[HIGH COURT OF AUSTRALIA.]

HAROLD ALFRED TEMPLETON (REGISTRAR OF TITLES OF VICTORIA) . . } APPELLANT;

AND

THE LEVIATHAN PROPRIETARY LIMITED RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1921.

MELBOURNE, *Oct.* 12-14, 17-20.

SYDNEY, *Dec.* 16.

Knox C.J., Higgins and Starke JJ.

Land—Registration of dealings—Trustee—Sale of land—Purchase-money secured by second mortgage—Breach of trust—Right of Registrar of Titles to refuse registration—Order of Supreme Court of Victoria authorizing sale—Jurisdiction—Effect of order—Beneficiaries not bound—Originating summons—Parties—Transfer of Land Act 1915 (*Vict.*) (*No.* 2740), *secs.* 55, 179, 233—*Conveyancing Act* 1915 (*Vict.*) (*No.* 2633), *sec.* 76 (1)—*Rules of the Supreme Court* 1916 (*Vict.*), *Order XVI., r.* 9; *Order LV., rr.* 3, 5, 6.

Sec. 55 of the *Transfer of Land Act* 1915 (Vict.) provides that "The Registrar shall not enter in the register book notice of any trust whether express implied or constructive; but trusts may be declared by any document, and a duplicate or an attested copy thereof may be deposited with the Registrar for safe custody and reference; and the Commissioner should it appear to him expedient so to do may protect in any way he deems advisable the rights of the persons for the time being beneficially interested thereunder or thereby required to give any consent; but the rights incident to any proprietorship or any instrument dealing or matter registered under this Act shall not be in any manner affected by the deposit of such duplicate or copy nor shall the same be registered." Sec. 179 provides that "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land lease mortgage or charge . . . shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." Sec. 233 (III.) provides that the Registrar "shall upon the direction of the Commissioner lodge a caveat on behalf of His Majesty or

on behalf of any person who is under the disability of infancy . . . to prohibit the transfer or dealing with any land belonging or supposed to belong to any such person, . or for the prevention of any fraud or improper dealing."

Held, by *Knox* C.J., *Higgins* and *Starke* JJ., that where the Registrar knows facts which show that an instrument proposed to be registered is a breach of trust, although no copy of the trust document is lodged under sec. 55 or King's caveat lodged under sec. 233 (III.), he may refuse to register the instrument.

Per Knox C.J. : The immunity which by sec. 179 a purchaser is to enjoy from the effect of notice is only to be afforded to him if and when he becomes registered and not before, and the doctrine of notice is not affected by the section except as regards registered instruments.

Per Higgins J. : Sec. 179 does not exempt a purchaser or other person dealing with the registered proprietor from all equitable principles, such as *Qui prior est tempore potior est jure* ; nor does it exempt him from the consequences of knowing participation in a dealing which is improper.

Per Higgins and *Starke* JJ. : *Primâ facie* it is the duty of the Registrar to register any instrument presented in proper form and signed by a person competent in law, and, according to the title as appearing on the register, to effect the dealing represented by the instrument. If an order of the Supreme Court purporting to authorize the dealing is within the jurisdiction of that Court, it is not for the Registrar to question the propriety of that order.

Order LV., r. 3, of the *Rules of the Supreme Court* 1916 (*Vict.*) provides that a trustee may take out, as of course, an originating summons returnable in the Chambers of a Judge for the determination without administration of the estate or trust of certain questions or matters including (*inter alia*) : "(*e*) Directing the . . . trustees to do or abstain from doing any particular act in their character as such . . . trustees," and "(*f*) the approval of any sale, purchase, compromise, or other transaction."

Held, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that on an originating summons under that rule a Judge has jurisdiction to entertain an application by trustees to approve of and authorize an act which, apart from such approval and authority, is a breach of trust, and an order made approving and authorizing such an act cannot, except by appeal, be challenged on the ground that, the act being a breach of trust, the order is made without jurisdiction.

Per Higgins J. : There is no power in the Court in the administration of an estate to do that which, if done by the trustees, would be a breach of trust.

In re New, (1901) 2 Ch., 534, discussed.

The executors and trustees of a will were the registered proprietors of one undivided half share in a piece of land, and one of the executors and trustees, A, was the registered proprietor of the other half share. Under the will the trustees had a power of sale and of investing on mortgage, and, at the time of

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

the transaction hereinafter referred to, the living persons interested in the land were eight children of the testator, including A, and seven grandchildren; and grandchildren who might afterwards be born would also become interested. The trustees and A as vendors, and a company of which A and another of the trustees held substantially all the shares, as purchaser, entered into an agreement for the sale of the land conditional upon the agreement being sanctioned by the Supreme Court of Victoria. By the agreement the purchase price was to be £96,000, payable as to £1,000 on the execution of the agreement, as to £57,000 within thirty days after the sanction had been obtained, as to £8,000 five years after the agreement, and the balance ten years after the agreement, with interest on the unpaid purchase-money. The vendors also agreed to transfer the land to the purchaser on payment of the £57,000, and at the same time to consent to the purchaser mortgaging the land for £55,000 repayable on or before the date when the final payment of purchase-money was due, provided that the purchaser should at the same time give the vendors a second mortgage over the land for £38,000 repayable at the same date. After the agreement was executed the trustees other than A applied to the Supreme Court by originating summons for a declaration that under the circumstances such judicial sanction or approval should be given as would authorize the carrying out of the agreement. The defendants to the originating summons were A and five other children of the testator (who were sued on behalf of themselves and all other children of the testator) and six of his grandchildren, of whom three were infants (who were sued on behalf of themselves and all other grandchildren of the testator). Two sons and one grandson of the testator were out of the jurisdiction, and were not joined as parties, and no representative order was made. *Cussen* J. in Chambers, upon hearing the summons, made an order declaring that it was for the benefit of the infant defendants and all other grandchildren of the testator who might be born and become interested and all other persons interested, that the agreement should be carried out, and that the plaintiffs and A, as executors and trustees, were by the order authorized to carry the agreement into effect. No reference was made in the order to the fact that certain of the children and grandchildren were sued "on behalf of" all others. Subsequently, in pursuance of the agreement a transfer of the land, a first mortgage by the purchasing company to a life assurance company for £55,000, and a second mortgage by the purchasing company for £38,000 to the trustees and executors, were lodged at the Titles Office for registration under the *Transfer of Land Act* 1915. The Commissioner of Titles, having before him the will of the testator and the order of *Cussen* J., refused to register the instruments on the grounds that the Court had no jurisdiction to authorize an investment by trustees on second mortgage, and that as to the second mortgage there was practically no margin of security, it was a contributory mortgage, and the period for repayment was too long. On the application of the purchasing company the Supreme Court by mandamus directed the Registrar of Titles to register the instruments. On appeal to the High Court,

Held, by *Knox* C.J. and *Higgins* J., that, apart from the order of *Cussen* J., the transaction so far as the second mortgage was concerned

was a breach of trust, and on that ground the Registrar might properly refuse to register the instruments.

Held, also, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that the order of *Cussen* J. was within his jurisdiction; but, by *Knox* C.J., *Higgins* and *Starke* JJ., that that order was not binding on the two sons and the grandson of the testator who were not made parties, and that it did not become binding by virtue of sec. 76 of the *Conveyancing Act* 1915 (Vict.), by which an order of the Court purporting to be under any statutory or other jurisdiction is not "as against a purchaser" to be invalidated on the ground of want of jurisdiction or of want of any concurrence, consent, notice or service, whether the purchaser has or has not notice of such want.

Held, therefore, that the order of *Cussen* J. afforded no answer to the Commissioner's grounds of objection, and that the refusal of the Registrar to register the instruments was justified.

Per Higgins J.: The transaction approved here was either a sale and investment on unauthorized securities, or an exchange of the property of the testator for other property which the trustees were not authorized by the will to hold; in either aspect the approval was beyond the power of the Court.

Quære, per Higgins J., whether the presumption in favour of the jurisdiction of a superior Court applies to an order made by a Judge of the Court in Chambers under a special power.

Effect of Order XVI., r. 9, and Order LV., rr. 5 and 6, of the *Rules of the Supreme Court* 1916 (*Vict.*), with regard to binding persons by an order made on originating summons in their absence, discussed.

Decision of the Supreme Court of Victoria (*Cussen* J.) reversed.

APPEAL from the Supreme Court of Victoria.

The following statement of the facts is taken from the judgment of *Knox* C.J.:—

At the date of his death Lewis Sanders was the owner in fee simple of an undivided half share in certain lands at the corner of Bourke and Swanston Streets in the City of Melbourne, the other undivided half share being owned by Nathaniel Lewis Levy.

By his will the said Lewis Sanders devised his residuary real and personal estate, including the said one half share in the said lands, to the said Nathaniel Lewis Levy, John Levi, Solomon Oswald Nelson and Algernon Benjamin Sanders, whom he thereby appointed trustees and executors, upon trust to sell and to invest the balance of the proceeds of sale, after payment of his debts, funeral and testamentary expenses and legacies, in the names or under the legal control of his trustees in or upon any of the public stocks, funds,

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

debentures or securities of the Commonwealth of Australia or any of the Governments of any of the States of such Commonwealth or of the United Kingdom of Great Britain and Ireland, or on mortgage of any real estate in the State of Victoria, or the debentures or stock of any municipal corporation, dock or harbour trust or board of works or other like or similar corporation having power to make or levy rates, tolls or dues by virtue of any Act of the Parliament of the Commonwealth of Australia or of the State of Victoria, or in the purchase as hereinafter mentioned of real estate in the said City of Melbourne, with liberty to sell, vary and transpose the investments from time to time into or for any other investments of the description aforesaid; and upon further trust to pay an annuity to his wife during her life and to divide the residue of the income equally between and among all his children who might for the time being be living; and the testator directed that after the death of his wife his trust estate should be apportioned into ten equal shares, and declared trusts of such shares for the benefit of his nine surviving sons and daughters and their children and the children of a deceased daughter; and the testator declared that his trustees should retain the respective tenth share apportioned to each such child of his who should survive him (subject to a power of appointment as to two fifths thereof) upon trust to pay the income thereof, as and when the same should become due and not by way of anticipation, into the proper hands of such child to be enjoyed by him or her as an inalienable personal provision during his or her life, and so that he or she should not have power to anticipate the growing payments thereof by sale, mortgage, charge or otherwise (except as therein specially provided for); and that after the decease of any of his said children the capital of the tenth share apportioned to or for such child or any unappointed and unapplied part or parts thereof should be held in trust for all or any of the children or the child, if only one, of his same child for such shares or interest as his same child should appoint, and in default of appointment in trust for the child, if only one, or for all the children, if more than one of his same child who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry under that age. The will contained a

discretionary power to the trustees to postpone the sale of the testator's real estate and a power until sale to grant or join in granting leases thereof. The testator, who died on 28th December 1911, left him surviving nine children, one of whom died without leaving any children on 20th June 1912.

After the death of the testator his trustees, in pursuance of a power given by a codicil to the will, joined with Nathaniel Lewis Levy in pulling down and rebuilding the premises on the Swanston Street land, and in order to raise money to pay for such building the trustees joined with the said Nathaniel Lewis Levy in a mortgage of the land. The amount owing on this mortgage was about £45,000.

After the testator's death the business formerly carried on by him and the said Nathaniel Lewis Levy was carried on by the said Nathaniel Lewis Levy and Algernon Benjamin Sanders in partnership until the month of January 1920, when the business was transferred to the Leviathan Proprietary Ltd., a proprietary company in which the majority of the shares was held by the said Nathaniel Lewis Levy and Algernon Benjamin Sanders.

On 28th June 1920 a conditional contract was made between the trustees of the will of Lewis Sanders of the first part and the said Nathaniel Lewis Levy of the second part, vendors, and the Leviathan Proprietary Ltd. of the third part, for the sale of the said land to the company. The relevant provisions of the contract are as follows :—

" (1) The purchase-money for the said land shall be the sum of £96,000 payable as follows, namely :—The purchaser shall pay to the vendors a deposit of £1,000 on the execution of this agreement, a further sum of £57,000 within thirty days after judicial sanction to the performance of this agreement shall have been obtained by the trustees, a sum of £8,000 on the first day of June 1925 and the sum of £30,000, being the balance of the purchase-money, on the first day of June 1930. . . . The purchaser shall also pay to the vendors interest at the rate of £6 per centum per annum on so much of the purchase-money as shall from time to time remain unpaid, to be calculated from the first day of June 1920 and to be paid quarterly. Upon and simultaneously with the payment of the said sum of

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

£57,000 the vendors will if requested by the purchaser so to do transfer the said land to the purchaser free from the existing mortgage, and consent to the purchaser executing and giving to the National Mutual Life Assurance Company of Australasia Limited or some other corporation or person or persons a first mortgage over the said land to secure the repayment of the sum of fifty-five thousand pounds on or before the first day of June 1930 with interest at the rate of £6 per centum per annum, provided the purchaser shall simultaneously with the said transfer and consent execute and give to the vendors a second mortgage over the said land to secure the payment to the vendors of the sum of £38,000 with interest thereon at the rate, by the instalments, at the times and in manner hereinbefore provided. Each of the said mortgages shall be in such form and contain such terms and conditions as the trustees or their legal advisers shall require or approve.

"(2) The purchaser shall not be entitled to possession of the said land until it shall have received the transfer before provided for and duly executed the aforesaid mortgages, and thereupon the purchaser shall become entitled to the rents and profits of the said land as from the first day of June 1920."

"(12) All moneys received or to be received by the vendors under or by virtue of this agreement or the second mortgage herein provided for shall be apportioned equally between the trustees and the said Nathaniel Lewis Levy.

"(13) The said Nathaniel Lewis Levy agrees with the trustees that he will at all times join with them in taking such actions as they may consider proper to compel the purchaser to comply strictly with the terms and conditions of this agreement.

"(14) The trustees agree to take promptly, without expense to either of the other parties hereto, such steps as they may be advised by counsel for the purpose of obtaining judicial sanction to the performance of this agreement; and all provisions herein contained are subject to such sanction being obtained within six months from the execution of this agreement."

The widow of the testator, six of his children and two of his grandchildren signed a consent indorsed on the contract.

On 2nd September 1920 an originating summons was taken out

in which the trustees (other than Algernon Benjamin Sanders) were plaintiffs, and the said Algernon Benjamin Sanders and five other children of the testator (sued as beneficiaries on behalf of themselves and all other children of the testator) and six grandchildren of the testator, three of whom were infants (sued as beneficiaries under the will on behalf of themselves and all other grandchildren of the testator) were defendants. Two sons and one grandson of the testator who were not in Australia were not joined as parties to this proceeding, and no representative order was made in it. The said originating summons asked for a declaration that under the circumstances appearing from the affidavit to be filed in support of the application there should be given such judicial sanction or approval as would authorize and enable the plaintiffs and the defendant Algernon Benjamin Sanders to carry out according to the terms thereof the contract above referred to.

On 24th September 1920 *Cussen* J., sitting in Chambers, made an order on the originating summons, the relevant portion of which is as follows :—" It is declared that it is for the benefit of the infant defendants and all other grandchildren of the testator who may hereafter be born and who may become entitled to share in the residue of the testator's estate and all other persons entitled to share in the said residue that the conditional contract dated the twenty-eighth day of June one thousand nine hundred and twenty and made between the plaintiffs and the defendant Algernon Benjamin Sanders of the first part and the said Nathaniel Lewis Levy of the second part and the Leviathan Proprietary Limited of the third part for the sale to the said Leviathan Proprietary Limited of all that piece of land being part of Crown Allotment 11 Sec. 12 City of Melbourne Parish of North Melbourne County of Bourke and being the whole of the land particularly described in the certificates of title entered in the Register Book volume 3658 folios 731499 and 731500 together with the party wall easements in the said contract mentioned be carried out and that the plaintiffs and the defendant Algernon Benjamin Sanders as executors and trustees of the will and codicil of the testator are hereby authorized to carry the said contract into effect according to the terms thereof."

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

On 25th October 1920 a transfer from Nathaniel Lewis Levy as registered proprietor of one undivided half share and from Nathaniel Lewis Levy, John Levi, Solomon Oswald Nelson and Algernon Benjamin Sanders as registered proprietors of the other undivided half share in the land to the company, a memorandum of first mortgage from the company to the National Mutual Life Association and a memorandum of second mortgage from the company to the transferors, were lodged in the Office of Titles for registration, and shortly after that date and before any refusal by the Registrar of Titles to register these documents a copy of the order of *Cussen* J. of 24th September was lodged in support of the application for registration. After an interview with the solicitors for the trustees the Registrar of Titles on 10th June 1921 wrote and sent to the solicitors a letter in the following terms :—" In connection with this matter the Commissioner requests me to inform you that after giving same very full consideration he finds himself quite unable to approve of the registration of the transfer lodged. It is in his opinion quite clear that there is no jurisdiction in any Court or Judge to authorize trustees to invest trust funds on second mortgage. There are also further objections : (1) that there is practically no margin of security ; (2) the mortgage is a contributory one ; (3) the period (ten years) is too long. He does not see his way to accept the order of *Cussen* J. approving of the transaction on behalf of infant beneficiaries as an authority to the contrary."

On 21st July 1921 the proposed transferors obtained an order *nisi* for a mandamus to the Registrar of Titles directing him to register the transfer and memoranda of mortgage ; and on 15th August 1921 the order *nisi* was made absolute by *Cussen* J., the order *nisi* having been amended by substituting the company for the transferors as prosecutor.

From this order the Registrar of Titles brought this appeal by special leave.

Owen Dixon (with him *Reginald Hayes*), for the appellant. The order of *Cussen* J. made on the originating summons is a perfectly proper order, if it is read as authorizing the trustees to sell to a company of which they were the only members. It should not be

construed as authorizing the trustees to do something which, not being authorized by the will, was a breach of trust. All that the Registrar has done is to say the order does not cure the objection that the transaction was a breach of trust. Where it is open to lodge a King's caveat the matter should be treated as if it were lodged. The transaction is a breach of trust in that there is a second mortgage, that that mortgage is a contributory mortgage, that it is a mortgage for a long term of years and that it is a mortgage without a sufficient margin of security (*Webb* v. *Jonas* (1); *Want* v. *Campain* (2); *Oliver* v. *Court* (3)).

[KNOX C.J. referred to *Chapman* v. *Browne* (4).]

The Supreme Court has no jurisdiction to sanction a breach of trust (*Gibson* v. *Jeyes* (5); *Campbell* v. *Walker* (6); *Cousins* v. *Cousins* (7); *Johnstone* v. *Baber* (8); *Blacklow* v. *Laws* (9); *Carlyon* v. *Truscott* (10); *In re Hambrough's Estate*; *Hambrough* v. *Hambrough* (11)). The Registrar may take the same objections to registration as a purchaser under the old law could take to title. The order in this case cannot be justified on the salvage jurisdiction, for this was not a case of salvage. The order should be construed as made with jurisdiction, and, if so, it gave no more authority than was given by the will. If the order was intended to authorize this particular sale on the particular terms, it did not extend to all the persons whose interests were affected—that is, it did not extend to unborn infants and the two children who were out of the jurisdiction and were not represented. The plaintiffs availed themselves, not of Order XVI., r. 32, of the *Rules of the Supreme Court* 1916, which authorizes the Court to appoint persons to represent absent parties, but only of r. 9, by which where the parties are numerous some may be sued on behalf of all. But r. 9 merely gets rid of any question of non-joinder. [Counsel referred to *In re Wilson*; *Delves* v. *Wilson* (12).] The order makes it appear that there were no guardians of the infants. Even if all the children were bound by the order, there

(1) (1888) 39 Ch. D., 660.
(2) (1893) 9 T.L.R., 254.
(3) (1820) 8 Price, 127.
(4) (1902) 1 Ch., 785.
(5) (1801) 6 Ves., 266.
(6) (1800) 5 Ves., 678.
(7) (1906) 3 C.L.R., 1198.
(8) (1845) 8 Beav., 233.
(9) (1842) 2 Ha., 40.
(10) (1875) L.R. 20 Eq., 348.
(11) (1909) 2 Ch., 620.
(12) (1899) 25 V.L.R., 193; 21 A.L.T., 166.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

were unborn children who were not bound. The Registrar at least has the right to decline to register instruments which upon the materials before him disclose a breach of trust (*Ex parte Bond* (1); *Perpetual Executors and Trustees Association of Australia* v. *Hosken* (2); *R.* v. *Registrar of Titles (Vict.)*; *Ex parte the Commonwealth* (3)). If the order of *Cussen* J. was wrongly made, the prerogative writ of mandamus should not go to enable the persons who obtained it to give effect to it.

Weigall K.C. and *Gregory* (with them *Latham*), for the respondent. Assuming that the Registrar was justified in refusing to register on the ground that there was a breach of trust, he is not entitled to do so in face of the order of *Cussen* J. authorizing the sale. This was not a case of trustees investing trust money on second mortgage, but it was a case where the trustees who were also executors had to sell land, which was subject to a very heavy mortgage, in which they had only an undivided half share, as to which they had no power of leasing, and upon which the testator by his will wished the business in which he had been a partner to be carried on. It was the sale of that property which the Supreme Court authorized. It is to be assumed that *Cussen* J. in making the order authorizing the sale had jurisdiction to make it, and that he considered that the circumstances before him gave him jurisdiction. There is jurisdiction in the Supreme Court in some circumstances to authorize a sale such as that in this case. It is open to argument whether this transaction involved any departure from the will. The trustees, who were entitled to realize, were not necessarily committing a breach of trust. So far as it might involve a departure from the will the sanction of the Court was sought as being desirable and permissible within *In re New* (4). Under secs. 18 and 25 of the *Trusts Act* 1915 very wide powers of sale are given to trustees (see *West of England and South Wales District Bank* v. *Murch* (5); *In re Houghton*; *Hawley* v. *Blake* (6); *Brooke* v. *Lord Mostyn* (7)), and this transaction would be permissible under those powers. The

(1) (1880) 6 V.L.R., 458; 2 A.L.T., 94.
(2) (1912) 14 C.L.R., 286, at p. 295.
(3) (1915) 20 C.L.R., 379.
(4) (1901) 2 Ch., 534.
(5) (1883) 23 Ch. D., 138.
(6) (1904) 1 Ch., 622.
(7) (1864) 2 DeG. J. & S., 373, at p. 415.

principle in *In re New* (1) is not limited to cases where the transaction is necessary in order to save the estate from irreparable injury. [Counsel referred to *In re Wells*; *Boyer* v. *Maclean* (2); *In re Tollemache* (3).]

[STARKE J. referred to *In re Hurst*; *Hurst* v. *Hurst* (4).]

It must, however, be assumed that *Cussen* J. considered that the case was one in which he had jurisdiction to make the order. Every person beneficially interested in the land was bound by the order, and there is nothing on the face of the order to suggest that any one of the living persons who were interested was not a party. Even if there were, or might be, some beneficiaries who were not bound the order is not thereby rendered a nullity so that the Registrar may disregard it. It still remains a good order, subject to the right of some person at some future time to seek such relief as may then be granted. Any unborn persons who might become interested were bound (*Basnett* v. *Moxon* (5); *Hopkins* v. *Hopkins* (6); *Bennett* v. *Morris* (7); *Leonard* v. *Sussex* (8); *Gaskell* v. *Gaskell* (9); *Fowler* v. *James* (10)).

[STARKE J. referred to *Lees* v. *Coulton* (11).

[KNOX C.J. referred to *May* v. *Newton* (12).]

As to the infants, they appeared by their guardian. The fact that the order does not recite that they did so appear does not affect the validity of the order, nor does the absence of an affidavit by the guardian approving of the proposed contract. In the absence of recitals it should be presumed that facts existed which gave the Court jurisdiction (*McLean Bros. & Rigg Ltd.* v. *Grice* (13)). On proceedings by originating summons under Order LV., rr. 3, 5 (A), of the *Rules of the Supreme Court* 1916, a Judge may proceed with whatever parties are before him (*In re Richerson*; *Scales* v. *Heyhoe* [*No.* 2] (14)); and it is for him to say whether the interests of the different parties are sufficiently represented. Whatever the Court could do in an administration action, it can do under those rules. If

(1) (1901) 2 Ch., 534.
(2) (1903) 1 Ch., 848, at p. 852.
(3) (1903) 1 Ch., 457, 955.
(4) (1891) 29 L.R. Ir., 219, at p. 228.
(5) (1875) L.R. 20 Eq., 182.
(6) (1738) 1 Atk., 581, at p. 590.
(7) (1888) 14 V.L.R., 9; 9 A.L.T., 160.
(8) (1705) 2 Vern., 526.
(9) (1836) 6 Sim., 643.
(10) (1847) 1 Ph., 803.
(11) (1875) L.R. 20 Eq., 20.
(12) (1887) 34 Ch. D., 347.
(13) (1906) 4 C.L.R., 835.
(14) (1893) 3 Ch., 146.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

the Judge thinks that other parties should be added, he may, under r. 6, order them to be added.

[HIGGINS J. referred to *Wilson* v. *Church* (1); *Watson* v. *Cave* [*No.* 1] (2); *Fraser* v. *Cooper, Hall & Co.* (3).]

The plaintiffs, under Order XVI., r. 9, or in an originating summons under Order LV., r. 5, may sue one person as representing a class without obtaining a representative order (*Trustees Executors and Agency Co.* v. *Urquhart* (4); *Elms* v. *Glen* (5); *Baxter* v. *Baxter* (6); *In re Wilson*; *Delves* v. *Wilson* (7)). The order of *Cussen* J. is an order of the Supreme Court (*Parkin* v. *James* (8)), and under sec. 76 of the *Conveyancing Act* 1915 the order is not invalidated by reason of want of jurisdiction, &c., against the respondent company which is a purchaser and has acted in good faith (*Hood and Challis on Conveyancing, Settled Land and Trustee Acts*, 7th ed., p. 170; *Carson's Real Property Statutes*, 2nd ed., p. 612; *In re Hall Dare's Contract* (9); *Daniel's Chancery Practice*, 8th ed., vol. I., pp. 952-953; vol. II., pp. 1946-1947; *Jones* v. *Barnett* (10); *In re Hambrough's Estate*; *Hambrough* v. *Hambrough* (11)). The Registrar, in asserting that the sale was a breach of trust and in refusing to register, has gone beyond his functions under the *Transfer of Land Act* 1915. In view of secs. 53 and 121 of the Act, if an instrument executed by the registered proprietor of an interest in land is lodged for registration, it is the Registrar's duty to register it. The Act operates to carry out the objects stated in the preamble by relegating trusts to their old position, in which they gave rise to rights *in personam* only; and one of its main principles is to keep trusts off the register. Under sec. 179, in the absence of fraud it is no concern of a purchaser that there is a trust in respect of the land.

[KNOX C.J. referred to *Baker's Creek Consolidated Gold Mining Co.* v. *Hack* (12); *Cowell* v. *Stacey* (13); *Williams* v. *Papworth* (14).]

(1) (1878) 9 Ch. D., 552.
(2) (1881) 17 Ch. D., 19.
(3) (1882) 21 Ch. D., 718.
(4) (1895) 21 V.L.R., 713; 17 A.L.T., 281.
(5) (1897) 23 V.L.R., 376; 19 A.L.T., 114.
(6) (1898) 19 A.L.T., 186.
(7) (1899) 25 V.L.R., 193; 21 A.L.T., 166.
(8) (1905) 2 C.L.R., 315.
(9) (1882) 21 Ch. D., 41.
(10) (1899) 1 Ch., 611.
(11) (1909) 2 Ch., 620.
(12) (1894) 15 N.S.W.L.R. (Eq.), 207.
(13) (1887) 13 V.L.R., 80.
(14) (1900) A.C., 563.

The protection which sec. 179 affords to a purchaser is not limited to the case where he has become registered, but he is entitled to that protection as soon as he has lodged his instrument for registration. Until an instrument is lodged for registration, any other person claiming an equity in the land may by a caveat or injunction or other proper proceeding challenge the right of a purchaser. Then the matter comes before the Court on a contest of equities, and in determining which is to prevail the ordinary rules apply. In *Cowell* v. *Stacey* (1) a caveat had been lodged before the instrument was lodged for registration, and there was conduct amounting to fraud (see *Butler* v. *Fairclough* (2)). The Act contemplates the lodging and registration as being simultaneous, and the registration dates from the lodging. Secs. 196 to 200 are framed for the express purpose of protecting a purchaser who up to the time he lodges his transfer is dealing with a registered proprietor with a clean certificate (see *Guest's Transfer of Land Act*, p. 161). Under that scheme a purchaser may ascertain at the time of lodging his transfer what is the position on the register. If this view be not correct, although the purchaser has taken all possible precautions the Registrar may refuse to register because there is a trust. The Act has taken away the protection given to equities by the doctrine of notice, and has substituted other forms of protection, *e.g.*, the lodging of a caveat (secs. 183, 185). In the case of fraud, registration or lodging for registration is of no effect (*Loke Yew* v. *Port Swettenham Rubber Co.* (3) ; *Chomley* v. *Firebrace* (4)).

[KNOX C.J. referred to *Barry* v. *Heider* (5).]

The Registrar has no general power to interfere with or refuse registration, and any implication of such a power is negatived by the express power given by sec. 55.

[HIGGINS J. referred to *In re British Bank of Australia* (6).]

The Commissioner cannot make use of sec. 55 except by lodging a caveat, and it is not available here because no trust document was deposited. [Counsel referred to *Ex parte Wisewould* (7) ; *Ex*

(1) (1887) 13 V.L.R., 80.
(2) (1917) 23 C.L.R., 78.
(3) (1913) A.C., 491.
(4) (1879) 5 V.L.R. (Eq.), 57, at p. 72.
(5) (1914) 19 C.L.R., 197, at pp. 213, 216.
(6) (1899) 21 A.L.T., 148.
(7) (1890) 16 V.L.R., 149; 11 A.L.T., 182.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

parte Campbell (1); *R.* v. *Registrar of Titles*; *Ex parte Briggs* (2); *Transfer of Land Act* 1915, secs. 225, 233; *Barnes* v. *James* (3).]

[KNOX C.J. referred to *In re Hazeldine's Trusts* (4).]

There was no breach of trust nor anything on the face of any of the documents lodged for the purpose of registration which would justify the Registrar in raising the question of whether there was a breach of trust. Even if there was, the order authorizing the sale is a complete answer. So long as the order stands, those who are parties or who purport to be bound by it are bound, and cannot say that it was made without jurisdiction. The Court may authorize a departure from the terms of a trust instrument even when it is not a case of salvage (*In re Evans and Bettell's Contract* (5); *In re Bagot's Settlement*; *Bagot* v. *Kittoe* (6); *Taylor* v. *Taylor*; *Ex parte Taylor* (7)). It is consistent with the order that *Cussen* J. acted on the salvage principle, and found the facts which gave him jurisdiction. [Counsel also referred to *Malone* v. *Registrar of Titles* (8); *Miles* v. *Jarvis* (9); *Sugden's Vendors and Purchasers*, 13th ed., p. 87.]

[STARKE J. referred to *Seton on Decrees*, 7th ed., p. 348; *Lechmere* v. *Brasier* (10); *In re Montagu*; *Derbishire* v. *Montagu* (11).]

Owen Dixon, in reply. Under the *Transfer of Land Act* the Registrar has the duty and power to ascertain the right of the transferor to transfer; and, when he is aware that the transferor holds upon certain trusts and when he has reason for supposing that the transfer is in breach of trust, his power extends to requiring that he be satisfied that the transfer is not in breach of trust. Sec. 179 rather supports that view than tells against it. The word "affected" in the phrase "shall be affected by notice" has the meaning it had in equity—the purchaser is not to be subject to an equity. The phrase assumes that the purchaser has the legal ownership and is registered. So that the section only gives protection to a person who becomes registered; he is not free from all equities until he is upon

(1) (1888) 9 A.L.T., 183.
(2) (1913) V.L.R., 549; 35 A.L.T., 69.
(3) (1902) 27 V.L.R., 749; 22 A.L.T., 212.
(4) (1908) 1 Ch., 34, at p. 40.
(5) (1910) 2 Ch., 438.
(6) (1894) 1 Ch., 177.
(7) (1875) L.R. 20 Eq., 297.
(8) (1919) V.L.R., 370; 40 A.L.T., 213.
(9) (1883) W.N., 203.
(10) (1821) 2 Jac. & W., 287.
(11) (1897) 2 Ch., 8.

the register. The provisions as to caveats show, not that a caveat is a condition precedent to a right, but that a caveat is a means of stopping registration. Sec. 179 was directed against legal owners being affected by notice, and is not apt to express an intention to give persons who have dealt by contract only positive rights which will defeat prior existing rights. The Act does not contemplate rights in relation to land being created otherwise than by registration. It was not the intention of the Act to give rights to persons merely because they have contracted on the faith of a certificate of title. [Counsel referred to *Barnes* v. *James* (1); *Walker* v. *Linom* (2).]

[HIGGINS J. referred to *Gibbs* v. *Messer* (3).

[STARKE J. referred to *Public Trustee* v. *Arthur* (4).]

The authorities all support the view that the protection afforded by sec. 179 comes into operation only upon registration (see *Chomley* v. *Firebrace* (5); *Cowell* v. *Stacey* (6); *Baker's Creek Consolidated Gold Mining Co.* v. *Hack* (7); *Solicitor-General* v. *Mere Tini* (8)).

[STARKE J. referred to *Crout* v. *Beissel* (9).]

The word "fraud" in sec. 179 includes knowledge of a breach of trust. If a person participates in a breach of trust with knowledge of all the facts which constitute the breach of trust, he is guilty of fraud within the meaning of the section (*Franklin* v. *Ind* (10); *National Bank* v. *National Mortgage and Agency Co.* (11)).

[STARKE J. referred to *Assets Co.* v. *Mere Roihi* (12); *Zachariah* v. *Morrow* (13).]

The Registrar's position is one in which he has to examine facts. The provision in sec. 55 which enables trust instruments to be deposited with the Commissioner must be for the purpose of protecting trusts. Under sec. 225 he could require the production of the will. The Commissioner has a duty to see that transfers which appear to be breaches of trust are not registered unless he

(1) (1902) 27 V.L.R., 749; 22 A.L.T., 212.
(2) (1907) 2 Ch., 104.
(3) (1891) A.C., 248.
(4) (1892) 25 S.A.L.R., 59.
(5) (1879) 5 V.L.R. (Eq.), 57.
(6) (1887) 13 V.L.R., 80.
(7) (1894) 15 N.S.W.L.R. (Eq.), 207.
(8) (1899) 17 N.Z.L.R., 773.
(9) (1909) V.L.R., 207; 30 A.L.T., 185.
(10) (1883) 17 S.A.L.R., 133, at p. 158.
(11) (1885) 3 N.Z.L.R., 257.
(12) (1905) A.C., 176.
(13) (1915) 34 N.Z.L.R., 885.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

is satisfied that they are not breaches of trust. He can prevent registration without lodging a caveat. On its merits the transfer should not be registered. Apart from the order of *Cussen* J. it would not give a good title. That order should be construed by looking at the facts upon which it is to operate. On its face it shows that the authority for making it was that the sale was for the benefit of the infants. It is for the other side to show that it purports to confer a power which otherwise did not exist; for, unless it does, it confers no more than approval of the transaction. It approves of a sale to some of the trustees, but it does not confer authority to sell in breach of trust. There is no jurisdiction in the Supreme Court to invest trustees with power which they have not got, although there is jurisdiction to sanction transactions which, apart from the sanction, would leave the trustees subject to an equity. The doctrine of *In re New* (1) is not one intended to give trustees power derived from the Court. Order LV., r. 3 (*e*), only authorizes a direction to trustees to do something which is within the scope of the trust (*Suffolk* v. *Lawrence* (2)), and under r. 3 (*f*) the Court can only approve of a sale which the trustees could have made themselves (*In re Robinson*; *Pickard* v. *Wheater* (3)); and the power of sale which the trustees have in this case does not authorize them to exchange investments which they hold for other investments which are not authorized by the trust. Under Order XVI., r. 9, where one person is sued as representing others, the others are not bound unless an order is obtained authorizing the one sued to defend on their behalf (*Walker* v. *Sur* (4); *May* v. *Newton* (5)).

[HIGGINS J. referred to *Mercantile Marine Service Association* v. *Toms* (6); *In re Whiting's Settlement*; *Whiting* v. *De Rutzen* (7).

[STARKE J. referred to *Gore* v. *Stacpoole* (8).]

Sec. 76 of the *Conveyancing Act* 1915 relates only to orders of the Court, and there is nothing to show that the order of *Cussen* J. was an order of the Court. The order is only validated as against the purchaser who buys after the order. The section is directed to vesting orders; it relates to title and not to contract. Even if

(1) (1901) 2 Ch., 534.
(2) (1884) 32 W.R., 899.
(3) (1886) 31 Ch. D., 247.
(4) (1914) 2 K.B., 930.
(5) (1887) 34 Ch. D., 347.
(6) (1916) 2 K.B., 243.
(7) (1905) 1 Ch., 96, at p. 101.
(8) (1813) 1 Dow, 18.

the determination be against the Registrar, mandamus should not go because the results have been produced by circumstances which were either inadvertent or improper (*In re Batchelor* (1)).

Cur. adv. vult.

Dec. 16.

The following written judgments were delivered :—

KNOX C.J. [After stating the facts as above set out, His Honor continued :—] The question for our decision is whether the Registrar of Titles was justified in refusing to register the transfer and memoranda of mortgages. On the face of the certificate of title the share formerly belonging to the testator in the property was vested in the said Nathaniel Lewis Levy, John Levi, Solomon Oswald Nelson and Algernon Benjamin Sanders as proprietors in fee simple without any indication that they held the share as trustees.

It was argued for the appellant, the Registrar of Titles, that the facts within his knowledge as Registrar showed that the transaction was a breach of trust, and that consequently he was justified in refusing to register the documents ; that he knew from the order of *Cussen* J. that the vendors were trustees, and from documents in his office what were the trusts of the will and that two of the trustees held all the shares in the purchasing company. The contract, it was said, disclosed breaches of trust (*a*) in investing the purchase-money on second mortgage, (*b*) in investing the purchase-money on a contributory mortgage and (*c*) in investing the purchase-money on a security with an insufficient margin. To this contention the respondent answered that even apart from the order of *Cussen* J. the Registrar of Titles went beyond his duties and powers in refusing to register the document, his only concern being to see that the transferors were identical with the registered proprietors of the land, and that if their identity was established the Registrar had no right to refuse registration even if he knew that the registered proprietors were trustees and that the transaction was a breach of trust. The respondent further contended that in any event, the transaction having been authorized by the order of *Cussen* J., it

(1) (1905) V.L.R., 579 ; 27 A.L.T, 22.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

KNOX C.J.

was the duty of the Registrar to register the documents necessary to carry it out.

The principal questions discussed during the argument may be stated as follows :—(1) Leaving out of consideration the order of *Cussen* J. of 24th September 1920, does the transaction between the trustees and the company constitute a breach of trust on the part of the trustees ? (2) Is it the duty or within the power of the Registrar of Titles to refuse to register a dealing which he believes on the facts within his knowledge as Registrar to be a breach of trust ? (3) Does sec. 179 of the *Transfer of Land Act* 1915 operate before registration to confer a clean title on persons dealing with a registered proprietor when the transaction amounts to a breach of trust on the part of the registered proprietor ? (4) Had *Cussen* J. jurisdiction to make the order of 24th September 1920 ? (5) If so, (*a*) what persons are bound by this order ; and (*b*) what is its effect ? (6) Is the respondent within the protection of sec. 76 of the *Conveyancing Act* 1915 ? I proceed to deal with these questions.

(1) Considering the question as unaffected by any order made by a competent Court, I think it is clear that the trustees committed a breach of trust in agreeing to sell the testator's interest on the terms of the contract of 28th June. Under the investment clause contained in the will it was their duty to invest the proceeds of sale of the testator's real estate in the manner therein specified, and although they had power to invest on mortgage of real estate in Victoria this power did not justify an investment on second mortgage or an investment on a contributory mortgage. Unless expressly authorized otherwise by the trust instrument or by statute, a trustee who has power to invest on mortgage of real estate can properly invest only on a legal first mortgage (*Norris* v. *Wright* (1) ; *Lockhart* v. *Reilly* (2)). It is clear also that a trustee having power to invest on mortgage must not, in the absence of express authority to do so, join in a contributory mortgage (*Webb* v. *Jonas* (3)). Moreover, there was in this case no margin of security—the first and second mortgage together covering an amount practically equal to the value of the property.

(1) (1851) 14 Beav., 291. (2) (1857) 1 DeG. & J., 464.
(3) (1888) 39 Ch. D., 660.

It was argued that the agreement to leave the balance of purchase-money outstanding on second mortgage must be regarded not as an investment of money but as a means of realizing an asset belonging to the trust estate. I am unable to accede to this argument. Under the will the duty of the trustees was (1) to sell the real estate and (2) to invest the proceeds in the manner specified by the will. If this transaction was not a sale, the trustees had no power to enter into it. If it was a sale, it was their duty to invest the proceeds of sale in their names or under their control in an authorized investment. The effect of the transaction into which they entered, if carried out, will be to deprive the trust estate of its undivided half share in the land and to get in exchange for it a contributory second mortgage without any margin of security and not falling due for ten years. It is difficult to conceive a clearer breach of trust.

(2) On the facts and documents within the knowledge of the Registrar of Titles in his official capacity, the dealing sought to be registered was a breach of trust on the part of the trustees. What is his duty in such a case? Must he register the dealing, or is he entitled to refuse to register? In my opinion where it has come to the knowledge of the Registrar that a dealing lodged for registration is a breach of trust, or that for any other reason the person dealing with the land as registered proprietor is not competent at law or in equity to deal with it in the manner proposed, it is his duty to refuse to register. I do not suggest nor was it contended that where the Registrar merely suspects that the dealing may be a breach of trust or otherwise improper, but knows no facts to justify him in concluding that it is so, it is any part of his duty, or that he has any right, to ask for information or make inquiries in order to ascertain the true facts. I desire to limit my opinion with regard to his power to refuse registration to those cases in which the facts within his knowledge appear to him to show that the proposed dealing is improper. The line of demarcation is indicated by the remarks of *àBeckett* J. in *In re British Bank of Australia* (1), where he distinguishes the decisions in *Ex parte Wisewould* (2) and *Ex parte*

(1) (1899) 21 A.L.T., at p. 150; 5 A.L.R., 292, at pp. 293-294.

(2) (1890) 16 V.L.R., 149; 11 A.L.T., 182.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

KNOX C.J.

Campbell (1), and by the observations of *Hodges* J. in *R.* v. *Registrar of Titles*; *Ex parte Briggs* (2).

Under secs. 55 and 233 (III.) of the *Transfer of Land Act* 1915 the duty is cast on the Registrar in certain cases to protect the rights of persons whose interests are not shown on the register; and I can see nothing in the Act to support the contention that in every other case the Registrar is bound to register a dealing, although he knows that the effect of his doing so may be to exclude or destroy the interests of persons having equitable rights against the registered proprietor.

(3) In my opinion the effect of sec. 179 of the *Transfer of Land Act* 1915 is correctly stated in *Hogg on the Registration of Title to Land throughout the Empire*, at pp. 125-127. In discussing the provisions of the corresponding section of the New South Wales Act, which he treats as representative and which is in substance identical with sec. 179, the learned author says:—"These general enactments relating to notice contemplate the possibility of the registered owner receiving notice of unregistered interests either before or after he is registered. Mere notice received only after due registration is almost necessarily inoperative as being inconsistent with the scheme of a conclusive register, and fraud or mistake would require to be superadded in order to make notice effective in such a case. The enactments are chiefly important with respect to notice received before the person receiving it is formally placed on the register as owner. As to this, a difficulty has arisen on the construction of these enactments, and the question has been raised whether a purchaser is amenable to notice at any time before being registered, or whether the initiation of his negotiations with the registered owner entitles him to disregard all adverse claims of which notice is received only after the initiation. The enactments have been taken, in several cases, to mean that a person who acquires any merely equitable interest from a registered owner gains some statutory protection under these enactments—that he is entitled, in fact, to rely on his vendor's registered title before he is himself registered. Both on principle and the balance of authority, this view, as thus

(1) (1888) 9 A.L.T., 183.
(2) (1913) V.L.R., at p. 551; 35 A.L.T., 69.

widely stated, seems inadmissible. . . . The immunity which the purchaser is to enjoy from the effect of notice is only to be afforded him if and when he does become registered, and not before. Before he does become registered it is open to any adverse claimant to step in and assert his claim, and for the purpose of trying his claim registration may be stayed—by caveat or otherwise. . . . The doctrine of notice is not, in fact, affected by these enactments except as regards registered interests, and any questions of priority between unregistered interests that depend on that doctrine will have to be decided on general principles of equity jurisprudence." This statement appears to me to be in accordance with the current of authority in New South Wales, Victoria and New Zealand, as illustrated by the decisions in *Baker's Creek Consolidated Gold Mining Co.* v. *Hack* (1), *Cowell* v. *Stacey* (2), *Crout* v. *Beissel* (3) and *Solicitor-General* v. *Mere Tini* (4).

It follows that the respondent, having actual notice that the transaction to which it was a party was a breach of trust, and not having got on the register, can derive no protection from the provisions of sec. 179 of the Act.

(4) " By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it. . . . The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted " (*Halsbury's Laws of England*, vol. IX., p. 13). The jurisdiction of a Judge of the Supreme Court of Victoria in matters brought before him by originating summons is defined by Order LV., r. 3, of the *Rules of the Supreme Court*, and includes jurisdiction to direct trustees to do or abstain from doing any particular act in their character as such trustees, to approve of any sale or other transaction, and to determine any question arising in the administration of the trust. The order now under consideration purports to authorize the trustees of the will of Lewis Sanders to carry out the provisional contract for the sale of this land, and by implication, if not expressly, signifies the approval of the transaction by the learned Judge. This is in no sense an appeal from his decision, and it is not for this Court to consider whether

(1) (1894) 15 N.S.W.L.R. (Eq.), 207.
(2) (1887) 13 V.L.R., 80.
(3) (1909) V.L.R., 207; 30 A.L.T., 185.
(4) (1899) 17 N.Z.L.R., 773.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

KNOX C.J.

on the evidence before him, the whole of which is not available to us, he was right in making the order. The sole question for us on this point is whether the learned Judge had jurisdiction to entertain the particular matter brought before him. Whether the application be regarded as asking for a direction to the trustees to carry out the provisional contract or as asking for the approval of the transaction, it is, in my opinion, clear that the learned Judge had authority to entertain it; and, if that be so, his decision or order, even if it were not warranted by the evidence adduced before him, as to which I express no opinion, cannot be regarded as made without jurisdiction or be treated as a nullity. In *Suffolk* v. *Lawrence* (1) and *In re Robinson*; *Pickard* v. *Wheater* (2), *Pearson* J. appears to have decided that an application of this kind could not properly be made by originating summons, but in *In re New* (3) an order authorizing trustees to carry out a transaction which was not within the powers conferred on them by the trust instrument was made by the Court of Appeal on originating summons. Having regard to this fact, I do not think the earlier decisions can be treated as authoritative on the question of procedure. In this view of the matter it becomes unnecessary to consider the precise bearing of the decision on the facts in *In re New*, on the authority of which the learned Judge is said to have relied. I desire to reserve my opinion on the question whether and to what extent the decision in that case is to be treated as justifying a departure from the rule stated by *Farwell* L.J. in *In re Hazeldine's Trusts* (4), in the following words, viz. :—" If the trustees cannot do it, neither can the Court, for, as Lord Chancellor *Law* says in *Fitzpatrick* v. *Waring* (5) : ' In the exercise of its jurisdiction for the administration of trusts this Court, I apprehend, has no power to make or authorize any leases or other dispositions of the trust property which the trustee could not have made himself. The Court, in such a case, whether it assumes the position of the trustee, or guides him in the discharge of his duties, is still confined within the limits of the trust as constituted by its author, and has no authority to go beyond those limits. Its business is to *execute* the trusts, not to *alter* them.' "

(1) (1884) 32 W.R., 899.
(2) (1886) 31 Ch. D., 247.
(3) (1901) 2 Ch., 534.
(4) (1908) 1 Ch., at pp. 40-41.
(5) (1882) 11 L.R. Ir., 35, at pp. 44-45.

(5*a*) The substantial question on this point is whether the order of *Cussen* J. is binding on the two sons and the grandson of the testator who were not parties to the proceedings in the Supreme Court. The originating summons in this case was taken out under Order LV., r. 3, by the trustees of the will for the determination of a question under clauses (*e*), (*f*) or (*g*) of that rule. By Order LV., r. 5, it is provided that in such case the persons to be served with the summons shall be the persons or one of the persons whose interests are sought to be affected. By r. 6 the Court or Judge may direct any other person to be served with the summons. The respondent relies on the provisions of Order XVI., r. 9, which provides that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter on behalf of or for the benefit of all persons so interested." It contends that, as the originating summons described the six children of the testator who were defendants as being sued on behalf of themselves and all other children of the testator, the absent beneficiaries were bound by the order by virtue of this rule. In my opinion this argument fails. The general rule is that a Court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties or those 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 (*Brydges* v. *Brydges* (1)). Rule 9 of Order XVI., on which the respondent relies, does not in terms provide as do rr. 9A, 32 (*a*) and 32 (*b*) that the order of the Court when made shall be binding on the persons not made parties or served as if they were parties to the proceedings ; and the decisions in *May* v. *Newton* (2) and *Bennett* v. *Morris* (3) in my opinion establish that persons whose rights or interests might be affected by an order of the Court are not bound unless (*a*) they are brought before the Court as parties to the proceedings, or (*b*) in cases provided for by the rules a representative order is made or notice of the order

(1) (1909) P., 187, at p. 191. (2) (1887) 34 Ch. D., 347.
(3) (1888) 14 V.L.R., 9 ; 9 A.L.T., 160.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

KNOX C.J.

by which it is proposed to bind them is served upon them. I exclude as irrelevant in this instance the case of a plaintiff suing on behalf of himself and others having the same interest. In the present case neither of these alternative courses has been followed, and in my opinion the two sons and the grandson of the testator who have not been so joined as parties are not bound by the order of *Cussen* J.

(5*b*) As the order is not binding on the beneficiaries who were not joined as parties, its effect can be no greater than to preclude the children and grandchildren of the testator who were parties to the proceedings, and possibly grandchildren who may be born hereafter, from questioning the propriety of the transaction in any proceedings between them and the trustees of the will. It has no effect as against the two sons and the grandson who were not parties, and their interests are not bound or in any way affected by the order.

(6) Sec. 76 (1) of the *Conveyancing Act* 1915 is in the following terms :—" An order of the Court purporting to be under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction or of want of any concurrence consent notice or service whether the purchaser has notice of any such want or not." It is contended by the respondent that by force of this provision it obtains under the order of *Cussen* J. a title which cannot be questioned by any of the beneficiaries under the will. Assuming, without deciding, that the order made by *Cussen* J. is an order of the Court, the section does not, in my opinion, extend to cure the defect arising from the omission to make the two absent sons and the absent grandson of the testator parties to the proceedings. The order does not purport to bind or affect the interests of any person except those who are named in the order as having appeared by counsel on the hearing of the application, and I see no reason for holding that the section was intended to or does operate to give to an order of the Court an effect in excess of that which appears on the face of the order. In *Jones* v. *Barnett* (1) it was held by the Court of Appeal that the section did not extend to validate an order made for the sale of a parcel of land described

(1) (1899) 1 Ch., 611; (1900) 1 Ch., 370.

in the order which was assumed to belong to A, who was a party, but really belonged to B, who was not a party to the proceedings; and in principle that decision is applicable to the facts of the present case. I see no reason for holding that the section relieves a purchaser from the obligation of seeing that the persons whose land or interests in land he claims were parties to the proceedings in which the order for sale was made, or that it was intended to validate an order made in the absence of parties entitled to or having interests in the land covered by the order.

As I am of opinion that the transaction was a breach of trust, that the order of *Cussen* J. was not binding on the absent beneficiaries, and that the defect as to parties was not cured by sec. 76 of the *Conveyancing Act*, it follows that in my opinion the appeal should be allowed, and the order for mandamus discharged.

HIGGINS J. This is an appeal from an order absolute for mandamus directed to the Registrar of Titles. The Supreme Court of Victoria has directed the Registrar to register (1) an instrument of transfer of land in Bourke Street, Melbourne, as for £96,000 to the Leviathan Company from Nathaniel Lewis Levy (registered proprietor of one undivided moiety) and from the same Nathaniel Lewis Levy together with John Levi, Solomon Oswald Nelson and Algernon Benjamin Sanders (I shall call these Sanders' trustees), registered proprietors of the other moiety; (2) an instrument of first mortgage of the same land from the Leviathan Company to the National Mutual Life Association to secure the repayment of £55,000 lent; (3) an instrument of second mortgage of the same land from the Leviathan Company to Sanders' trustees to secure £38,000 balance of the purchase-money. These three instruments—one transfer and two mortgages—are dated 22nd October 1920 and were lodged for registration on 25th October, together with the two certificates of title—one moiety in the name of Nathaniel Lewis Levy, the other moiety in the names of Sanders' trustees. Shortly afterwards an order made by *Cussen* J. in Chambers on originating summons (24th September 1920) was lodged in support of the application for registration.

It is of great importance to fix clearly what were the documents

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Higgins J.

presented to the Registrar in order to find what he would see in them and whether he was justified in hesitating as to registration. *Primâ facie*, it is the duty of the Registrar to register any instrument presented in proper form and signed by a person competent in law, and according to the title as appearing on the register, to effect the dealing represented by the instrument.

Now, the transfer purports to be in consideration of (1) £58,000 paid by the company, as to one-half to Nathaniel Lewis Levy and as to the other half to Sanders' trustees; and (2) £38,000 intended to be secured by a second mortgage over the said land.

The first mortgage, to the National Mutual, for £55,000 is in the usual form, giving the mortgagee power on any default for seven days to sell, or to enter and demise. The mortgage debt is repayable on 30th September 1925. The second mortgage, in favour of Sanders' trustees (Nathaniel Lewis Levy is not mentioned separately as to his separate right), is not repayable (in due course) until 1st June 1925 as to £8,000 or until 1st June 1930 as to £30,000.

The order on originating summons is headed: "In the matter of the trusts of the will and codicil of Lewis Sanders late of Bourke Street" &c. "merchant tailor." It shows that three of the four Sanders' trustees were plaintiffs (including Nathaniel Lewis Levy) and one trustee (Algernon Benjamin Sanders) was a defendant; that counsel appeared for the plaintiffs; that other counsel appeared for Algernon Benjamin Sanders, Frederick Roy Sanders, Zara Octavia Glass, Estell May Sanders, Caroline Sanders and Abigail Nelson; and other counsel for Lylie Nelson, Dorothy Levi, Sybil Levi, Hubert Levi, Richard Glass and Nancy Glass. Although the three last-named parties are described in the heading as infants, there is nothing on the face of the order to show that they appeared by any guardian *ad litem*, or that there was any affidavit made (as is usual) by the guardian or by a solicitor, or any opinion of counsel on behalf of the infants recommending that the order should be made. There was no such affidavit in fact made, no such opinion in fact given.

Then the order declares "that it is for the benefit of the infant defendants and all other grandchildren of the testator who may hereafter be born and who may become entitled to share in the residue of the testator's estate and all other persons entitled to share in the

said residue that the conditional contract dated twenty-eighth day of June one thousand nine hundred and twenty and made between the plaintiffs and the defendant Algernon Benjamin Sanders of the first part and the said Nathaniel Lewis Levy of the second part and the Leviathan Proprietary Limited of the third part for the sale to the said Leviathan Proprietary Limited of the land in the two certificates be carried out and that the plaintiffs and the defendant Algernon Benjamin Sanders as executors and trustees of the will and codicil of the testator are hereby authorized to carry the said contract into effect according to the terms thereof."

So far the Registrar would learn, from the order submitted and the instruments, that the four proprietors mentioned in one of the certificates were trustees of the will of Sanders, that infants born and possibly to be born were interested under the will, and that in the opinion of the learned Judge it was for the benefit of all interested under the will that a certain conditional contract should be carried out, and that the order purported to authorize the trustees to carry the contract into effect. The Registrar would also learn that the purchasers of land for £96,000 are allowed to get the legal estate as registered proprietors on payment of £3,000 only, to pay £55,000 by a first mortgage of the proprietors' own land to a stranger, and to pay the balance, £38,000, after ten years under a second mortgage of that land. In other words, the estate of Sanders as the result of the transaction would have exchanged its undivided moiety of valuable city land for a second mortgage of that land payable in 1930 (or, rather, for a half share in that second mortgage). This extraordinary result alone, even if we overlook other obvious considerations, justified the Registrar in holding his hand and in making inquiries. Under sec. 225 of the *Transfer of Land Act* the Commissioner can by summons require information and the production of relevant documents, and, without such a summons, the applicants produced to him the conditional contract referred to in the order on the originating summons, as well as the will of Sanders.

The contract produced is dated 28th June 1920. It is made between Sanders' trustees, Nathaniel Lewis Levy and the Leviathan Company. It contains an agreement to sell the land to the company for £96,000, payable as to £1,000 on the execution of the agreement,

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Higgins J.

£57,000 after judicial sanction to the performance of the contract, £8,000 on 1st June 1925 and £30,000 on the 1st June 1930. The company is to be at liberty to make payments in the meantime on account, not less than £3,000 at a time. The vendors were to transfer the land to the company free from an existing mortgage when the company paid the £57,000, and to let the company give to the National Mutual the first mortgage for £55,000, and the company is to give to the vendors a second mortgage to secure the balance of £38,000. The purchaser is to enjoy the rents and profits, and to pay rates, as from 1st June 1920. The widow of the testator consented in writing to the sale on the terms of the contract, and also two sons out of four (the others were out of the jurisdiction) and four daughters and two adult granddaughters. Under the will and codicil of Sanders, Algernon Benjamin Sanders (a son and one of the trustees of the will) was to become partner in the tailoring business carried on with Nathaniel Lewis Levy in the buildings on the land. The real estate is devised to the trustees upon trust to sell, and from the proceeds of sale and the personal estate numerous legacies were to be paid and the residue is to be invested in the names or under the legal control of the trustees in Government securities, &c., or on mortgage of Victorian real estate. Subject to an annuity of £800 for the widow, the property and income are distributable among the testator's children or their issue. I set out only the points that seem material for the present purpose.

It is to be noticed, in passing, that the contract approved in the order, and which the trustees are authorized to carry into effect, is not a mere contract for sale—it involves also a contract for investment of the trust moneys. The investment for £38,000, at all events, (half of which belongs to the estate) is to be on second mortgage, a contributory mortgage, with practically no "mortgagee's margin" for security. Assuming the purchase-money, £96,000, to be the fair value of the land (counsel for the trustees have urged that it is more than the value), the sum of the first and second mortgages is £93,000. If there should be default for seven days in payment of interest by the company the first mortgagee can sell, and the second mortgagees are helpless unless they can redeem; and they may not be at the time in a position to redeem. Assuming that

trustees selling for a gross sum of money may give a long term for the payment of the balance of the purchase-money, they must take the same precautions as to mortgage, legal estate, sole control, and "mortgagees' margin" for security, as if they actually received the purchase-money from the purchaser A and lent it out to B. It is impossible to conceive that any Court of equity would refuse to treat the provision for investment of the trust moneys (£19,000 in this case) as being other than a glaring breach of trust in itself.

In addition to these facts the Registrar found among the documents filed by the Leviathan Company in his office of Registrar-General of the State a return as to the allotment of shares in the company. This showed that the said Nathaniel Lewis Levy and Algernon Benjamin Sanders, as partners in the tailoring business carried on in the building, had sold to the company the business and assets in consideration of 35,000 £1 shares in the company fully paid up; and that these two were the only shareholders at the date of the return.

The result of the complex transaction, then, seems to be as follows:—A limited proprietary company, consisting of two persons carrying on business on the premises who hold all the shares fully paid up, buys the land for £96,000. Both of these persons are trustees of Sanders' will. They pay £55,000 with moneys borrowed from a stranger on first mortgage of the land, and they promise to pay the balance, £38,000, within ten years, the balance being secured by second mortgage. The mortgages, taken together, are for an amount nearly equal to the total purchase-money, and there is practically no margin of security for the investment. If the land decrease in value, the vendors will (apart from the company's covenants) lose the land, and also the purchase-money payable for it; if the land increase in value, the increment goes to the company and its shareholders—not to the vendors.

I propose to consider presently the effect of the order on originating summons; but apart from the effect of that order I am clearly of opinion that the Registrar was right in refusing to register these three instruments tendered, inasmuch as on the face of the documents submitted they constituted a breach of trust, an improper dealing within the meaning of sec. 233 (III.). It is true that no

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Higgins J.

King's caveat or other caveat had been lodged under that section, and that no copy of the will and codicil had been deposited under sec. 55; but these devices are treated as merely means to the end of preventing improper dealings, and it has been repeatedly held that the Registrar may simply refuse to register (*In re British Bank of Australia* (1); *R.* v. *Registrar of Titles*; *Ex parte Briggs* (2); *Ex parte Equity Trustees Executors and Agency Co.* (3)). The Registrar has to discharge not merely ministerial but also judicial duties; and it is his duty to "prevent instruments from being registered which in law, as well as fact, ought not to be placed on the register" (*Registrar of Titles* v. *Paterson* (4); *Ex parte Bond* (5); *R.* v. *Registrar of Titles*; *Ex parte Briggs* (2); *Ex parte National Trustees Executors and Agency Co. of Australia* (6)). It is not his duty to require proofs negativing any fraud or improper dealing where there is nothing on the face of the documents submitted to suggest it (*Ex parte Wisewould* (7); *Ex parte Equity Trustees Executors and Agency Co.* (8); *Ex parte Campbell* (9); *Hosken* v. *Danaher* (10)) or to inquire into unregistered interests as to which the purchaser or person dealing with the registered proprietor is relieved from inquiry under sec. 179. But in this case the proposed transaction on its face is a breach of trust, and improper; and the burden of showing that the instruments ought to be registered falls on the applicant for the mandamus.

I have next to consider the effect of the order on originating summons. This order purports to give authority to the trustees to carry the contract into effect; and if the order is good on its face, if it is within the jurisdiction of the Supreme Court, it is not for the Registrar to question its propriety (*Assets Co.* v. *Mere Roihi* (11)). The Registrar has no appellate jurisdiction over the Supreme Court; he has to obey the Court. If the order is wrong, it can be set aside by the Full Court or the High Court or His Majesty in Council, and not otherwise. But if the order authorizing the

(1) (1899) 21 A.L.T., 148; 5 A.L.R., 292.
(2) (1913) V.L.R., 549; 35 A.L.T., 69.
(3) (1911) V.L.R., 197, at p. 213; 32 A.L.T., 183, at p. 188.
(4) (1876) 2 App. Cas., 110.
(5) (1880) 6 V.L.R. (L.), at p. 463; 2 A.L.T., 94.
(6) (1898) 19 A.L.T., 222.
(7) (1890) 16 V.L.R., 149; 11 A.L.T., 182.
(8) (1911) V.L.R., 197; 32 A.L.T., 183.
(9) (1888) 9 A.L.T., 183.
(10) (1911) V.L.R., 214; 32 A.L.T., 190.
(11) (1905) A.C., at p. 203.

trustees to carry out such a transaction in breach of trust is beyond the jurisdiction of the Supreme Court, the order is not a protection to the Registrar or to the assurance fund (sec. 250, &c.).

Now, it is clearly laid down that the Court cannot authorize a trustee to do that which the trustee could not do himself. In *In re Hazeldine's Trusts* (1) *Farwell* L.J. cites with approval these words of *Law* L.C. of Ireland (2) :—" In the exercise of its jurisdiction for the administration of trusts this Court, I apprehend, has no power to make or authorize any leases or other dispositions of trust property which the trustee could not have made himself. The Court, in such a case, whether it assumes the place of the trustee, or guides him in the discharge of his duties, is still confined within the limits of the trust as constituted by its author, and has no authority to go beyond those limits. Its business is to *execute* the trusts, not to *alter* them." The Court has jurisdiction to execute the trusts or to guide the trustee in the execution ; but it has no jurisdiction to transgress the trusts or to authorize the trustee to transgress them. Order LV., r. 3 (*e*) and (*f*), is cited as enabling the learned Judge to make this order on originating summons, but the effect of r. 3 is misapprehended. It provides that trustees may take out as of course an originating summons returnable in Judge's Chambers for relief of a certain kind—that is to say, the determination *without an administration of the estate or trust* of any of the following questions or matters : " (*e*) Directing the . . . trustees to do or abstain from doing any particular act in their character as such . . . trustees ; (*f*) the approval of any sale, purchase, compromise, or other transaction." Under the old practice, if the trustees came face to face with some one difficulty, the Court would have had to order that the trusts of the will be carried out by (or under the direction of) the Court ; and after such a decree the trustees had to get the sanction of the Court for (practically) every step. To save such useless expense and delay, these rules enable the trustees to ask the guidance of the Court as to the specific difficulty without throwing the whole administration into Chancery. But, as has been shown in *Suffolk* v. *Lawrence* (3), the rule " only authorizes a direction to trustees

(1) (1908) 1 Ch., at pp. 40-41. (2) (1882) 11 L.R. Ir., at pp. 44-45.
(3) (1884) 32 W.R., at p. 900.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Higgins J.

to do or to abstain from doing some act within the scope of their trust"; and "sub-sec. (*f*) refers to the approval of any sale which could be made by the . . . trustees . . . and which, but for this order, the . . . trustees might have been obliged to make at their own discretion, or for which they could have obtained the direction of the Court only in a proper administration action. I do not think that the rule gives the Court any power to direct a sale in a case in which it had no power to do so previously" (per *Pearson* J. in *In re Robinson*; *Pickard* v. *Wheater* (1)). Therefore this order, so far as it purports to authorize the trustees to carry out the conditional contract—to place the trust money on second mortgage, a contributory mortgage, and without any margin of value for security—is beyond the powers of the Judge on originating summons. It would also be beyond the powers of the Court even in an action; for under the *Supreme Court Act* (sec. 16) the Court has only "such power and authority to do exercise and perform all acts matters and things necessary for the due execution of such equitable jurisdiction as was possessed by the Lord High Chancellor of England in the exercise of similar jurisdiction within the realm of England" on 6th January 1852. The Lord Chancellor had no such power as is here assumed, to give authority to trustees to depart from their trusts. He could enforce and supervise and direct the mode of execution of trusts; he could not release trustees from their obligations. Under the will of Sanders, there was a trust to sell the real estate, *i.e.*, to sell for a gross sum of money; the money was to be applied in payment of legacies, and the residue was to be invested in the names or under the legal control of the trustees on (*inter alia*) mortgage of Victorian real estate. This means, in my opinion, first mortgage, under the sole control of the trustees, with a proper margin of value for security, and repayable within a reasonable time. Here, the term of the second mortgage is ten years. That this objection to the order goes to the root of jurisdiction is shown by *Buckley* J. in *In re Morrison* (2). There was under the will a trust to sell and invest, but not on company shares or debentures. A proposal was made to convert a business in which the testator was a partner into a limited company, and to give to the

(1) (1886) 31 Ch. D., at p. 249. (2) (1901) 1 Ch., 701.

estate shares and debentures of the company. The proposed arrangement was, as assumed by the Judge, highly beneficial. But *Buckley* J. said there was "not jurisdiction to approve the agreement." It either amounted to a sale and investment on unauthorized securities, or an exchange of the property of the testator for other property which the trustees were not authorized to hold. There was "no power in the Court in the administration of the estate to do that which, if done by the trustees, would be a breach of trust" (see also *In re Crawshay* (1)).

Counsel for the company, however, have placed much reliance on the case of *In re New* (2), as showing that the Courts in England have sanctioned departure from the trust. It might be sufficient to say that *New's Case* was admittedly very exceptional, and that the exceptional facts do not exist in this case. Briefly, a testator held shares in a prosperous colliery company, and by his will directed his trustees either to hold the shares or to sell them and invest the proceeds on certain usual trust securities. Under a reconstruction scheme of the shareholders, it was proposed that shareholders in the existing company should exchange their shares for fully paid and more realizable shares in a new company. The Court sanctioned the exchange of the shares by the trustees for the shares and debentures in the new company, but only on the undertaking of the trustees to apply to the Court for leave to further retain the shares and debentures if they should desire to retain them for more than one year. The Court refused to authorize the retaining of the shares and debentures as a permanent investment. *Romer* L.J. said (3): "As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorized by its terms"; and he based the exceptional order made in this case on the fact that the will had not made any provision for the emergency which had arisen. Mere benefit to the estate was not enough. This case and others were reviewed by *Kekewich* J. and by the Court of Appeal in *In re*

(1) (1888) 60 L.T., 357.
(2) (1901) 2 Ch., 534.
(3) (1901) 2 Ch., at p. 544.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Higgins J.

Tollemache (1). *Kekewich* J. said that this extraordinary jurisdiction was not exercised if there were no urgency (and there is no urgency alleged in the present case), or if it would create a new trust in lieu of that being administered; and he refused to sanction the proposed change of investment not authorized by the instrument of trust, for the mere reason that it would be for the advantage of the beneficiaries—following *Morrison's Case* (2). On appeal, the refusal was affirmed, *Romer* L.J. saying that *In re New* shows how far the Court will go, and beyond that point it will not go. The position in *In re New* seems analogous to that of trustees who are directed to invest on mortgage of real estate, and who cannot find a suitable investment; for the Court will sanction the leaving of money waiting investment in some substantial bank, even at interest (see *Lewin on Trusts*, 12th ed., 330). At all events, the extraordinary jurisdiction, such as it is, cannot be extended to such a case as the present, where the investment is not merely temporary until a regular investment can be found, and where the Judge bases his order not on urgent grounds or temporary purposes but solely on the benefit to the persons interested or to be interested. The order must be construed as other instruments, and the maxims *Expressio facit cessare tacitum*, *Expressio unius exclusio alterius*, apply.

There is, of course, the presumption that, where a superior Court of Record makes an order, the facts existed which could give it jurisdiction; but it is only a presumption. Where any order is made by an inferior Court, the burden lies on the party upholding the order to show that the facts were sufficient; where the order is made by a superior Court, the burden lies on the party impugning the order (per *Holroyd* J. in *R.* v. *All Saints* (3); *Gosset* v. *Howard* (4); *Mayor &c. of London* v. *Cox* (5), per *Willes* J.). I am assuming in favour of the company that the presumption in favour of jurisdiction applies to the order of a Justice made in Chambers under the special power conferred by Order LV., r. 3; but the point is by no means clear (see *Gossett* v. *Howard* (6)). Here it is

(1) (1903) 1 Ch., 457, 955.
(2) (1901) 1 Ch., 701.
(3) (1828) 7 B. & C., 785.
(4) (1845) 10 Q.B., 411.
(5) (1867) L.R. 2 H.L., 239, at p. 259.
(6) (1845) 10 Q.B., at p. 454.

not pretended that facts existed such as were proved in *In re New* (1); and if we are at liberty to examine the affidavit in support of the order on the originating summons, as counsel for the company invited us, it is clear that the allegations were pointed to the mere issue of benefit and to the expediency of getting the sanction of the Court because "the company is so closely connected with two of the trustees." The order is based on a finding that it is for the benefit of the infants and others entitled to share in the residue to carry out the conditional contract, and on that finding alone; the conditional contract, if set out in full in the order, would be seen, obviously, to cover an investment which would be a clear breach of trust, and as it is the duty of the Court to carry out the will of the testator, not to substitute its own will, the order is, in my opinion, invalid. The Registrar's objections are confined to the investment, but the transfer as for £96,000 incorporates expressly as part of the consideration the second mortgage, and the first mortgage to the National Mutual is essential to the payment of the £58,000.

Much stress has been laid by counsel for the company on sec. 179 of the *Transfer of Land Act*, as entitling the company to get the instruments registered "except in the case of fraud." But, *so far as the investment is concerned*, the sanction is inapplicable, as the company is not a person "contracting or dealing with or taking or proposing to take a transfer from the proprietor of any registered land lease mortgage or charge." The mortgages presuppose the registration of the company as proprietor, and the mortgage to which the Registrar objects is a mortgage made by the company after the company becomes proprietor. Sec. 179 seems to be purely negative in effect. It prescribes that certain equitable principles as to notice of unregistered interests and as to the duty of the person dealing with the registered proprietor to make inquiries are not to apply to land under the Act; but it does not exempt the purchaser or other person dealing with the registered proprietor from *all* equitable principles, such as *Qui prior est tempore potior est jure*, nor does it exempt him from the consequences of knowing participation in a dealing which is improper. Therefore,

(1) (1901) 2 Ch., 534.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Higgins J.

when a proprietor, B, is under an equitable obligation to A as to the land and by contract with C comes under an obligation to C, of the two equitable obligations that of A prevails—until registration of C. If C become registered, his right prevails over the right of A by virtue of sec. 72, not of sec. 179, and therefore the duty of the Registrar to take every care before he registers is imperative. If he register an improper dealing, he may render the assurance fund liable to make good the loss to A.

For these reasons I am of opinion that, unless sec. 76 of the *Conveyancing Act* applies, the order of *Cussen* J. on originating summons is invalid for want of jurisdiction, that the Registrar was justified in refusing to register the mortgages and that the rule absolute for mandamus is wrong. Neither the Supreme Court nor a Judge thereof had power to authorize the trustees to take an investment which was not authorized by the will, or to accept in effect a second mortgage of the land—a contributory mortgage too with no proper margin for safety, in place of a title in fee simple to the undivided moiety of the land itself. I prefer to base my opinion on this ground of final substance; but I concur with my learned brothers in their view that the order on the originating summons, even if there were power to make it, is not a protection to the Registrar as against the two sons of the testator who were out of the jurisdiction and not parties to the summons. The rule is clearly laid down by *Farwell* L.J. in *Brydges* v. *Brydges* (1):—"The Court has no jurisdiction, inherent or otherwise, over any person other than those properly 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 . . . . 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." This principle as to parties is a matter of jurisdiction of the Court (*In re Shephard*; *Atkins* v. *Shephard* (2)). It is not necessary to consider whether

(1) (1909) P., at p. 191.

(2) (1890) 43 Ch. D., 131.

the order would be binding on infant beneficiaries, present or future.

But there is still a question as to the effect of sec. 76 of the *Conveyancing Act* 1915: "(1) An order of the Court purporting to be under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction or of want of any concurrence consent notice or service whether the purchaser has notice of any such want or not." This section differs from the English section from which it is taken (sec. 70 of 44 & 45 Vict. c. 41) in an important particular, the effect of which was probably not sufficiently considered by the draughtsman; for the Victorian Act applies not merely to an order *made* under any statutory or other jurisdiction, but to an order "purporting" to be so made; and the consequences may be very unexpected. But, whatever the effect of the section, it does not, in my opinion, apply to the impugned transaction here—the second mortgage from the company to the trustees. The order is not to be invalidated "as against a purchaser"; and "'purchaser,' unless a contrary intention appears, includes a lessee or mortgagee or an intending purchaser lessee or mortgagee or other person who for valuable consideration *takes or deals for* property" (sec. 3). The section, in short, is meant to secure the title of the person *who takes* property or an interest therein—land, lease, mortgage, &c.,—not to exonerate the person who gives title, where the transaction involves a breach of trust or improper dealing. There is much to be said, too, for the view that the order referred to in the section is to be treated as valid so far as regards the parties to the action only (see *Jones* v. *Barnett* (1)), but the provision that the order is not to be invalidated for "want of any concurrence consent notice or service" is puzzling. It is doubtful also, whether this order in Chambers can be treated as an order of the Supreme Court for the purpose of sec. 76—see sec. 3 ("Court"), secs. 6, 12, 21, 22, 25, 75, &c. The distinction between Court and Judge in Chambers seems to be recognized throughout the Act. But I prefer to rest my judgment on the ground that sec. 76 does not apply to a complex of transactions such as we find in the conditional contract.

(1) (1899) 1 Ch., 611; (1900) 1 Ch., 370.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

I think it only fair to add that I see no ground for thinking that the parties to this transaction had any intention to defraud the infants, in the sense of seeking to get a pecuniary advantage at their expense.

Starke J.

STARKE J. The rule absolute for mandamus must, in my opinion also, be discharged. The case requires a consideration of (1) the proper functions and duties of the Registrar of Titles, (2) the jurisdiction of the Supreme Court, (3) the parties bound by the order of *Cussen* J. dated 24th September 1900, (4) the effect of the *Conveyancing Act* 1915, sec. 76. It is indeed unfortunate that we have not the reasoned opinion of *Cussen* J. upon any of these points. The parties have presented aspects of the case to us which were not brought to the attention of that learned Judge nor considered by him.

Considerable argument was heard to the effect that it was the duty of the Registrar of Titles to register any instrument recognized by the *Transfer of Land Act*, when it was executed by the registered proprietor of any title appearing on the register book. But the Act is not, in my opinion, an Act simply to facilitate the registration of documents: its purpose is to simplify title, and to enable the registration of title. Trusts or notices of trusts may not be entered upon the register book (*Transfer of Land Act* 1915, sec. 55); but they are not swept away and destroyed—though considerable protection is given against unregistered instruments to persons dealing with registered proprietors of titles appearing upon the register (sec. 179). It is not, I think, necessary or desirable in this case to determine the full scope and extent of sec. 179 of the *Transfer of Land Act*, for a transfer of the land from proprietors who are trustees to a company in which two of the trustees are, according to the evidence, the principal, if not the only, shareholders, cannot be afforded protection by reason of any of the provisions of that section. And it is the company which seeks to compel the registration of the transfer to it and of the instruments of mortgage depending upon that transfer.

My brother *Higgins* has examined the function and duty of the Registrar in relation to the registration of instruments under the *Transfer of Land Act*, and I am in complete agreement with him.

Nothing more is therefore required than to express my concurrence in his opinion on the subject.

The jurisdiction of the Supreme Court to make the order authorizing the carrying out of the conditional contract, which has been the subject of so much debate, is by far the most important question in the case. But we must remember, and keep constantly present to our minds, that we are not sitting on appeal from the order made by *Cussen* J., and that we are not considering whether that order was a provident or an improvident exercise of jurisdiction or whether the learned Judge misunderstood or misinterpreted the law. The question is: Had the Supreme Court jurisdiction to decide the case, or was its order a nullity? (See *Mayor &c. of London* v. *Cox* (1)).

The Supreme Court is a Court of general jurisdiction within the territorial limits of Victoria, and (except the County Court to a limited extent) no other Court in Victoria has jurisdiction to determine questions relating to the administration of trusts (*Supreme Court Act* 1915, sec. 16). Therefore it is clear to me that the Supreme Court had jurisdiction to determine the question which came before *Cussen* J. upon originating summons. No doubt there are expressions in the books to the effect that the Court of Chancery has no jurisdiction "to break the trusts of a will" (see *In re Hurst*; *Hurst* v. *Hurst* (2); *In re Hazeldine's Trusts* (3)). But the applications constantly made to Courts now exercising the jurisdiction of the Court of Chancery, to sanction various acts or proposed acts of administration, justify the conclusion that the question whether those acts can or cannot be done is within the jurisdiction of such Courts. A Judge of a Court of general jurisdiction may give an erroneous decision; he may misinterpret a will or a statute, or misunderstand a principle of law, or arrive at a conclusion in point of fact which cannot be justified upon the evidence adduced before him: but all this is matter for correction upon appeal. The judgment is not a nullity; it is conclusive, at least as between the parties to the proceedings and their privies, unless modified upon appeal.

(1) (1867) L.R. 2 H.L., at p. 279. (2) (1891) 29 L.R. Ir., 219.
(3) (1908) 1 Ch., at p. 41.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Starke J.

The learned counsel for the company did not seriously contend that the conditional contract entered into between the company and the trustees of Sanders' will could be supported by reference to any express trust in the will of the testator. Rather, they relied upon a state of facts which rendered the contract necessary if anything was to be preserved to the beneficiaries of the trust estate. According to the argument, the trustees might lawfully have entered into the contract in the circumstances, but for protection appealed to the Court, which then sanctioned and authorized the transaction upon the principle illustrated by *In re New* (1) and other cases. It may be that *Cussen* J. extended the principle beyond its proper limits in this case, and gave a wrong decision both upon the facts and the law, but we cannot, in this proceeding against the Registrar for a mandamus, either correct that decision or treat the order as a nullity. So far as the parties bound by the order are concerned, it finally concludes them and their privies as to the authority and duty of the trustees to the extent expressed in the order.

Mr. *Dixon* endeavoured to convince us that the order of *Cussen* J. did not authorize any transaction which was beyond the powers of the trustees of the will, but simply enabled trustees, despite their personal interest, to enter upon an authorized transaction. A proper and complete answer to this argument is, in my opinion, that the order authorized the trustees to carry a particular contract into effect according to its terms. So far as the contract is authorized by the will, the order is protective ; so far as it is beyond the authority of the will the order—despite any error of the Court—is an authority to the trustees, or at least a determination of their powers and duty as trustees under the will, which parties bound by the order cannot controvert. A disposition was shown at the Bar to treat *In re New* (1) as an authority enabling the sanction of the Court to be given to any act which appeared beneficial to persons interested in trust estates. I do not for one moment suppose that *Cussen* J. acted upon any such view. It is unnecessary in this case to consider the true limits of the principle applied in *In re New*, but perhaps I may add that the opinions given in the

(1) (1901) 2 Ch., 534.

case recognize that the authority of the Court should be exercised within very narrow limits, and should not be brought into play merely because the act is for the benefit of the persons interested in the trust estate (*Cousins* v. *Cousins* (1)). This brings me to the point: Who are bound by the order of *Cussen* J. ?

The Registrar, acting under the guidance of the Commissioner, was, I must say, thoroughly justified, upon the materials presented to him, in challenging the registration of the instruments produced to him for that purpose.

The order of *Cussen* J. was drawn up by the parties with singular want of care, but we have thought it right to look at the record and the materials upon which the order was founded in order to see if all the beneficiaries of the testator Sanders, whose interests are affected by the order, were properly before the Court, and bound by the order. If beneficial interests are outstanding, the Registrar, for the reasons assigned by my brother *Higgins*, is justified in refusing registration of the instruments presented to him. There are several beneficiaries who are not named as parties to the proceedings before *Cussen* J., namely, Arthur Henry Sanders, a son, residing in South America, another son, Nathaniel Lionel Sanders, residing in London, and a grandson, Cecil Maurice Nelson, also residing in London. It is said that they are bound because the remaining children of the testator are sued as beneficiaries under his will and codicil on behalf of themselves and all other children of the testator other than the trustee Algernon Benjamin Sanders, and certain infant grandchildren of the testator were sued as beneficiaries under his will and codicil on behalf of themselves and all other grandchildren of the testator other than certain named grandchildren. The infant grandchildren appeared by their guardian *ad litem*, though it does not so appear in the order of *Cussen* J.

The joinder of grandchildren on behalf of themselves and all other grandchildren of the testator can only be taken to refer, in my opinion, to existing grandchildren, and not to grandchildren who are not *in esse*. A question therefore arises as to the representation of the possible interests of unborn grandchildren. According to the practice of the Courts of equity all persons having an interest

(1) (1906) 3 C.L.R., at p. 1200.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Starke J.

in the subject matter of a suit ought to be made parties. That practice, however, was founded upon convenience, and gave way in cases where it produced inconvenience (*Cockburn* v. *Thompson* (1); *Willats* v. *Busby* (2)). In cases, for instance, where the persons interested were so numerous as to make it inconvenient that all should be parties, then, if they had a community of interest, one or more were allowed to sue or be sued on behalf of all (*Calvert on Parties*, sec. 2, pp. 19 *et seqq.*; *Duke of Bedford* v. *Ellis* (3)). And "everybody interested, although not actually present, was bound by the decision, because he was present by representation" (*Commissioners of Sewers* v. *Gellatly* (4); *In re Calgary and Medicine Hat Land Co*; *Pigeon* v. *The Co.* (5)). It was no doubt the duty of the Court in such suits to see that the absent interests were fairly and honestly represented. The principle of representation was adopted by the *Judicature Act* and Rules both in England and in Victoria (*Rules of the Supreme Court*, Order XVI., r. 9; *Duke of Bedford* v. *Ellis* (6)). But the Judicature Rules simplified and extended in many respects the practice of the Court of Chancery (*In re Richerson*; *Scales* v. *Heyhoe* [*No.* 2] (7)).

The learned counsel who appeared for the company supported the order of *Cussen* J. by reference to Order XVI., r. 9, and Order LV., rr. 3 (*a*), (*f*) and (*g*), and 5 (A) (*a*) and 6. Order XVI., r. 9, simply applies the practice of the Court of Chancery to the Supreme Court of Victoria; it does not, in my opinion, enlarge the principle of representation acted upon in the Court of Chancery. There is some authority for saying that Order LV. only authorizes a direction to trustees within the scope of their trust (*Suffolk* v. *Lawrence* (8); *In re Robinson*; *Pickard* v. *Wheater* (9)). A wider jurisdiction has, however, been constantly exercised (see *In re New* (10) and *In re Tollemache* (11)). The effect of the rules has been considered to some extent in *May* v. *Newton* (12). The position as to cases within Order XVI., r. 9, is made clear. Apparently, "one

(1) (1809) 16 Ves., 321, at p. 325.
(2) (1841) 5 Beav., 193.
(3) (1901) A.C., 1, at pp. 8-9.
(4) (1876) 3 Ch. D., 610, at pp. 615-616.
(5) (1908) 2 Ch., 652, at p. 659.
(6) (1901) A.C., at p. 8.
(7) (1893) 3 Ch., 146.
(8) (1884) 32 W.R., 899.
(9) (1886) 31 Ch. D., 247.
(10) (1901) 2 Ch., 534.
(11) (1903) 1 Ch., 457, 955.
(12) (1887) 34 Ch. D., 347.

might sue on behalf of all so as to bind the class," but "it seems proper, in order to bind absent parties, to obtain the direction" of the Court (1). As to cases coming under Order LV., the law is not, I think, settled by anything that was said in *May* v. *Newton*. Order LV., however, deals, in my opinion, with the frame of the proceedings and not with the question of the persons bound by an order made under its provisions. Thus, r. 5 only directs that the persons to be served in the first instance with the summons (under rr. 3 and 4) shall be certain persons, and r. 6 empowers the Court to direct such other persons to be served as it shall think fit. But if the Judge does not in fact direct any further parties to be added, there is nothing in the rule which provides that those other parties are bound. An appeal must then be made to the practice of the Court in dealing with the representation of absent parties, or to other rules (if any) for that purpose. In order to bind absent parties, it would be wise, as *Kay* J. suggested in *May* v. *Newton*, to obtain a proper order of the Court for that purpose. But the propriety of this course does not dispose of the argument put forward in the present case, that the absent parties are properly represented in the proceedings. The argument fails, however, in my opinion, because the case is not one in which the doctrine acted upon by the Court of Chancery and embodied in Order XVI., r. 9, can rightly be applied. The parties were not so numerous that you could "never come at justice" unless the principle of representation were applied (*Duke of Bedford* v. *Ellis* (2); *Commissioners of Sewers* v. *Gellatly* (3); *Calvert on Parties to Suits in Equity*, pp. 39 *et seqq.*; *Story on Pleadings*, 6th ed., sec. 15 (*a*), pp. 153-154)). Neither in the originating summons, though it purports to be a representative proceeding, nor in the order of *Cussen* J., is there any suggestion that the persons interested are too numerous for all to be joined. And if we look to the affidavit we find that the children of the testator him surviving numbered nine, including one of the trustees, and the grandchildren seven.

It is the duty of the Court now to determine whether the absent parties are, under these circumstances, bound by reason of the

(1) (1887) 34 Ch. D., at p. 349. (2) (1901) A.C., at pp. 8-9.
(3) (1876) 3 Ch. D., at pp. 615-616.

H. C. OF A. 1921.

TEMPLETON v. LEVIATHAN PROPRIETARY LTD.

Starke J.

principle of representation. Nothing in the order of *Cussen* J. concludes the matter: it is open to the sons and the grandchild to say that they are not bound by any order obtained in such proceedings; and, if it is open to them, the Registrar may properly rely on the same point. Further, I incline to the view that the principle of representation was wholly inapplicable to the subject of the proceedings in this case, namely, the sanction of a sale beyond the express powers of the trustees; but this point was not really argued, and I express no concluded opinion upon it. (See *Calvert on Parties*, p. 218; *Phillipson* v. *Gatty* (1)). Apart from the principle and the Rules of Court already referred to, the learned counsel for the company did not suggest that the sons and grandchild were bound by the order of *Cussen* J., and I have not myself been able to discover any other basis for supporting the view that they are bound. Unless a person was a party to a suit, or properly represented in that suit, or served with the decree in the suit, the decree did not bind him (*Willats* v. *Busby* (2); *Powell* v. *Wright* (3); *Bennett* v. *Morris* (4)). The decisions of *Holroyd* J. in *Elms* v. *Glen* (5) and *In re Wilson* (6) do not touch the matter now in dispute. A plaintiff may select the representative parties in a case to which Order XVI., r. 9, applies, but there remain behind, first, the duty of the Court on the hearing of the proceeding to see that the absent parties are properly represented, and, second, the question how far an order made in the proceeding operates to bind absent parties. The latter question depends upon the principle of representation as applied by the Court of Chancery and upon orders made by the Supreme Court pursuant to its Rules.

The argument for the Registrar of Titles also suggested that the interests of unborn grandchildren were not bound by the order of *Cussen* J. I do not consider it necessary to decide this question, but the following cases may prove useful if the point ever arises hereafter: *In re Whiting's Settlement*; *Whiting* v. *De Rutzen* (7); *Fussell* v. *Dowding* (8); *McArthur* v. *Scott* (9).

(1) (1848) 6 Ha., 26.
(2) (1841) 5 Beav., 193.
(3) (1844) 7 Beav., 444, at pp. 447, 449, 450.
(4) (1888) 14 V.L.R., 9; 9 A.L.T., 160.
(5) (1897) 23 V.L.R., 376; 19 A.L.T., 114.
(6) (1899) 25 V.L.R., at p. 199; 21 A.L.T., at p. 167.
(7) (1905) 1 Ch., at pp. 100-101.
(8) (1884) 27 Ch. D., 237, at p. 240.
(9) (1885) 113 U.S., 340, at p. 402.

The result, therefore, is that two sons and a grandchild are not bound by the order of *Cussen* J.; and as these interests are outstanding, the Registrar was entitled, in my opinion, to refuse registration of the instruments tendered to him. Nor, in my opinion, does the *Conveyancing Act* 1915, sec. 76, affect the matter. The section is very sweeping in its terms, and difficult to construe. But *Jones* v. *Barnett* (1) is a sufficient authority for saying that an order of the Court cannot affect persons who are not named as parties to the suit or properly represented therein, and who are not bound by the order of the Court. Further, I would add that the order of the Court is not invalidated: it has full force and effect as to parties within the suit, notwithstanding any defects in the jurisdiction of the Court or in the authority of the Judge, or in the procedure adopted in the case. I desire to say, however, that in my opinion "an order of the Court" is not less "an order of the Court" because it is made by a Judge sitting in Chambers rather than in Court (see *Parkin* v. *James* (2)).

Appeal allowed. Order for mandamus discharged. Respondent to pay costs in the Supreme Court and in the High Court.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Snowden, Neave & Demaine.*

B. L.

(1) (1899) 1 Ch., 611; (1900) 1 Ch., 370.

(2) (1905) 2 C.L.R., 315.