Before the Lords of the Judicial Committee of the Privy Council on the Appeal of Barayene v. *Stuart and another from the Supreme Court of New South Wales; November 7th*, 1883.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THEIR Lordships think that in this case it would be very difficult to sustain the absolute Order of the Supreme Court, the subject of appeal, on the ground of surprise alone. It is an Order making absolute a rule nisi, which rests entirely upon the ground of surprise in the production in evidence of Green's mortgage deed of the 9th March 1846, and the deeds that follow it; viz., the transfer of that mortgage from Green to Want, and the conveyance from Want to Shuttleworth. That is the sole ground upon which the Order of the Supreme Court has been granted. But their Lordships cannot avoid seeing that the trial which took place was in its course, as reported to their Lordships, eminently unsatisfactory.

Their Lordships do not acquiesce in the entirety of the reasons for the judgement of the Chief Justice of the Supreme Court. He is reported to have said: "That being so, the only title which "Broughton made out was under this mortgage; "and there was no evidence of any default by "the mortgagor, from which it follows that such "mortgagor and all persons claiming under him "are entitled to retain possession as against the

Ra 9621. 100.—11/83. Wt. 5011. E. & S.

" mortgagee and all persons claiming under " him. The Plaintiff's title, then, to such " possession, until default, is so far clear." Again, in another passage, he is further reported to have said: "A conveyance under a power " of sale in a mortgage should recite the exis- " tence of such power—the default and the " sale as consequent thereon. Looking at the " terms of this mortgage to Green, it appears to " me that the necessity for inquiring into the " default is dispensed with only where a " receipt is given avowedly under the power of " sale; and it follows, therefore, that Broughton " does not stand in the position of a person who " has purchased under such a power. So far " as the deeds now before us are concerned, the " representatives of William Bligh Gore, that is to " say those who are the transferees of his equity " of redemption, are entitled to the possession; " and, that being so, the verdict is one that ought " not to be allowed to stand."

Their Lordships cannot give their sanction to these observations, which yet are calculated to affect the rights of the parties in a new trial and have rendered this Appeal necessary. If the case had been taken down to a second trial on the absolute Order and with these reasons of the Chief Justice, the presiding judge should necessarily have directed a verdict for the Plaintiffs.

Their Lordships will, therefore, humbly recommend Her Majesty to affirm the Order of the Supreme Court so far as it directs a new trial in the action; to vary it so far as it rests on the ground of surprise only; and to declare that the said Order for a new trial should rest on the larger ground that the trial which was had, and the verdict in such trial, were unsatisfactory, and that a new investigation ought to take place. And their Lordships will humbly report to Her Majesty to this effect.

There will be no costs of this Appeal.