Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of De Mestre and Another v. *West and Others, from the Supreme Court of New South Wales; delivered* 20*th February* 1891.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
LORD HOBHOUSE.
LORD FIELD.

[*Delivered by the Earl of Selborne.*]

THEIR Lordships have considered the arguments addressed to them in this case, and they have come to the conclusion that it will be their duty to advise Her Majesty to affirm the judgment appealed from.

It is unnecessary to go into the history of the law upon this subject. The general rule has long been settled, that a voluntary conveyance, even though from the most honest motives and the most moral considerations, may be defeated, according to the construction which has been placed upon the statute of 27 Elizabeth, cap. 4, by a subsequent conveyance to a purchaser for value such as was made in this case. It has also been determined, in a manner which it would be too late now to attempt to review,—in the case, amongst others, of *Sutton* v. *Chetwynd*, 3 Merivale, 249; and in the Irish case of *Cormick* v. *Trapaud*, 6 Dow. p. 60, both decided by the House of Lords,—that this rule is applicable to limitations in favour of volunteers under marriage settlements. Therefore, as the law is so settled, some special reason, consistent with that law, must be shown for taking any

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particular case out of the rule. Whether their Lordships would have established such a rule had the matter been new is not the question.

The case which has been mainly relied upon as an authority for allowing this Appeal is one in the Court of Exchequer, of *Dickenson* v. *Wright* (5 H. & N. 401), which was affirmed in the Court of Exchequer Chamber under the title of *Clarke* v. *Wright* (6 H. & N. 849). Their Lordships probably would agree that, if that case ought to be followed, it might be an authority in support of the present Appeal. But they observe not only that Lord St. Leonards, in editions of his book on Vendors and Purchasers later than *Clarke* v. *Wright*, but subsequent judges—Vice-Chancellor Hall, a great judge in this branch of the law especially, and the present Lord Justice Kay—have unfavourably criticised that decision. And, when the reasons given for that decision, and the state of opinion apparent from the report of what took place in the Court of Exchequer Chamber come to be examined, it seems to their Lordships impossible that it can be supported. In the Court of Exchequer, where the judgment was given by Baron Channell, it is apparent that the Court proceeded upon the view that the case of *Newstead* v. *Searles* (1 Atkyns, 264) was an authority for the proposition that a settlement by a widow about to marry upon her children by a former marriage is good against a subsequent mortgagee, putting it in that general way, without any reference to any more special reasons. And no doubt, if that had been so, it would have been difficult to resist the conclusion drawn by the Court of Exchequer, that by parity of reasoning the same rule would apply in favour of an illegitimate child. *Clayton* v. *Lord Wilton* (6 M. & S. 67) was also referred to by the same learned judge as having determined that a

limitation in a marriage settlement to the children of a possible second marriage is good, without reference to special circumstances. Unless the view so taken of those previous authorities of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* was correct, the foundation of that judgment fails.

In the Court of Exchequer Chamber their Lordships find a very great conflict of opinion among the judges, and plainly the majority of the judges would have been for reversing the judgment below if they had not taken the same view of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* which was taken by Baron Channell. No doubt two very learned judges in that Court, Mr. Justice Blackburn and Mr. Justice Willes, put the case upon a different ground, and endeavoured to explain in a different way the decisions in *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton;* the ground taken by them being apparently this, that if it can be inferred from circumstances that the parties had specially in view, when they made their agreement, provision to be made for persons who would otherwise have been volunteers, they were no longer volunteers, because it was a matter of special bargain, although there might be no other valuable consideration for that agreement than the marriage. In other words, that, although *primâ facie* provisions in favour of collaterals in marriage settlements were not within the marriage consideration, yet they might always be brought within it if the parties so intended. No other authority was cited in favour of that proposition; and, if sound, it would go far to destroy the general rule; for it is recited in almost every marriage settlement that all the provisions made by it, whether for the parties themselves and the issue of the marriage, or for anyone else, are made pursuant to agreement. And if, as Mr. Justice Blackburn appears

to have thought, the acceptance by a husband of interests in his wife's property, different from those which the law would have given him if there had been a marriage without any settlement, would be a sufficient consideration to support limitations to collaterals against a purchaser for value, this, or something equivalent, may be said to occur in every case in which any property of the wife is brought into settlement. Nor do their Lordships think that the omission to provide in a marriage settlement for all or some of the issue of the marriage can operate as a consideration in favour of persons provided for by it who would otherwise be volunteers. The majority of the judges, in *Clarke* v. *Wright*, differed from Mr. Justice Blackburn on these points; and if *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* had been understood as their Lordships understand those cases, *Clarke* v. *Wright* would not have been decided as it was.

Under those circumstances it appears to their Lordships to be their duty to advise Her Majesty, in accordance with the view which they themselves take of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*, and which was taken by the House of Lords in *Mackie* v. *Herbertson* (9 L.R. Ap. Cases, 303). The order of the limitations in both those cases was such, that the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument, without also giving effect to the others. It was on that ground, and not from any special favour to provisions for the benefit of children who were not issue of the marriage, that their Lordships consider both those cases to have been determined. If similar circumstances should occur in any other case, it may be inferred from what

was said in the House of Lords in *Mackie* v. *Herbertson*, that the same principle would be applied; and indeed the principle seems to be clear; for the settlement in any such case could not be defeated without defeating the interests of children unquestionably within the consideration of marriage. There is no authority for the proposition that under the statute a particular limitation can be picked out of the middle of a settlement, or the shares of some persons who would take *pari passu* with others according to the terms of the settlement picked out, in order to be destroyed, in favour of a subsequent purchaser; leaving subsequent or concurrent interests of persons who were within the consideration of marriage under the same settlement undisturbed.

The only question in their Lordships' view which remains is, whether in this case there are special circumstances which bring it within the principle of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*, so understood. The property settled was that of the wife only. No consideration, except that of marriage, proceeded from the husband. There is an ultimate limitation of the property which the wife is herself settling to her heirs, subject to a general power of appointment, not in favour of any particular persons within the marriage consideration, but in those general forms in which it may be said that in almost all settlements the ultimate undisposed of and unsettled interest is reserved back to the settlor, or subject to the appointment of the settlor. It seems to their Lordships impossible to hold, that this is enough to bring a case within the principle of *Newstead* v. *Searles*. Then does the interposed provision about raising money for the benefit of the illegitimate son of the wife during the lifetime of the husband and wife, or either of them, make any difference? However

that provision ought to be construed, it was only a power to raise a sum not exceeding a certain amount, during a certain period of time, which is not alleged to have been, and which their Lordships must assume not to have been executed. Their Lordships do not think it necessary to determine whether Mr. George Taylor Rowe, the illegitimate son, could have insisted on the exercise of that power, if he had claimed to have it executed in his favour, or not. He is dead, and the question is not with him, but it is with those who come last in the order of the settlement—his issue. It was not for them that this money was to have been raised, if it had been raised at all. No doubt if it had been raised they would have had an ultimate interest in it under the settlement; but in the present suit no claim is made on the footing that it ought to have been raised. Their Lordships think therefore that there are not in this settlement any special provisions, sufficient to bring it within *Newstead* v. *Searles;* and that the Court below was right in holding the case to fall within the general rule. The Appeal must therefore be dismissed, and their Lordships will so advise Her Majesty. The Appellants will pay to the Respondent West his costs of this Appeal.