* (1).]

That case illustrates the difference between the two views. This memorial does not set out "the nature of the instrument," as required by 6 Geo. IV. No. 22, sec. 4. According to the statement of claim the instrument was an agreement in consideration of marriage to settle certain land on the intended wife for life, and after her death for her children. Such an instrument is not sufficiently described by the words "agreement for a marriage settlement." Those words give no indication of the extent to which the land is affected. The legislature intended that the limitations should be set out. An abstract of the operative words would be sufficient. See *Stephen* v. *Roberts* (2); *Healy* v. *Thames Valley Railway Co.* (3). By the recital to sec. 13 of 7 Vict. No. 16, it is stated that "the limitations contained in deeds and conveyances" were set out imperfectly, and it was therefore provided that a copy of the instrument should be filed. This shows that the legislature thought that, under 6 Geo. IV. No. 22, the limitations of instruments should be set out. Ford, who verified the memorial, was not a "competent person" within the meaning of sec. 4 of 6 Geo. IV. No. 22. He must be a person able to swear to the truth of the several particulars required to be set out in the memorial. It is not sufficient that he should merely be able to extract those particulars from the instrument to be registered. The priority conferred by 6 Geo. IV. No. 22, is in respect of a similar estate or interest. The indenture in question here conferred only an equitable estate, and it has no priority in respect of the legal estate which the defendant Company has. The English *Registration Act* (2 & 3 Anne c. 4), does not give priority to equitable estates, but the Irish Act (6 Anne c. 2) (Ireland) does. The Act 6 Geo. IV. No. 22, is more like the Irish Act than the English Act, but the important words "both in law and equity" which occur in sec. 4 of the Irish Act are omitted from 6 Geo. IV. No. 22. As to the

(1) 5 Ch. D., 911.
(2) 11 N.S.W. L.R. (Eq.), 127, at p. 131.
(3) 34 L.J. Q.B., 52; 5 B. & S., 769.

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construction of the Irish Act see *Bushell* v. *Bushell* (1); *Drew* v. *Lord Norbury* (2); *Mill* v. *Hill* (3); *Molesworth's Registration Law of Ireland*, p. 73; *Robbins on Mortgages*, vol. II., p. 1252; *Coote on Mortgages*, 7th ed., pp. 1264, 1271.

[*Isaacs* referred to *Wharton* v. *Greville* (4).]

That case appears not to be distinguishable on this point, but was wrongly decided. The Proclamation recites that it is desirable to introduce the English provisions as to registration.

[They also referred to *Broom's Legal Maxims*, 7th ed., p. 422; *Goddard's Case* (5); *Sharpe* v. *Birch* (6); *Real Property Act* 1890, (Vict.) sec. 201.]

Isaacs in reply. The statement of the "nature of the instrument" is sufficient. The object is to put persons on inquiry. If the legislature had, when passing 7 Vict. No. 16, sec. 13, thought that previous registrations had been invalid they would have validated those registrations. *Wharton* v. *Greville* (4) is a correct decision, and this Court is bound to follow it.

[GRIFFITH C.J.—*Doe d. Peacock* v. *King* (7), and *Terry* v. *Osborne* (8), are to a like effect.]

He also referred to *Battison* v. *Hobson* (9); *Sumpter* v. *Cooper* (10); *The Encyclopædia of the laws of England*, vol. XI., p. 504.

Cur. adv. vult.

August 28.

GRIFFITH C.J. This is an action for specific performance of an agreement for a marriage settlement made on 10th March, 1862, and registered in the following year. The plaintiffs are persons claiming to be entitled under that settlement, and the defendants are the owners in fee of the land alleged to be affected by the settlement. The defendants claim under a conveyance which was subsequent in date to, and was registered subsequently to, the deed under which the plaintiffs claim. The plaintiffs' title, if any, is equitable, that of the defendants is legal. In order to establish

(1) 1 Sch.. & Lef., 90, at p. 101.
(2) 9 Ir Eq. Rep., 171.
(3) 3 H.L.C., 828, at p. 853.
(4) 1 V.L.T., 76.
(5) 2 Rep., 4b.
(6) 8 Q.B.D., 111.
(7) 2 Legge, 829.
(8) 1 Legge, 806.
(9) (1896) 2 Ch., 403.
(10) 2 B. & Ad., 223.

the plaintiffs' claim they endeavoured to prove the registration of the agreement under which they claim, and for that purpose they tendered in evidence the memorial which was registered under the Statute 6 Geo. IV. No. 22, and called the witness by whom it was verified. It appeared in the course of his evidence that the memorial, when signed by one of the parties to the instrument —the grantor—had not upon it the date of the deed or the name of the attesting witness. It was objected that the memorial was not in conformity with the Statute, and that therefore the registration was bad. *Hood* J. was of that opinion. Of course that was fatal to the plaintiffs' case, and judgment was entered for the defendants. In the reasons for the learned Judge's decision furnished to us he says:—"I decide that the memorial does not comply with the Statute, and as the plaintiffs in the face of that decision cannot establish priority, I enter judgment for the defendant the National Trustees Co., with costs." It is necessary therefore to refer to the Statute under which the question arises, which is, as I have said, 6 Geo. IV. No. 22, passed in 1825.

In 1817 a Proclamation had been issued by the Governor of New South Wales, which I suppose had the force of law, by which provision was made for the registration of deeds. It recited the danger of secret conveyances of land and the possibility of frauds, and that it is desirable that "all conveyances, deeds, mortgages, and all other instruments with regard to, or touching the transfer and conveyance of freehold property within this territory, should be more formally and properly than heretofore, according to and in due course of law, drawn, executed, and registered." It then provided that all deeds and conveyances might be registered, and that if they were not registered, they should be deemed to be fraudulent as against any subsequent purchaser or mortgagee for valuable consideration under a deed or conveyance which was registered. The Act only applied to deeds and conveyances, and the mode of registration was this:—The deed was to be brought by one of the parties to it to the office of the Judge Advocate in Sydney, the party to be identified and verified as such on oath,—before the Judge Advocate I suppose—and one at least of the witnesses to the execution of the deed was upon oath to prove before the Judge Advocate the execution of the deed. The Judge Advo-

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cate himself was then to enter in the register book a memorial in respect of the deed, which memorial was to contain the day of the month, and the year when the deed or conveyance bore date, and the names and additions of the parties and of the witnesses, and the places of their abode, and a description of the land, &c. given, granted, or conveyed, or any way affected or charged, and a memorandum as to the registration was to be written on the back of the deed. It will be observed that one of the parties to the deed had to produce the deed himself, and had to be identified on oath, and one of the witnesses had to verify on oath the execution of the deed, and the Judge Advocate himself made the entry in the register. The Act of 1825 established a different system. It extended the provisions for registration to other instruments besides deeds and conveyances. Sec. 1 provided that from and after the passing of the Act all deeds conveyances and other instruments in writing (except leases for less than three years) relating to, or in any way affecting any lands, tenements, or other hereditaments in New South Wales might be registered in the manner therein directed; and that all such deeds, conveyances and other instruments in writing made and executed *bonâ fide* and for valuable consideration and registered in conformity with the provisions of the Proclamation of 1817 or of the Act, should have and be allowed priority over every other deed, conveyance, or other instrument in writing:— "That is to say, the deed, conveyance, or other instrument in writing, first registered in the office of the Judge Advocate (if the same shall have been registered under the said Proclamation), or first registered in the office of the Supreme Court (if the same shall be registered in conformity with this Act or ordinance), shall have priority in respect of all land, tenements, or other hereditaments, conveyed or affected by such deed, conveyance, or other instrument in writing over every other deed, conveyance, or other instrument in writing whatsoever and howsoever conveying, charging, or affecting the same lands, tenements, or other hereditaments; and the deed, conveyance, or other instrument in writing, next registered as aforesaid, *mutatis mutandis*, shall have priority over every other deed, conveyance, or instrument in writing as aforesaid, and so on according to the priority of the time of registering such deed, conveyance, or instrument in writing as aforesaid." The mode of

registration was provided by sec. 4, as follows:—"The registration of all deeds, conveyances, and other instruments in writing, of or relating to any lands, tenements or hereditaments in New South Wales, shall be made in the following manner; that is to say, a memorial shall be written on parchment or paper, setting forth the date of such deed, or other instrument, intended to be registered, and the nature thereof; the names of all the parties, and all the witnesses thereto; the lands, tenements, or hereditaments intended to be conveyed; the pecuniary, or other consideration paid, in the form, or to the effect, mentioned in the schedule hereto annexed, marked A, or with such alterations therein as the nature and circumstance of any particular case may require; and the said memorial shall be signed by some or one of the parties to the original deed or instrument and shall be delivered into the office of the Supreme Court of New South Wales, and verified upon the oath of some competent person, that such memorial contains a just and true account of the several particulars therein set forth," &c.

Changes made by this Act were considerable. It was no longer required that one of the parties should attend in person before the Judge Advocate and be identified. For that attendance was substituted the signature of one of the parties to the memorial, and, instead of the entry of the memorial being made by the Judge Advocate himself from the original instrument, the particulars of the instrument were required to be written and verified by the oath of some competent person. On that it is contended on behalf of the respondents—and the argument seems to have satisfied the learned Judge below—that all the particulars required by sec. 4 of the Act to be set out in the memorial must be written on the parchment before the party put his name to it. That depends upon the proper construction of the section. The argument is based principally upon the words "the said memorial" in the phrase "the said memorial shall be signed." Having regard to the previous law, the apparent object of the change, the construction of the sentence, and what we know of the form of legislation in those days, I am of opinion that the words "the said memorial" mean the memorial required to be registered—that is what the legislature was speaking of—and that the words "the said memorial shall be signed"

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mean that the document which is taken to the Registrar shall bear the signature of one of the parties. I think that, if it can be predicated of the memorial when it is taken to the Registrar that it contains the particulars required by sec. 4, and that it bears the signature of one of the parties, then the memorial is good within the provisions of the Act and is complete, and that the fact that the date and the name of the attesting witness were not filled in when it was signed by the party is immaterial. But it is not necessary to go as far as that, because, if it is necessary that the memorial shall contain any of the particulars set out in sec. 4 before it is signed by the party, the obligation can be no more imperative than in the case of a deed. The date of a deed is not a material part of the deed, and the name of the attesting witness is of course no part of a deed, for it cannot be there before the deed is executed. In my judgment, if what is written after the signature is attached is no more than what might be written in or on a deed after it is executed without invalidating it, then no objection can be taken to the memorial on that ground, and the registration is, so far, good. I think that any other construction would, as I said during argument, be setting a trap for persons trusting to the register. The registration of any deed might be upset by proving many years afterwards by evidence more or less reliable that some quite unimportant blank, which was in the memorial when it was signed, was filled up afterwards. That is I think inconsistent with the object of the legislature, which was to keep a record of deeds and other instruments. I am of opinion that this objection cannot prevail.

The next objection taken was that the memorial did not set out the nature of the instrument. The only way in which the instrument is described is as an "agreement for a marriage settlement." I have pointed out that the Proclamation only made provision for the registration of deeds and conveyances, while the Act 6 Geo. IV. No. 22 allowed the registration of all sorts of instruments. By the Act 5 Vict. No. 21, that provision was made more distinct. This later Act made no change in the mode of preparing memorials, and did not repeal sec. 1 of 6 Geo. IV. No. 22, but it added another provision in sec. 11, that "all deeds and other instruments affecting any lands or hereditaments in New South

Wales, or its dependencies, which shall be executed or made after the passing of this Act, and which shall be duly registered under the provisions of this Act, shall have and take priority, not according to their respective dates, but according to the priority of registration thereof only"—which is very much the same as the prior Act. By section 14 it was expressly provided that "the term instrument hereinbefore used, shall, for the several purposes of this Act, be construed to include not only conveyances and other deeds, but also all instruments in writing whatsoever, whereby real estate shall be affected, or shall be intended so to be." Reliance was placed for the respondents upon sec. 13 of 7 Vict. No. 16, which did not extend to the district of Port Phillip, as containing an expression of the opinion of the legislature as to what the memorial ought to contain. That section recited that "Whereas, from the imperfect manner in which the limitations contained in deeds and conveyances, relating to real estates, are generally set forth and described, in the memorials or extracts of the same, as heretofore filed, it is expedient that full copies . . . should be registered and filed . . . instead of the memorials or extracts heretofore required," and then went on to provide that, in future, in New South Wales such full copies should be registered. I do not think that that provision indicates that a memorial registered under the Act of 1825 should set forth the limitations contained in the deed. Indeed, setting out such limitations seems to be quite inconsistent with the form of the Schedule to the Act of 1825, which merely required the "nature of the instrument" to be stated in the memorial. All kinds of instruments might be registered except leases for less than three years. In my opinion, the nature of the instrument was sufficiently stated by the words "agreement for a marriage settlement."

The next objection taken was that the person who verified the memorial was not a "competent person." It is suggested that he should be a person who could verify the execution of the instrument. The answer is that the Statute does not say so. It says that the memorial is to be "verified upon the oath of some competent person that such memorial contains a just and true account of the several particulars therein set forth." In this case the memorial was verified by a person who swears in those terms,

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i.e., that the memorial contains a just and true account of the several particulars therein set forth. It is in the form in the schedule. In my opinion there is nothing to indicate that the competent person should be a person able to swear to the execution of the original instrument. In my judgment, therefore, all these objections fail, and the memorial should have been received in evidence as sufficient evidence of the registration of the deed, and the plaintiffs' case should have gone on, if that was all.

But another objection was taken before us, viz., that in any event the appellants cannot succeed because their title is equitable only, and that of the respondents is legal. They have the legal estate as appears by the statement of claim, which does not allege that they were not purchasers for value without notice, nor is it suggested that any such case could be made by the appellants. Although it is very inconvenient that a Court of final appeal should decide a point of law as a Court of first instance, yet it may be necessary to do so if on the face of the proceedings it appears that one of the parties is entitled to judgment in any event, and the Judicial Committee has always assumed that jurisdiction. If the objection is a good one—that a person who has acquired a legal estate for valuable consideration without notice of a previous equitable title, is not affected by the previous registration of that equitable title, and that the Act does not give priority to such equitable title—then the appellants cannot succeed if the action goes on. Both parties desire that we should express our opinion on this point, and I will now give mine. The question turns upon the provision I have already read in sec. 1 of 6 Geo. IV. No. 22, that is:—"the deed, conveyance, or other instrument in writing first registered . . . . shall have priority . . . over every other deed, conveyance, or other instrument in writing whatsoever and howsoever conveying, charging, or affecting the same lands, tenements, or other hereditaments." The view suggested by Mr. Cussen is that full effect could be given to those words by holding that the date of the registration of a deed was for the purpose of priority to be taken as the date of the deed, so that in this case there would be an agreement by way of marriage settlement, which conferred equitable rights, followed by a conveyance by the same person for valuable consideration

without notice, which would give the legal estate, and that in that case the legal estate would prevail over the equitable. If the matter were *res integra*, there would, no doubt, be a good deal to be said in favour of that view. But the Act of 1825 was in substance founded upon the Irish *Registration Act*, (6 Anne c. 2), while the Proclamation was founded upon the English *Registration Act*, (2 & 3 Anne c. 4). The Act of 1825 followed 8 Anne c. 2, except for the omission of the words "both in law and equity," but the omission of those words cannot, so far as I can see, make any difference as to the interpretation of the section. The interpretation of the Irish Act was settled by the decision of Lord *Redesdale* L.C., in 1803 in the case of *Bushell* v. *Bushell* (1):— "On the whole of this case, therefore, I have no sort of doubt of the true construction of this Act. The instrument registered must prevail against a subsequently registered instrument, by force of the clause in the 4th section, that being an instrument which affects lands, it shall be good not only at Law but in Equity, according to the priority of registry. This is not at all grounded on the next section of the Act, which avoids unregistered conveyances: that is a provision of a totally different description. The meaning of the former clause, I take it, is to give full effect by force of the registry even to articles, if registered, against a legal conveyance: so that the Act has given to contracts registered a force and effect with respect to lands themselves, which they have not in England, there being no such clause in the English registry Act; this I take to be the true meaning of the Act." That case was followed in Ireland in several cases, and finally the question came for decision in the House of Lords in *Mill* v. *Hill* (2). Lord *St. Leonards*, who was then Lord Chancellor, had himself as Lord Chancellor of Ireland in *Drew* v. *Lord Norbury* (3), followed the opinion of Lord *Redesdale*, and the House of Lords affirmed the view then taken. As I have said, I do not think that the omission of the words "both in law and equity" makes any difference, but if I did, I think that the matter is not open for argument in Victoria, because in *Wharton* v. *Greville* (4), nearly fifty years ago, the Supreme Court of Victoria put a construction upon 6 Geo. IV. No.

(1) 1 Sch. & Lef., 90, at p. 102.
(2) 3 H.L.C., 828.
(3) 9 Ir. Eq. Rep., 171.
(4) 1 V.L.T., 76.

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22 exactly in conformity with that put upon the Irish *Registration Act* in *Bushell* v. *Bushell* (1). The Court consisted of *Sir William à Beckett* C.J., and *Barry* and *Williams* JJ. That case is admittedly undistinguishable from the present. It was a proceeding, not in the form of a bill in equity, but by a rule *nisi* asking for the specific performance of an agreement for the sale of certain land. The complainants' title was a registered agreement for the sale of the land to the respondent Greville, and another of the respondents, Lang, was a purchaser without notice of the agreement, and the conveyance to him was not registered until after the registration of the complainants' agreement. The Court construed sec. 4 of 6 Geo. IV. c. 22, and came to the conclusion that the same construction must be put upon it as Lord *Redesdale* had put upon the Irish Act. It was a very carefully considered judgment, and after quoting the section, *Sir William à Beckett* C.J. said (2): "We cannot, in the face of words so comprehensive and so explicit, recognise such a refinement as that suggested, and without laying any stress on notice, or want of notice to Lang, or on the obligation to search the registry, or on the advantages or disadvantages of considering registration as constructive notice, or the different modes in which the question has been settled in England, Ireland, and in America—(*vide Story, Equity Jurisprudence*, vol. I., p. 323)—we may safely determine that the instrument first registered, that is the agreement which the complainants seek to enforce, must prevail *pro tanto* against the subsequently registered deed." That case settled the construction of that section in Victoria, and has been the law of Victoria unchallenged now for nearly fifty years; and, even if I thought it was not a good decision—which I am very far from thinking—this Court, administering the law of Victoria, is bound to follow it. The Supreme Court of New South Wales, two years before, in the case of *Doe d. Peacock* v. *King* (3), has decided to the same effect. For these reasons I think that the objection taken to the statement of claim fails; and, as the objections to the regularity of the registration also fail, the case ought to be gone on with and tried to a conclusion. I therefore think that the appeal should be allowed, and the case remitted to the Supreme Court.

(1) 1 Sch. & Lef., 90. (2) 1 V.L.T., 76, at p. 78. (3) 2 Legge, 829.

BARTON J. On the 10th March, 1862, John Darbyshire agreed by deed with the defendant Elizabeth White Darbyshire, then Irwin, in consideration of marriage, to settle on her for life, and after her death on their children as tenants in common in fee, certain lands including Crown allotments 1 and 4 Section 3, suburban township of Belvoir. The marriage took place the next day, and on the 2nd December, 1863, a memorial of the agreement was received and registered in the office of the Registrar of the Supreme Court of Victoria. Both the validity and the legal effect of the memorial are in dispute. In 1870 Darbyshire mortgaged the lands the subject of the settlement to Alfred Evans. This mortgage was duly registered in February, 1870. Darbyshire died in 1880, intestate, and in 1885 administration of his estate was granted to the defendant Whittaker. In 1883 Evans, the mortgagee, sold the land under his power of sale to John George Dougharty, and the conveyance was duly registered in the same year. John George Dougharty died in 1889, having by his will devised the lands in question on certain trusts. It is admitted that the legal estate in the land, the subject of this action, is vested in the defendant and respondent the National Trustees Executors and Agency Co., who are now trustees of J. G. Dougharty's estate, and that Alfred Evans and J. G. Dougharty in turn took for valuable consideration and without notice of the agreement to settle. The plaintiffs, the children of the marriage between John Darbyshire, deceased, and the defendant Elizabeth White Darbyshire, sue for specific performance of the agreement for a marriage settlement made by the deed of 10th March, 1862, and for a declaration that they are entitled under that agreement to an estate in fee-simple reversionary on the estate of John Darbyshire's widow, the first named of the defendants, as tenants in common, and that the defendant company holds the lands in trust for the interest of the plaintiffs therein. The defences of the company so far as this Court is concerned are, (1) that the agreement for a settlement of 1862 has not been duly registered; and (2) that even if the registration is valid, that agreement, which gives the plaintiffs no more than an equitable interest, does not take priority, even *pro tanto*, of the legal estate vested in the defendant company, so as

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to affect them with a trust in respect of the equitable interest of the plaintiffs.

At the trial before *Hood* J., the contest was entirely on the validity of the registration, as the success of the defendant company on that point relieved them from the necessity of raising their contention as to the effect of the registration. That contention, however, they properly raise now as a bar to the granting of the appeal, even if the registration is good, inasmuch as the plaintiffs must fail unless they establish priority of title. The only evidence at the trial was that of Mr. Ford, a notary, who has been connected with the law in this city for the last fifty years. In 1862 he was a law clerk, and it was he who registered the memorial in respect of the agreement to settle. The memorial was in the form prescribed in Schedule A to the Registration Act of New South Wales, 6 Geo. IV. No. 22, which applies in this State. The columns in this form are headed respectively "Date of Instrument," "Nature of Instrument," "Names of Parties," "Names of Witnesses," "Description of the Lands or Property conveyed," "Consideration and how paid," "Any other particulars that the case may require." Ford filled in certain particulars. Before he did so, the memorial stood thus:—John Darbyshire had signed it at the foot. The column for the date lacked the words "tenth" for the day, "March" for the month, and "two" to complete 1862. The column for "Nature of Instrument" had been filled up with "Agreement for a marriage settlement," as it now stands. The "Names of the Parties" were stated as "John Darbyshire to Elizabeth White Irwin," and they so remain. There were no "Names of Witnesses." The "Description of the Lands or Property conveyed" was as it is now, the alteration of "Beechworth" to "Belvoir" bearing Darbyshire's initials, and the column for "Any other particulars that the case may require" was and is now blank. Before verifying the memorial on oath, Ford, under the words "Date of Instrument," wrote in the words "tenth," "March," and "two" as they now appear there; and under the roads "Names of the Witnesses" he wrote in and initialled the words "W. G. Sturgess, Beechworth." These particulars he took from the deed itself. He also wrote in the figures "534" and "134," the respective numbers of the memorial and book. In the blank form

of the verification, before swearing, he filled in his own name and occupation and the date, namely "second," "December," and "three," and then signed and swore it before the Commissioner. On these facts the whole objection must rest on this, that the date column and the witness column of the memorial itself were completed by Ford, Darbyshire (the grantor) having left them blank. The filling in of the numbers at the top could not impair the validity of the registration, and the completion of the verification form cannot be contended to have been Darbyshire's duty, or to have vitiated the memorial when performed by the man who was to swear to it. These facts having been given in evidence, *Hood* J. decided that the memorial did not comply with the Statute, and rejected the evidence, and, as the plaintiffs in the face of that decision could not establish priority, he entered judgment for the defendant company with costs. The plaintiffs now appeal to us on the ground that the decision that there was no proper registration was erroneous.

I refer first to the Proclamation of the Governor of New South Wales of 18th January, 1817. It applies to "deeds and conveyances" only, but orders and declares that all deeds and conveyances "of or concerning or whereby any houses lands . . . . may be any way affected in law or equity, may, at the election of the party or parties concerned, be registered" in the manner hereinafter directed; and that "every such deed or conveyance that shall at any time after the said twenty-fifth day of March next be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed shall be registered as by this present Proclamation is directed, before the registering of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim." It further orders and declares that every deed and conveyance to be entered and registered shall be brought to the Judge Advocate by a grantor or grantee thereof, "to be identified and verified as such on oath," and at least one of the witnesses to the execution shall on his oath before the Judge Advocate prove the signing and sealing; and the Judge Advocate is to enter in the register book a memorial of "every such deed or conveyance so attested as aforesaid," which shall contain "the day of the month, and the

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year, when such deed or conveyance bears date, and the names and additions of all the parties . . . . and of all the witnesses to such deed or conveyance, and the places of their abode, and shall express or mention the lands . . . . and the names of all the counties, or places . . . . where such lands . . . . are lying or being, that are given, granted, or conveyed or any way affected or charged . . . . or to the same effect." Next we come to the New South Wales Act 6 Geo. IV. No. 22, under which enactment and 5 Vict. No. 21, this registration is made. The former Act enacts as to the effect of registration (sec. 1) that after its passing "all deeds, conveyances, and other instruments in writing (except leases for less than three years), of and relating to, or in any manner affecting" any lands, &c., may be entered and registered in the Supreme Court office as in the Act directed; and that "all such deeds, conveyances, and other instruments in writing . . . . made and executed *bonâ fide*, and for a valuable consideration" and registered in pursuance of the Proclamation (which is recited) or in conformity with the Act, "shall have and be allowed priority over every other deed, conveyance, or other instrument in writing, that is to say, the deed, conveyance, or other instrument in writing, first registered in the office of the Judge Advocate" (if under the Proclamation), or in the Supreme Court office, (if registered in conformity with the Act), "shall have priority in respect of all lands . . . . conveyed or affected by such deed, conveyance, or other instrument in writing over every other deed, conveyance, or other instrument in writing whatsoever and howsoever conveying, charging, or affecting the same lands," &c. I have read this section with some particularity in order to draw attention to the signification of the words "charging or affecting," and also to the breadth of the expression "other instruments in writing." Then sec. 4 provides as to the manner of registration, that the registration of all deeds, conveyances and other instruments in writing of or relating to any lands, &c., shall be made in this way:—"A memorial shall be written . . . . setting forth the date of such deed, or other instrument, intended to be registered, and the nature thereof; the name of all the parties, and all the witnesses thereto; the lands . . . intended to be conveyed; the pecuniary or other consideration

paid," in the form or to the effect mentioned in Schedule A to the Act; or with such alterations as the circumstances may require; "and the said memorial shall be signed by some or one of the parties to the original deed or instrument, and shall be delivered into the office of the Supreme Court . . . . and verified upon the oath of some competent person, that such memorial contains a just and true account of the several particulars therein set forth, which oath shall be made before one of the Judges, or the Registrar of the said Court;" and upon the delivery and certification of the memorial, "the proper officer or clerk appointed for such purpose shall give a receipt for the same, in which shall be specified the certain day, hour, and time on which the same shall have been delivered into the said office." Then follow in the next section other provisions directing the proper officer to perform other duties in relation to the memorial.

In 1842, the provisions of 6 Geo. IV. No. 22, having been found inconvenient by reason of the wide extent of the then area of New South Wales, provision was made by 5 Vict. No. 21 for the establishment of a separate registry for the District of Port Phillip, and memorials which were under the old Act required to be verified, were by sec. 1 allowed to be verified within the district of Port Phillip before "the Deputy Registrar or other person who may be appointed to discharge the duties of Registrar there, or before any Commissioner of the said Supreme Court appointed in any part of the colony under this Act for these purposes." The original instrument was however to be produced at the time of verification (sec. 2), and, if it appeared to have been executed by a marksman, the registering officer had to refuse to complete the memorial by his certificate unless the execution by the marksman was attested in the manner prescribed. Sec. 12 of this Act prescribes that where the party on whose behalf any instrument is required to be registered shall be dead or absent from the colony when the registration is required to be made, the lawful representative or attorney of such party, upon application to the Resident Judge of the Supreme Court at Port Phillip, and upon proof to his satisfaction of the death or absence of such party, he may sign the memorial in the name and on behalf of the original

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party, such signing to be as valid and effectual to all intents and purposes as if it had been by the original party or parties.

The English Act (2 & 3 Anne c. 4), applying only to the West Riding of Yorkshire, provided by sec. 1 that a memorial of all deeds and conveyances, and of all wills, of or concerning or whereby any lands, &c., in the West Riding of Yorkshire may be in any way affected in law or in equity, may be registered in manner thereinafter directed; and that every deed or conveyance that shall, after any such memorial is so registered, be executed of the lands, &c., or any part thereof comprised in such memorial, "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof shall be registered as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim," and similarly as to wills. Sec. 7 enacts that all memorials to be registered shall be put into writing and directed to the "Register;" and, in case of deeds and conveyances, shall be under the hand and seal of the grantors or some or one of them, his or their guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the deed or conveyance; which witness on his oath shall prove the signing of the memorial and the execution of the deed or conveyance. By sec. 8 it was provided that every memorial shall contain the day of the month and year when the deed, &c., bears date, and the names and additions of all the parties, and of the witnesses, and the place of their abode, and shall express or mention the lands, &c., contained and the names of all the parishes, &c., where any such lands, &c., are that are in any way affected or charged, &c., every such deed, &c., to be produced to the "Register," &c., who shall endorse a certificate, &c.

We come now to the Irish Act (6 Anne c. 2). Sec. 1 established a public office for registering memorials of "deeds and conveyances, wills and devises" in Dublin. Sec. 3 provided that a memorial might be registered as thereafter directed at the election of the party or parties concerned. Sec. 4 provided that every such deed or conveyance of which a memorial shall be duly registered "according to the rules and directions in this Act pre-

scribed" is to be "deemed and taken as good and effectual both in law and equity according to the priority of time of registering such memorial for and concerning the . . . lands . . . in such a deed or conveyance mentioned or contained, according to the right, title and interest of the person or persons so conveying such . . . lands . . against all and every other deed conveyance or disposition of the . . . lands . . . or any part thereof comprised or contained in any such memorial." Sec. 5 provided that deeds, &c., not registered, should be fraudulent and void as against deeds registered and creditors by judgment, &c. Sec. 6 provided that memorials should be "put into writing" and "directed to the Register," and in case of deeds or conveyances, should be under the hand and seal of some or one of the grantors or of the grantees, his, her or their guardians or trustees, attested by two witnesses, one whereof should be one of the witnesses to the execution of such deed or conveyance: that such witnesses should prove by affidavit the signing and sealing of the memorial and the execution of the deed or conveyance, and the day and the time of the delivery of the memorial for registration.

Now, it is contended, as I have said, for the respondent company that the registration does not comply with the necessary requirements of 6 Geo. IV. No. 22, and comparison is made between the Proclamation and the several Acts with the view of showing that the particulars required and essential were not in this memorial at the time when Darbyshire signed it, and that it was necessary that it should be a complete memorial in all particulars directed by the Act before such signature. Admittedly there are particulars among those contained in the section of the Act which do not appear to have been in the memorial when Darbyshire signed it, and which were subsequently filled in by Ford. There is a considerable difference between the requirements of the Proclamation of 1817 and those of the Act 6 Geo. IV. No. 22. Before a memorial could be registered under the Proclamation, the deed itself had to be brought by at least one of the grantors or grantees, who was himself to be identified on oath, to the Judge Advocate, and one at least of the witnesses to the execution of the deed had upon oath before the Judge Advocate to prove the signing and sealing of the deed, and it was not until then that the Judge Advocate could

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enter in the register book the memorial containing particulars similar to those contained in the present memorial, and which became the registration of the deed. So that when one refers to sec. 4 of 6 Geo. IV. No. 22, there is observed a great difference in the stringency of the requirements under it. It was no longer necessary that a grantor or grantee should be identified on oath, nor was it necessary, apparently, that the deed itself should be produced at the time of registration. It was simply directed that there should be registered a memorial setting forth the date and the nature of the instrument, the names of the parties and witnesses to it, the lands, &c., affected by it, and the consideration, in the form in Schedule A with any necessary alterations that the circumstances required. That memorial was to be signed by some or one of the parties, and was to be verified on the oath "of some competent person." It is contended that, as there is no distinction between the particulars required by the section, to omit one of them at the time of the signature of the memorial is the same as if all were omitted, and that the fact that at the time of registration the memorial contains all the particulars is quite immaterial —it may contain all the particulars and yet be bad because the grantor or grantee had left out part of them when he signed. The consequences of upholding such a contention would be very serious indeed. It is not expected of those who sit in Courts of Justice that they shall lay aside their common knowledge, and those who have any experience of the working of a lawyer's office must know that in a great number of cases memorials are constantly signed in blank by the party, and that the necessary particulars are filled in afterwards by the solictor or by his clerk who has charge of the matter. That is a matter of common practice. The lawyer or his clerk knows the facts and fills in the particulars, and then takes the oath verifying the contents of the memorial, and tenders it for registration. I would venture the opinion that only a small proportion of the memorials of registered documents here and in New South Wales have been filled in as to absolutely all the particulars at the time the parties have signed them. So that the consequences of such a decision as is invoked by the respondents would be most serious to titles throughout the country. If by any reasonable construction of

the Act such consequences can be avoided, I think it is incumbent upon this Court to adopt it. It appears to me that, reading this section according to the light of common reason, the intention of the framers of the Act, who, as I have pointed out, had departed in a very large degree from the particularity required by the Proclamation, is absolutely satisfied if the party signing the memorial has signed it when it contained such particulars as to render the memorial absolutely identifiable as a memorial flowing from a deed of which those are the particulars. If the remaining particulars are afterwards filled in by the registration clerk of the solicitor who produces the memorial or by some such person, then, upon the memorial in its completed form being verified by the oath of such person, there is a complete memorial for registration. Various cases were cited to us as to the maxim *qui facit per alium facit per se*, but I do not think those cases apply to a case in which the fulfilment of these statutory provisions is contested.

It was contended in support of the argument directed to the invalidation of this memorial, that because the words "the said memorial" are used throughout sec. 4, after the words "a memorial shall be written on parchment or paper," it is intended that the document shall be in the same state at each stage, and therefore that when the section says "the said memorial shall be signed," it means the memorial then containing all the particulars. I do not think that is a reasonable construction. An examination of the section seems to me to show that, when the memorial is verified upon the oath of a competent person that it contains a just and true account of the particulars therein set forth, and that oath is made before the proper person, then the memorial, if it contains all the particulars required by the section, is a complete memorial for registration, provided only that it shall have been signed by one of the parties, and that at the time of such signing it shall have been in such a state as to be identifiable with the original deed, to the extent of showing that it is a memorial in pursuance of that deed and of none other. For instance, take the present case. Surely the particulars set out in the memorial at the time it was signed, viz., that there was an agreement for a marriage settlement between certain named persons and affecting certain specified land, are sufficient to identify the memorial with the

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instrument to which it referred. I am of opinion that the memorial ought to contain particulars of that kind when it is signed, and that in the present case, before Ford touched it, the memorial could only be assignable to the agreement for a marriage settlement of 10th March, 1862. In that state I consider that it was sufficient a compliance with the Act for Darbyshire then to sign it, and to leave the other particulars to be filled in by the clerk. That has been duly done, the instrument has been verified, there can be no mistake that the memorial is now, and was at the time of signature, sufficient to show anyone who inquired about it what instrument it referred to, and I am of opinion that is all the Act requires.

There are other contentions, the chief of which is that that which has been written in the column under "Nature of Instrument" is insufficient. It is contended that "Agreement for a marriage settlement" is not a sufficient description of the nature of the instrument, and that some description of the limitations intended to be in the marriage settlement should be set forth in the memorial. I am unable to agree with that contention. It seems to me that sec. 4 was passed for the purpose of enabling a person, who was making a search in respect of the title to land, to see whether there was any instrument registered affecting that land so that he might find out whether there had been any dealings with that land which would affect the title to it. It was sufficient therefore that the instrument in this case should be described as an agreement for a marriage settlement, because a person contemplating later dealing with the land would, from the description of the instrument in the memorial, be put upon inquiry. There are no words in any part of this Act requiring any greater particularity, and, in their absence, the only conclusion I can come to is that the intention of the Act was that the description should be sufficient to put a person on inquiry,—to let him know that upon the result of a search he might discover to what extent the land in respect of which he was searching was affected by previous dealings. It would be very difficult to draw the line at which the description would cease to be sufficient if the argument of Mr. Cussen were adopted. I am of opinion, therefore, that as regards the nature of the instrument the memorial is sufficient.

Again, it is said that the memorial is not verified by a competent person, because the law clerk did not answer that description, and it seemed to be, if not contended, at any rate implied, that the only person who was competent to verify the memorial was a person who was present at the execution of the instrument itself—one of the attesting witnesses. The Act itself requires no such narrow construction as that, and although it may be difficult to say what is the exact meaning of the words "competent person," there are no parts of the section which show that a competent person must be one of the witnesses to the instrument. If that had been the intention it would have been easy to say so instead of using the broader words "competent person." By sec. 11 of 5 Vict. No. 21 the lawful representative of a person who was dead or absent from the colony might sign the memorial, and not only would his signature be sufficient, but the whole registration would be as valid and effectual as if the memorial had been signed by the person who was absent or dead. I cannot find anywhere in the Act a line or expression to show that a person conversant with the instrument itself to be registered, and carrying on an occupation which familiarizes him with such a process, is not competent to fill in whatever is necessary and to verify the memorial so filled in. Consequently I cannot bring myself to hold that Ford was not a competent witness.

Agreeing as I do with the learned Chief Justice, I shall not deal very fully with the other objection, viz., that the registration of this agreement for a marriage settlement is ineffectual to give it priority over the subsequent conveyance of the legal estate. Mr. Cussen dealt with that question with his usual ability. The decisions upon the Irish *Registration Act* (6 Anne c. 2), are of importance in considering this matter. The first of them is that in the case of *Bushell* v. *Bushell* (1), where Lord *Redesdale* L.C., after setting out the differences between 6 Anne c. 2, secs. 3 and 4, and the provisions of the English Act, 2 & 3 Anne c. 4, says (2):— "This difference in these Acts seems to me to have been what has produced the difference in the decisions upon them; and that difference does not consist in the registry *here* being *notice*, but in the priority which the Statute here gives to the prior registered

(1) 1 Sch. & Lef., 90.

(2) 1 Sch. & Lef., 90, at p. 102.

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deed. That part of the Act which makes a deed not registered fraudulent and void against a registered deed, has received the same construction in both countries: the question whether a registered deed was to have priority of another registered deed, according to the priority of registry, and how far this priority was to extend, has received a different determination in England and in Ireland, and that difference is founded on the words of the Irish Act." The Lord Chancellor then deals with the cases; then he says:—"On the whole of this case, therefore, I have no sort of doubt of the true construction of this Act. The instrument registered must prevail against a subsequently registered instrument, by force of the clause in the 4th section, that being an instrument which affects lands, it shall be good not only at law but in equity, according to the priority of registry. This is not at all grounded on the next section of the Act, which avoids unregistered conveyances: that is a provision of a totally different description. The meaning of the former clause, I take it, is to give full effect by force of the registry even to articles, if registered, against a legal conveyance: so that the Act has given to contracts registered a force and effect with respect to lands themselves, which they have not in England, there being no such clause in the English *Registry Act*; this I take to be the true meaning of the Act, as far as I can collect; and it will answer all the purposes of every decision on the subject."

Sec. 4 of 6 Anne c. 2 there referred to was confined to deeds and conveyances of which a memorial should be duly registered, and provided that they should be "deemed and taken as good and effectual both in law and equity, according to the priority of time of registering such memorial."

There were several other cases following this in which the same construction was given to the Irish Act, and ultimately the important case of *Drew* v. *Lord Norbury* (1) was decided by Lord *St. Leonards*, then *Sir Edward Sudgen* L.C. The Lord Chancellor having expressed the inclination of his opinion, directed the case to be re-argued before himself, *Blackburn* C.J., and *Pennefather* B., and they decided that the construction put upon sec. 4 of 6 Anne c. 2 by Lord *Redesdale* was the right one. The

(1) 3 Jo. & Lat., 267.

same point came before the House of Lords in *Mill* v. *Hill* (1). In his judgment Lord *Truro* says (2):—"But, in *Bushell* v. *Bushell* (3), Lord *Redesdale* took time to consider the question, and delivered an elaborate judgment upon the subject, marked by all the intelligence and soundness of law for which that learned Judge was conspicuous, and he came to the conclusion that upon the true construction of this section, differing in its language from the section in the English Act, the equity in the grant which was registered would prevail, as an equity, against any subsequent grant, by the same party, inconsistent with it . . . It is now fifty years since Lord *Redesdale* came to that decision, and between six and seven years since the present Lord Chancellor, then holding the seals of Ireland, confirmed and adopted it. If the rules of law applicable to the settlement of property, which have been solemnly decided and acted upon during a period of fifty years, which have governed professional men in that country in advising and in arranging their clients' interests in respect of property, are to be called in question, and if at the end of that time that which might have been at one time doubtful, but has long since been settled, is to be re-opened and reconsidered, and an alteration takes place, I confess it appears to me that the Courts would become rather a snare than a protection. The opinion of Lord *Redesdale* was in itself entitled to great weight as an authority, and it is entitled to still greater weight when the length of time is considered during which I must suppose it to have been acquiesced in, and to have been acted upon in regulating the disposition of property; and I think your Lordships would be very slow indeed to do anything which would bring that judgment into doubt, more particularly when you consider that it has come under the solemn revision of the present Lord Chancellor, assisted by the two learned Judges I have mentioned, and has been deliberately confirmed. I should therefore submit to your Lordships, that that should be taken as settled law, not subject to any doubt or question, and not now again open to argument; and that under that Act it should be deemed that, according to the true construction, an equity which is duly registered is entitled to bind

(1) 3 H.L.C., 828.
(2) 3 H.L.C., 828, at p. 853.
(3) 1 Sch. & Lef., 90.

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property which may be the subject of grants made at a time subsequent to such registration. My Lords, entertaining that opinion, I should most respectfully recommend your Lordships to acquiesce in, and to confirm the ruling which I have before stated." That therefore is the final construction put upon the Irish Act by the House of Lords.

But the words "at law or in equity" are absent from the New South Wales Act, which, in other respects, is extremely similar to the Irish Act. On the other hand the former Act deals with the registration of "deeds, conveyances, and *other instruments in writing.*" Looking at the cases collected under the word "Instrument" in *Stroud's Judicial Dictionary*, 2nd ed., p. 986, it appears clear to my mind that those words, especially when used in juxtaposition with the words "deeds and conveyances," indicate that instruments in writing might be made otherwise than by deed. If that is so it is stroug to show that equitable assignments or securities were intended to be included in the New South Wales Act, and that the Act applies in express words, not merely to instruments effecting the complete legal transfer of the freehold or other title, but also to instruments charging or affecting land and giving only an equitable title. Now, to my mind, it is not by the mere use of the words "at law or in equity," that this matter is to be decided, but by the scheme and scope of the Act. The use of those words and of the words "instrument in writing," "charging or affecting the same lands," and "whatsoever and howsoever," if they do not contain an express direction, appear at any rate to raise a very strong and almost irresistible inference that instruments conferring an equitable title were intended to be included in the Act. That that is the law in Victoria, appears clear from the case of *Wharton* v. *Greville* (1) heard before *Sir William à Beckett* C.J., and *Barry* and *Williams* JJ. The Court there considered the whole question in the light of Lord *Redesdale's* decision, and in delivering the judgment of the Court the Chief Justice said (2):—"No authority was cited in support of the distinction between legal and equitable instruments, and the attempt to classify them so that the Act should be read distributively as separately applicable to each. 'Priority in

(1) 1 V.L.T., 76.

(2) 1 V.L.T., 76, at p. 78.

respect of all lands &c. affected by &c. an instrument in writing over every other &c. instrument in writing, whatsoever and howsoever affecting the same,' &c., is the substance of the words used. We cannot in the face of words so comprehensive and so explicit, recognize such a refinement as that suggested, and . . . . we may safely determine that the instrument first registered, that is the agreement which the complainant seeks to enforce, must prevail *pro tanto* against the subsequently registered deed. . . . Nevertheless, so far as the respondent Greville is concerned, we are of opinion that the registry having established the priority sought to be enforced, he could only sell his estate to Lang subject to the equitable interest previously created by the agreement for the lease, and liable to its being enforced if desired against the person into whose hands the estate might come." The words just quoted in a case similar in principle seem to me exactly to describe the position which arises here, and I am of opinion that, so far as the respondents here are concerned, the registration having established the priority sought to be enforced, the settler could only sell his interest subject to the equitable interest previously created by the agreement for a marriage settlement, and liable to its being enforced, if desired, against the person into whose hands the estate might come. There are obvious reasons why a decision of the Full Court of Victoria given so many years ago should not at this late day be over-ruled except on the clearest grounds. I am of opinion with the learned Chief Justice that this registration was valid, and think therefore that the appeal should be allowed.

O'Connor J. I agree with my learned brethren that this memorial was duly registered. I do not propose to advert to all the objections raised against the registration but only to the most important, that is, that the memorial was not complete when it was signed by one of the parties to the deed, the settlor. The facts bearing upon that question may be stated in a very few words. The original deed was complete in every particular when the memorial was made. The memorial was complete in every particular when it was verified and presented for registration. But it appears that the signature of the party to the

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deed, the settlor, was placed upon the memorial at a time when it was wanting in the date of the deed and the name of the witness to the deed. The question is whether the events having occurred in that order—the signature of the party having been placed on the memorial when it was not absolutely complete—that vitiates the registration. That question turns upon the words of sec. 4 of 6 Geo. IV. No. 22:—"The said memorial shall be signed by some or one of the parties to the original deed or instrument." We are of course bound to administer the Act according to its plain language, and, if there were no ambiguity in the language, it would be unnecessary to refer either to the history of the Act or to other Statutes dealing with the same subject in Ireland and in England. But the word "signed" is not free from ambiguity, and therefore it is necessary to look, first of all, at what was the object and intent of the Statute, and, secondly, at what was the law before the Statute was passed.

Now, the signature to a deed or document of any kind may be required for a variety of purposes. If it is intended to indicate the assent of the party to the contents of the deed or document, it is clear that the signature must be placed on the deed or document when it is complete so that the assent may be given to every part of it. Where, however, the signature is required, not for the purpose of expressing the assent of the party to the contents of the document, but for the purpose of verifying it as a copy or identifying the transaction, altogether different considerations arise. The two different purposes which I have mentioned, either of which may be intended to be effected by the signature to a document according to the meaning to be given to the word "signed," are well illustrated by the Acts which have been referred to. By the Irish Act the memorial is to be signed by one of the parties, and the words are express—"the memorial shall be under the hand and seal of one of the parties." Similarly, under the English Registration Act, where the memorial is to be signed by one of the parties it is enacted that the memorial shall be under the hand and seal of one of the parties. In both those cases there can be no question that, as the legislature has expressed the intention that the memorial shall be assented to and approved of by one of the parties to the instrument the

signature must be placed upon the memorial when it is completed. Now, we have to see whether that was the object of the legislature in passing 6 Geo. IV. No. 22, in its present form. For that purpose it is necessary to look at the scheme of registration which this Act provides for. The Proclamation of 1817, which was apparently the first means of registration adopted in New South Wales, provided for a system by which the deed was to be brought for registration by one of the parties who had to be identified on oath, and the execution had to be verified by one of the witnesses to the instrument. These things had to be done in the presence of the Judge Advocate who, on the formalities being completed, himself then entered the memorial in the register book. In the preamble to 6 Geo. IV. No. 22, that Proclamation is referred to, and the Act is expressed to be passed for the following purpose:—"To confirm the said Proclamation to a certain extent, and to make more effectual provision for the future registration of deeds, conveyances, and other instruments in writing." Under the system established by the Proclamation a party to the deed was not required to sign. He simply brought the deed to the Judge Advocate, was himself identified, and the deed also was identified. I think that Mr. Lewis was quite right in the reasons he stated for the alteration made by 6 Geo. IV. c. 22. At the time of the Proclamation the settlement of New South Wales was within narrow limits, and it was not a very difficult thing in the majority of land transactions for a party to a deed, who wished to register it, to go to Sydney. But, as settlement spread, that attendance became practically impossible, and therefore some new system was desirable. One important object then in passing sec. 4 of 6 Geo. IV. c. 22 was to dispense with the personal attendance of one of the parties to the deed, and the method was substituted of requiring his identity in connection with the transaction to be established by his signature upon the memorial. The intention of the section therefore being, not that the memorial should be signed by the party in such a way as to signify his assent to the provisions of the deed, nor to verify the contents of the memorial, but to identify him with the transaction, it appears to me we are giving full effect to the section if we interpret the words "signed" as meaning this:—that the signature of the party must be upon

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the memorial, and it must have been put there at a time when it was substantially a memorial of the deed which it represented, the main object being to ensure that when the memorial was presented in the complete form at the Supreme Court office it should have upon it the signature of one of the parties which identified the transaction. For these reasons, assenting as I do to what has been said by the other members of the Court, I am of opinion that the memorial was properly registered.

The other question raised by Mr. Cussen is very important. In regard to that I am very clearly of opinion that the intention of this Act was to place equitable instruments upon the same footing as legal instruments. Whatever priority is given to an instrument dealing with the legal estate, is given by the Act to an instrument which deals with the equitable estate. There again it is necessary to refer to the history of the legislation as showing the condition of the law before the Act 6 Geo. IV. No. 22 was passed. First of all I shall deal with the words of the Act itself. I can scarcely imagine language that could be clearer to cover every possible kind of document. Sec. 1 provides that the document when registered,—"shall have and be allowed priority over every other deed, conveyance, or other instrument in writing, that is to say, the deed, conveyance, or other instrument in writing, first registered . . . shall have priority in respect of all lands, tenements, or other hereditaments, conveyed or affected by such deed, conveyance, or other instrument in writing over every other deed, conveyance or other instrument in writing whatsoever and howsoever conveying, charging, or affecting the same land, tenements, or other hereditaments." It is impossible to give a full meaning to those words without including every kind of instrument dealing with land whether the title conferred by the instrument was enforcible in a Court of Equity or in a Court of law. In regard to this part of the case we have the authority of *Wharton* v. *Greville* (1). If that authority did not, as I think it does, rest upon sound and clear reasoning, which in itself commends it to my approval, I should still hold the opinion that the law laid down there ought to be affirmed upon the very well-known principle—which must

(1) 1 V.L.T., 76.

guide Courts in dealing with questions as to title to property—that wherever a decision must be taken by reason of its age and its general acceptance by business men, property owners, and the legal profession, to have become part of the established law of the country, the Courts will not interfere with it, unless it palpably violates some principle of law. This decision, however, need not be supported upon any such principle. It stands upon its own merits.

As the question is of some importance it may be well to refer to another matter which may throw some light on the construction of this Statute. Before I deal with the New South Wales Proclamation I will refer to the condition of the law in England and Ireland at the time of its publication. There were two systems of registration then in force, one in England and the other in Ireland, and the difference between those systems appears in the decisions which have been referred to. In 1803 the difference was shown very clearly in the judgment of *Sir Edward Sugden* LC. in *Drew* v. *Lord Norbury* (1). I quote his exact words. He says (2):—"It is impossible not to be struck with the difference between the Registry Acts here and in England. Although both were passed in the same year, yet the English Act does not affect to go further than to protect purchasers, by declaring unregistered deeds to be invalid as against subsequent registered instruments; whereas the Irish Act does expressly extend to all deeds, whether they are for value or not; and as between them, it gives priority of operation according to priority of registration. If there be two voluntary conveyances, and the second deed be registered before that which was first executed, it would, under the 6 Anne c. 2, have priority of operation over the other deed. The intent, therefore, of the Acts in the two countries was not altogether the same; and after the most scrupulous examination of the Acts in both countries, I have not been able to find any words in the English Acts equivalent to the fourth section of the Irish Act."

That being the difference between the two systems, and the law having been clearly laid down that the Irish Act applied to equitable as well as legal titles, the Governor of New South Wales proceeded to deal with the matter of registration by the proclama-

(1) 3 Jo. & Lat., 267. (2) 3 Jo. & Lat., 267, at p. 303.

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tion, which inaugurated the scheme on the principle of the English Act, that is to say, not giving priority to every registered instrument, but dealing only with the protection of subsequent purchasers. But when the law of registration was altered by the New South Wales legislature by 6 Geo. IV. No. 22, they adopted the Irish system, and expressly left out the words of the Proclamation protecting purchasers, and gave priority to all instruments according to the date of registration. In those circumstances it appears to me not open to contention that the decisions on the English Act, by which equitable titles were shut out from protection, should be applied to the interpretation of 6 Geo. IV. No. 22, rather than the decisions on the Irish Act upon which 6 Geo. IV. No. 22 was undoubtedly modelled. I do not think it is necessary to add anything further to what has been already said. I am of opinion upon this second ground also that, if the deed was properly registered, it stands upon exactly the same footing in respect of protection as if it had been a deed conveying the legal estate, always however having regard to the operation of the instrument according to its terms. For these reasons I am of opinion that the memorial should have been admitted in evidence.

Appeal allowed. Action remitted to the Supreme Court of Victoria. The respondent company to pay the costs of the appeal.

Solicitor for appellant, *W. Leslie Park*, Melbourne.

Solicitors for respondent, *Lewis, Hedderwick & Fookes*, Melbourne.

B. L.