

~~PC~~  
~~Case~~

IN THE PRIVY COUNCIL

No. **12** of 1966

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

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B E T W E E N:

ALAN FREDERICK FRAZER Appellant

- and -

DOUGLAS HAMILTON WALKER First Respondent

- and -

EDWARD RADOMSKI AND NELLIE RADOMSKI Second Respondents

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CASE FOR FIRST RESPONDENT

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RECORD

1. This Appeal is from a judgment of the Court of Appeal of New Zealand given at Wellington on the 15th November 1965 in which the Court of Appeal dismissed the appeal by ALAN FREDERICK FRAZER, the present Appellant against a judgment given in favour of the present Respondents by the Supreme Court of New Zealand at Auckland on the 5th May 1965.

pp.30-52

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2. The facts relevant to this Appeal are summarized in the judgment of Turner J. in the Court of Appeal - Appellant and his wife were registered as proprietors of land. His wife executed a mortgage over the land to Second Respondents, who accepted it bona fide and for value, advancing upon its security a sum by way of loan. In fact, though his wife's signature was genuine, appellant's signature was a forgery. He knew nothing about the transaction. The mortgage was registered by Second Respondents in good faith. Default was made under it. Second Respondents, still in good faith, duly exercised their power of sale. First Respondent bought the property at the auction.

p.42  
11.24-36

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The sale was conducted by the Registrar, but Second Respondents themselves executed the transfer to First Respondent. First Respondent took bona fide and for value. His transfer was duly regis-

tered. After all this, the forgery came for the first time to the notice of the Appellant.

3. After the registration of the First Respondent as registered proprietor of the land he issued proceedings in the Magistrate's Court against the present appellant for possession of the land. These proceedings were removed into the Supreme Court. The present appellant counter-claimed for declarations that his interest in the land had not been affected by the purported mortgage or the subsequent sale to the First Respondent; that the mortgage was a nullity; that he was the beneficial owner of an undivided half-interest in the land, and for an order directing the cancellation of the entries or memorials in the Land Transfer Register and substituting an entry or memorial restoring the land into his name.

pp.1 & 2 10

p.2,1.42  
p.4,1.6

4. In the Supreme Court, Richmond J. gave judgment for possession of the land to the First Respondent and gave judgment for the First and Second Respondents on the Counter-claim, holding that the First Respondent had acquired an indefeasible title.

p.30 20

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LONDON, W.C.1.

5. Richmond J. decided in favour of the Respondents on the question of title on the basis that he was bound by the decision of the Court of Appeal of New Zealand in Boyd v. Mayor etc. of Wellington 1924 NZLR, 1174. The effect of that decision is that by the operation of Sections 62 and 63 of the Land Transfer Act 1952 any person who without fraud succeeds in procuring himself to be registered as proprietor of land under the Land Transfer Act has an indefeasible title although the documents which form the basis of his registration are absolutely inoperative in themselves.

p.29  
11.26-33 30

6. The appellant contended that this principle does not apply where the cause of nullity of a transaction is forgery. Richmond J. expressed doubt whether nullity due to forgery can be distinguished in principle from nullity due to some other cause but held that in any event as the transfer to the First Respondent was not a forgery the principle of Boyd's case afforded complete protection to the First Respondent.

p.29  
11.33-40 40

7. The present appellant appealed to the Court of Appeal of New Zealand. In that Court all three Judges concurred in the dismissing of the appeal but all did so on grounds other than that adopted by Richmond J. As to these grounds all the Judges indicated that they preferred not to express a conclusion upon them though both North P. and Turner J. expressed doubt whether Boyd v. Mayor etc. of Wellington was conclusive in a case involving a forgery.

p.42,11.1-11;p.46  
1.6;p.47  
1.12;p.51  
11.29-43 50

8. In the Court of Appeal of New Zealand all three Judges held that Section 183 of the Land Transfer Act 1952 applied to protect the First Respondent.

p.40,1.22 -  
p.41,1.25

That section reads:

10           “(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, 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 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 this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.”

p.44,1.10 -  
p.45,1.17

p.48,1.29 -  
p.51,1.28

20           The Judges held that a mortgagee exercising a power of sale is a "vendor" within the meaning of the section and that accordingly the section was directly applicable to the facts of this case.

30           9. In addition, North P. expressed the view that Section 182 of the Land Transfer Act 1952 also probably operated to give the First Respondent an indefeasible title.

That section reads:

40           “Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct 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.”

p.39,1.14 -  
p.40,1.22

50           10. The First Respondent contends:

RECORD

- (1) That he acquired an indefeasible title to the land by virtue of the operation of Section 183 of the Land Transfer Act, 1952;
- (2) Alternatively, that he acquired an indefeasible title to the land by virtue of the operation of Section 182 of the Land Transfer Act, 1952;
- (3) Alternatively, that he acquired an indefeasible title by virtue of the operation of Section 62 and/or Section 63 of the Land Transfer Act 1952 and the decision in Boyd v. The Mayor etc. of Wellington.

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11. The First Respondent humbly submits that the decision of the Court of Appeal was right and that this appeal should be dismissed with costs for the following among other

R E A S O N S

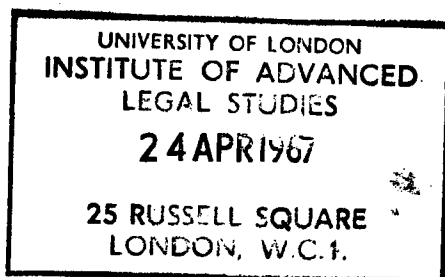
- (1) That the upholding of the above submissions by reading the relevant sections of the Land Transfer Act 1952 in the manner contended for, places an interpretation upon the Act which is consonant with the scheme of the Act as a whole, particularly with reference to the provisions for compensation contained in Part XI thereof;
- (2) That if the relevant sections, or any of them are not construed as contended for, the result would be to create an irrational and impractical distinction between the position of a purchaser in a mortgagee's sale and any other purchaser;
- (3) And for the reasons appearing in the Judgments given in the Court of Appeal and the Supreme Court.

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*D.S. Beattie.*

COUNSEL FOR FIRST RESPONDENT



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IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE COURT OF APPEAL OF NEW  
ZEALAND

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BETWEEN :

ALAN FREDERICK FRAZER                      Appellant

- and -

DOUGLAS HAMILTON WALKER

First Respondent

- and -

EDWARD RADOMSKI AND NELLIE RADOMSKI

Second Respondents

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CASE    FOR    FIRST    RESPONDENT

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