

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gibbs v. Messer and others, from the Supreme Court of the Colony of Victoria; delivered 24th January 1891.*

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Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD HERSCHELL.

LORD MACNAGHTEN.

LORD MORRIS.

MR. SHAND (LORD SHAND).

[*Delivered by Lord Watson.*]

This appeal depends upon the construction of the "Transfer of Land Statute," No. 301 of 1866, which established a register of titles and encumbrances for the Colony of Victoria, in order "to give certainty to the title to estates in land, and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive."

The facts of the case, so far as they bear upon the question which we have to decide, may be shortly stated. The Plaintiff, Mrs. Messer, who resides in Scotland, was entered in the register as proprietor in fee simple, free from encumbrances, of certain parcels of land in the district of Hamilton. In the year 1884, she was joined by her husband, who left behind him in the Colony, in the custody of Charles James Cresswell, a solicitor at Hamilton, her duplicate certificates of title, and also a power of attorney, by which

she had authorized her husband to sell, mortgage, or otherwise dispose of the lands.

During their absence from the Colony Cresswell forged a transfer of the lands by Mr. Messer, as his wife's attorney, to "Hugh Cameron, of North Hamilton, county of Dundas, grazier." It is admitted that there was no such person as the transferee in existence. Cresswell then, representing himself to be agent for Hugh Cameron, produced the transfer, dated the 11th August 1885, along with Mrs. Messer's certificates of title, to the Registrar, who cancelled each folio in which her name was entered, registered Hugh Cameron as proprietor upon a new folio, and issued the usual duplicate certificate in his name.

Still professing to act as agent for Hugh Cameron, Cresswell next arranged with the Defendants, the McIntyres, for a loan of 3,000*l.*, to be secured by mortgage. He wrote, with his own hand, a deed of mortgage, bearing date the 10th October 1885, purporting to be executed by Cameron, he himself being the subscribing witness, whose attestation is required by the statute. Upon the faith of that document the McIntyres paid the money to Cresswell, who forthwith appropriated it to his own purposes. When they presented their mortgage for registration, the Registrar declined to enter it until he was satisfied that the Hugh Cameron registered as proprietor was not identical with a person of the same name who had recently been made bankrupt. They accordingly obtained from Cresswell a statutory declaration, purporting to be sworn by his client Hugh Cameron before himself, as a Commissioner of the Supreme Court of the Colony for taking affidavits, to the effect that the declarant had never been made insolvent, or taken the benefit of any Act relating to bankruptcy or

insolvency. Upon production of that evidence the Registrar duly entered a memorial of the mortgage in the folio containing Hugh Cameron's certificate of title.

Mr. Messer returned to the Colony in July 1886, when these frauds were discovered, and Cresswell absconded, leaving no assets. The present suit was then brought by Mrs. Messer against (1) the Registrar, (2) the McIntyres, as mortgagees of Hugh Cameron, and (3) Cresswell. It prays for an order for the calling in and cancellation of the certificates in name of Hugh Cameron, and also for the issue to the Plaintiff of new certificates of title, free from the incumbrance of the McIntyres' mortgage; and alternatively, in the event of the mortgage being held to constitute a valid encumbrance upon her title, for a declaration that the Plaintiff shall be at liberty to redeem, and that the moneys necessary therefor be paid by the Registrar out of the assurance fund created by the Act.

It is clear that the registration of the name of Hugh Cameron, a fictitious and non-existing transferee, cannot impede the right of the true owner Mrs. Messer, who has been thereby defrauded, to have her name restored to the register. Accordingly, in the absence of Cresswell, who has not appeared to defend, the controversy between the litigant parties has been mainly if not wholly confined to the question whether the mortgage is or is not an incumbrance affecting Mrs. Messer's title. If the mortgage is valid, their Lordships see no reason to doubt that Mrs. Messer has been deprived of an interest in her land, in consequence of fraud, within the meaning of Section 144, and that, failing recovery from Cresswell (against whom she has taken all the proceedings which the clause requires), she is entitled to receive

the amount payable for its redemption out of the assurance fund. On the other hand, if the mortgage does not constitute an incumbrance upon her title, Mrs. Messer will obtain a full measure of relief, and can have no claim against the fund.

Mr. Justice Webb, the Judge of First Instance, sustained the validity of the mortgage, but ordered that the Plaintiff should be at liberty to redeem, and that the Defendant, the Registrar, should pay to her, out of the assurance fund, her costs of the action, all moneys from time to time paid by her for interest in respect of the mortgage, and also all moneys necessarily paid by her for principal interest and costs in order to its redemption. His decision was affirmed on appeal by the Full Court, with the variation that the Plaintiff was found liable in costs to the mortgagees, to be added to her own costs of suit, and repaid to her by the Registrar out of the assurance fund.

The Registrar has appealed to this Board from the judgment of the Full Court. In the course of the argument it was maintained, on his behalf, that the protection given by the statute to proprietors of a mere interest in land, such as is created by a statutory mortgage, which does not operate as a transfer of the legal estate, is less extensive than the protection afforded to proprietors of the land itself. Their Lordships do not find it necessary to determine that point, although, *prima facie*, it does appear to have been the intention of the Act to confer the same kind and degree of security upon all persons who, transacting in reliance on the register, acquire either proprietary rights or mere interests in land, in good faith and for valuable consideration. They assume, for the purposes of this case, that the statute, in that respect, makes no distinction

between these two classes of proprietors ; and that the McIntyres' mortgage is not liable to impeachment upon grounds which would have been unavailing against a transfer of the land obtained by them, in similar circumstances, from the same author.

Their Lordships do not propose to criticize in detail the various enactments of the statute relating to the validity of registered rights. The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, *in boná fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a *boná fide* transferee, would have been liable to cancellation at the instance of Mrs. Messer ; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a *boná fide* mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register ; and they cannot by registration of a forged deed acquire a valid title in their

own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

The difficulty which the mortgagees in this case have to encounter arises from the circumstance that Hugh Cameron was, as Mr. Justice Webb aptly describes him, a "myth." His was the only name on the register, and, having no existence, he could neither execute a transfer nor a mortgage. The mortgagees have endeavoured to surmount that difficulty by arguing that, in the circumstances of the case, Cresswell must be held to have been *de jure*, if not *de facto*, the proprietor whose name was on the register, and that their mortgage, executed by him in the name of Hugh Cameron, is therefore as valid as if Cresswell's own name had been on the register, and he, and not Cameron, had been the apparent mortgagor. That argument found favour with both Courts below.

The views entertained by the learned Judges have been very clearly explained by Mr. Justice A'Beckett, who, in delivering the judgment of the Full Bench, said:—" We therefore feel no  
 " doubt that the certificate of title on which  
 " the mortgagees advanced their money, though  
 " brought into existence by the forgery of the  
 " Defendant Cresswell, was as efficacious in their  
 " favour as if it had issued upon an honest  
 " and regular transaction. That certificate de-  
 " scribed Hugh Cameron as the proprietor, and  
 " the mortgagees had the right to rely upon the  
 " certificate as evidence of his title to an in-  
 " defeasible estate in the land mortgaged to  
 " them. It now appears that no such person  
 " as Mr. Hugh Cameron described in the cer-  
 " tificate in fact existed; and the Appellants  
 " contend that a mortgage purporting to be by  
 " this fictitious person, and affecting land  
 " alleged to be his, is a mortgage of a non-

“existent interest—a mere abstraction which  
 “cannot derogate from the rights of the true  
 “owner—and that the mortgage is therefore  
 “worthless. This contention appears to us to be  
 “answered by the view put forward in the  
 “statement of claim inferentially admitted by  
 “the Registrar of Titles, and sustained by the  
 “evidence, that Charles James Cresswell had,  
 “for the purpose of dealing with this land,  
 “assumed the name of Hugh Cameron. It was  
 “he who signed the transfer to Hugh Cameron  
 “as transferee, and who signed the mortgage to  
 “the Defendants McIntyre as mortgagor, and  
 “he produced the certificate of title of Hugh  
 “Cameron for the purpose of having the mort-  
 “gage registered upon it. Upon these facts we  
 “think that, in favour of the mortgagees, he  
 “should be regarded as the proprietor of the  
 “land with whom they dealt, on the faith of the  
 “certificate evidencing his title.”

The opinion thus expressed appears to re-  
 cognize the principle that a mortgagee, advancing  
 his money on the faith of the register, cannot  
 get a good security for himself except by trans-  
 acting with the person who, according to the  
 register, is the proprietor having title to create  
 the incumbrance. So far their Lordships agree;  
 but they do not concur in the inferences which  
 the learned Judges have drawn from the facts  
 in evidence, with respect to the position of  
 Cresswell throughout these transactions, and his  
 true relation to the name entered on the register  
 as that of the proprietor. They are unable,  
 upon the facts proved, to affirm that Cresswell  
 “assumed” the name of Hugh Cameron for the  
 purpose of dealing with Mrs. Messer’s land. A  
 man cannot, with any propriety, be said to assume  
 a name, or in other words an *alias*, unless he acts  
 personally under that name, or asserts it to be his  
 own designation. Nothing could be farther from

Cresswell's purpose than his assumption of the name of Hugh Cameron; on the contrary, the mainspring of his fraudulent device consisted in representing Hugh Cameron to be a real person, a grazier, who had no connection with himself beyond that of an ordinary client. In pursuance of that device, he professed to transact with the McIntyres in the capacity of Cameron's law agent, he attested what purported to be Cameron's signature to their deed of mortgage, and he gave them a document, used by them in order to obtain registration of their right, which bore that Hugh Cameron had appeared personally before him, and had signed the document in his presence, after making oath to the verity of its contents. The McIntyres must, in these circumstances, have understood Cresswell and Hugh Cameron to be distinct individualities. They nowhere allege the contrary; and if they had even suspected that Hugh Cameron was only another name for Cresswell, they would not have been justified in completing the transaction without inquiry. The McIntyres cannot therefore, as matter of fact, be held to have dealt on the faith of the certificate as evidencing the proprietary title of Cresswell.

The truth is that Hugh Cameron was in no sense an *alias* of Cresswell's, but a fiction or puppet created by him, in order that it might appear to be an individual having a separate and independent existence. The reasoning of the learned Judges fails to appreciate the difference between these two things. If Cresswell had, as they say he did, "assumed" the name of Hugh Cameron, and had used it fraudulently, he would not have been a forger. His fraud, in that case, would have lain in the representation that Hugh Cameron was his own designation, and he would, no doubt, have been



amenable to the criminal law, in respect of such fraud. But, in first registering a fictitious Hugh Cameron as proprietor of the land, and then executing and delivering a mortgage in the name of Hugh Cameron, Cresswell represented the mortgagor to be a person other than himself, and committed the crime of forgery. The real character of the criminal acts perpetrated by Cresswell differs in no respect from what it would have been, had Hugh Cameron been a real person, whose name was put upon the register by him, and used by him in a forged deed creating an incumbrance.

Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a *bonâ fide* purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed. The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences.

Their Lordships will humbly advise Her Majesty to reverse both judgments below, and, in lieu thereof, (1) to declare that the mortgage purporting to be executed by Hugh Cameron to the Defendants McIntyre is invalid, and does not

constitute an incumbrance upon the title of the Plaintiff Mrs. Messer; (2) to direct the Defendant Richard Gibbs to cancel the two certificates of title issued in the name of Hugh Cameron and entered in folios 346,585 and 346,586 of the Register Book, Vol. 1,733, and also the memorial of the said mortgage entered in these folios, and to substitute therefor two certificates of title, to the same lands respectively, in the name of the Plaintiff; (3) to order the Defendants McIntyre to pay to the Plaintiff her costs of suit in both Courts below; (4) to order the Defendant Charles James Cresswell to pay to the Defendant Richard Gibbs his costs in those Courts, and here, and also to pay to the Defendants McIntyre all such costs, either incurred by them, or paid by them to the Plaintiff as hereby provided. The Defendants McIntyre must pay to the Plaintiff Mrs. Messer her costs of this appeal.

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