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ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N

A	<u>ALAN FREDERICK FRAZER</u>	<u>Appellant</u>
	<u>A N D</u>	
	<u>DOUGLAS HAMILTON WALKER</u>	<u>First Respondent</u>
	<u>A N D</u>	
B	<u>EDWARD RADOMSKI and NELLIE RADOMSKI</u>	<u>Second Respondents</u>

CASE FOR THE APPELLANT

C	1. This is an appeal from a judgment of the Court of Appeal of New Zealand dated 15th day of November 1965, affirming a judgment of the Supreme Court of New Zealand dated 5th day of May 1965, in a civil action in which the Appellant sought to set aside a mortgage given to the Second Respondents (hereinafter referred to as "the Mortgagees"), and a subsequent transfer given by the Mortgagees to the First Respondent (hereinafter referred to as "the Purchaser"), the transfer being executed by the Mortgagees under a power of sale contained in the mortgage.	<u>RECORD</u>
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F	2. The Appellant and his wife were the joint owners of approximately 10 acres of land which was a small farm in a suburb of Auckland. The Appellant's wife signed a mortgage over the land but the Appellant's signature was forged by his wife. The Mortgagees knew nothing of the forgery, nor did the Purchaser until after the Purchaser had bought the land at an auction and had registered a transfer signed by the Mortgagees transferring the interests of both the Appellant and his wife to the Purchaser.	P.27. 11.30-40
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H	3. The Appellant knew nothing of the mortgage or transfer until after the transfer had been registered.	P.27.11.30-40 P.42.11.25-35.
	4. The Purchaser commenced proceedings against the Appellant for possession of the land, the Appellant removed the action into the Supreme Court on the grounds that a question of title was involved, and defending	P.28 11.7-34

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RECORD

P. 3

11. 35-46

the action, joined in the Mortgagees, pleading that the mortgage was a forgery. He sought removal from the register of the mortgage and the transfer, so that he could be restored to the register as proprietor of the fee simple with his wife as joint tenant, or alternatively, he sought a declaration that his interest in the land was unaffected by the forged mortgage and the transfer pursuant to it.

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11. 26-40

5. In the Supreme Court Richmond, J. held that he was bound by the case of Boyd v Mayor etc. of Wellington [1924] N.Z.L.R. 1174, in which the Court of

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Appeal decided by a majority (Stout C.J., Sim and Adams JJ., Salmond and Stringer JJ. dissenting) that a void proclamation when registered created an indefeasible interest as proprietor of the estate in fee simple. Richmond J. saw no difference between nullity due to forgery and nullity due to any other cause, and gave judgment in favour of the Mortgagees and the Purchaser.

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P.32 1.9 to
P.39 1.12.

6. In the Court of Appeal North P. accepted the Appellant's submission that Boyd v Mayor of Wellington was to be distinguished, but, Turner J. and McCarthy J. felt it unnecessary to decide the point. Turner J. however discussed the decision.

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7. All three Judges held that the Appellant could not succeed because of the provisions of Section 183 of the Land Transfer Act 1952, which reads as follows:

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"No liability on bona fide purchaser or mortgagee -

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"(1) Nothing in this Act shall be so interpreted as to render subject to action for

"recovery of damages, or for possession, or

"to deprivation of the estate or interest in

"respect of which he is registered as proprietor

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"or, any purchaser or mortgagee bona fide for

"valuable consideration of land under the

"provisions of this Act on the ground that his

"vendor or mortgagor may have been registered

"as proprietor through fraud or error, or

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"under any void or voidable instrument, or may

"have derived from or through a person registered as proprietor through fraud or error, or

"under any void or voidable instrument, and

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"this whether the fraud or error consists in

"wrong description of the boundaries or of the

"parcels of any land, or otherwise howsoever. RECORD
"(2) This Section shall be read subject to the
"provisions of Sections seventy-seven and
"seventy-nine hereof."

A 8. The Appellant submitted, inter alia, that
the Purchaser could not claim the benefit of
this Section because he could not argue that
the Mortgagees were "his vendor" within the
B meaning of those words in that Section. It
was said that the word "proprietor", in the
phrase "may have been registered as proprietor",
C meant the proprietor of the interest being
transferred, and because the Mortgagees were
not registered as the proprietors of the fee
simple, they did not come within this term.

9. In dealing with this submission, North P.
rejected the suggestion that the Mortgagees
could not be a vendor within the meaning of the
Section inasmuch as they needed the authority
D of the Appellant to transfer his interest, and
could only act as his agents to do so. The
learned Judge referred to decided cases which
hold that a mortgagee is not a trustee for
E the power of sale, and then concluded that
because the mortgagee does not have to account
to a mortgagor as an agent must account to
his principal, the Mortgagees in this case
were not the agents of the Appellant.

P. 41
11. 1-18

F 10. But with respect, His Honour wrongly
interpreted the submission as meaning that
there was a relationship of principal and
agent between the Mortgagees and the Appellant;
the submission was that the Mortgagees were
G merely intermediaries, and that without the
Appellant's consent, they could not transfer
to someone else his interest in the land.
This consent they did not have, and could
not give, and therefore they were not the
H vendor of the purchaser, within the meaning
of the Section. In discussing questions
of agency, and the matter of a mortgagee's
duty to act as trustee for the power of sale,
His Honour moved away from the Appellant's
I submission, and treated the mortgage in this
case as if it were a genuine mortgage,
overlooking the forgery and its effect.

J 11. Turner J. dealt with this submission by P.44 1.22 to
saying that every purchaser must have a vendor P.45 1.16.
and then by posing the question, if the
Mortgagees were not the vendor of this
Purchaser, who could be? In reply to the
answer that the Mortgagees were agents

RECORD

for the Appellant, who was the person whose consent was necessary to pass the estate in the land, the learned Judge adopted what had been said on the topic of principal and agent by North P., and said that the Mortgagees were in no way answerable to the Mortgagor as would be an agent to his principals.

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12. In this, the Appellant submits the learned Judge was wrong because he applied the test of the relationship of mortgagor and mortgagee under a genuine mortgage, not the test applicable in the case of this forged document. Furthermore, the Appellant was not submitting that there was any contract of agency, but only that the mortgagees were acting as intermediaries of the Appellant, from whom they had no authority so to do.

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P.49 1.28
to P.51
1.28.

13. In answer to this submission McCarthy J. said that the Mortgagees were registered as proprietors of an estate as mortgagees, and therefore were proprietors as defined by the Act. He regarded the Appellant's submission as being too narrow, and held that a wider reading should be given to the Section.

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14. The Appellant submits that His Honour was wrong in this matter, because although the Mortgagees could be proprietors of an estate as mortgagees they could only be within the statutory definition of proprietor as regards the Appellant's wife and the interest she held as joint-owner. The statutory definition of proprietor is contained in Section 2 as follows:

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"Proprietor" means any person seised or possessed of any estate or interest in land, at law or in equity, in possession or expectancy:"

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As against the Appellant, the Mortgagees had no interest in his land, and were not seised or possessed of any estate or interest in his share, either at law or in equity, in possession or expectancy. They could not therefore be, vis-a-vis the Appellant, a proprietor.

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15. His Honour went on to discuss the general scheme of the Act and the Torrens System of registration, and was of opinion that his view of Section 183 was in accordance therewith. But with respect, His Honour did not direct himself in this part of his judgment to the fact that the document which had been registered was a forgery, and did not here give consideration to the effects which follow when a forged

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A 16. All three judgments did not canvass any further the question of the effect of registration of a transfer pursuant to a forged mortgage, and did not consider the implications contained in the passage in the case of Assets Co. v Mere Roihi [1905] A.C. 176 at 211, where your Lordships' Board in comparing forgery with fraud said:

B "Moreover, forgery is more than fraud,
"and gives rise to considerations peculiar
"to itself."

C 17. The Appellant submits that the meaning of Section 183 cannot properly be construed without weighing the considerations above referred to. The learned Judges in the Court below all assumed that the Mortgagees were validly and lawfully registered as proprietors of an estate as Mortgagees. But one of the peculiar considerations attaching to a forged document is that it is not an executed instrument within the meaning of Section 157 of the Land Transfer Act 1952. The Section provides that for an instrument to be executed for the purpose of creating, transferring, or charging an estate it must be signed by the registered proprietor. In the case of a forgery, the instrument is not signed by the registered proprietor and the document is not executed so as to comply with the requirements of the Act.

F 18. Such an instrument, not being properly executed cannot be accepted for registration, this being expressly prohibited by Regulation 24 of the Land Transfer Regulations 1948, which provides:

G " No application, instrument, dealing or
"other matter shall be received for registrat-
"ion unless it complies in all respects with
"the requirements of the Act, and of these
"and any other regulations for the time being
"in force or if it is contrary to any other
H "law or regulation in force, or if there
"appears to be fraud or improper dealing."

I 19. The Appellant submits that the holder of a forged instrument is not a "proprietor" within the meaning of Section 183 of the Act, because he has no estate or interest in land, and therefore does not have a registrable interest within the meaning of Section 2 (supra).

20. The certificate which every instrument requires pursuant to Section 164 of the Act, that the

document is correct for the purposes of the Act, cannot be a correct certificate when the proprietor's signature is a forgery. This certificate must be on every instrument before it is tendered for registration, and the Registrar has no power to register any instrument without the required certificate. A

21. The Appellant submits that where there is such a certificate wrongly endorsed as in the case of a forged mortgage, the certificate is a nullity, and relies upon the case of District Land Registrar v Thompson [1922] N.Z.L.R. 627. B

22. The Appellant therefore submits that their Honours in the Court of Appeal did not give due weight to the monitory passage in the Mere Roihi case (supra), which passage must be carefully considered before the meaning of Section 183 of the Land Transfer Act can be ascertained for the purposes of a case like the present. C D

23. The Appellant also submits that the Purchaser has no right to be on the title, because the transfer under which he claims is a nullity and Section 183 does not apply in such a case.

24. Accordingly the Appellant submits with respect, that the appeal should be allowed and the Appellant's name restored to the title of his property for the following (among other) E

REASONS

1. BECAUSE the scheme of the Act is much wider than was assumed by the learned Judges in the Court of Appeal. F

2. BECAUSE the consequences that follow when a forged instrument is tendered for registration as foreshadowed by Your Lordships' Board in Assets Co. v Mere Roihi were not weighed adequately. G

3. BECAUSE the benefit of Section 183 is not available to the Purchaser.

4. BECAUSE the case of Boyd v Mayor etc. of Wellington (supra) was wrongly decided and/or gives no protection to either Purchaser or Mortgagees as against the Appellant. H

P.B. TEMM.

IN THE PRIVY COUNCIL No. 12 of 1966.

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW
ZEALAND.

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ALAN FREDERICK FRAZER Appellant

A N D

DOUGLAS HAMILTON WALKER First
Respondent

A N D

EDWARD RADOMSKI and NELLIE
RADOMSKI Second
Respondents

CASE FOR THE APPELLANT

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