

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McEllister and others v. Biggs and others, from the Supreme Court of South Australia; delivered Thursday, March 15th, 1883.*

Present:

LORD BLACKBURN.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

This is an Appeal from a decree of the Supreme Court of South Australia which affirmed the decree of the Primary Judge of the same Court, in Equity, in a suit in which William Biggs and others were the Plaintiffs and Thomas Edward McEllister and others were the Defendants. The decree of the First Court was that Edward McEllister, under whom the Defendants claim, not as purchasers or for valuable consideration, became registered proprietor of the allotment No. 23, through fraud within the meaning of the Real Property Act of 1861, and that the certificates of the title registered in respect of that lot "were " and are fraudulent and void as against George " Guthrie and those claiming under him, and " ought to be cancelled so far as regards the " said allotment, except McKew's piece in the " pleadings mentioned."

The Primary Judge also decreed that the Plaintiffs were entitled to the said allotment No. 23, except McKew's piece, and that " The certificates " of title be delivered up to be cancelled and be " cancelled accordingly; that the registration " and entry in the said register book of the

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“ said transfer of the said allotment from  
“ Thomas Greaves Waterhouse and George  
“ Turline, in the pleadings mentioned, to the  
“ Defendants Thomas Edward McEllister, Robert  
“ McEllister, and Susan Mary Gleeson, be can-  
“ celled; that the Registrar General of the said  
“ province cancel the said certificates of title and  
“ each of them, and the said registration and entry  
“ of the said transfer in the said register book;  
“ that the Defendants be restrained by the Order  
“ or injunction of this Honourable Court from  
“ transferring, mortgaging, charging, encum-  
“ bering, or otherwise dealing with, or joining  
“ or concurring in transferring, mortgaging,  
“ charging, encumbering, or otherwise dealing  
“ with, the said allotment No. 23, except McKew’s  
“ piece or any part thereof.”

Both the Lower Courts have delivered very clear and elaborate judgments, and it is unnecessary for their Lordships to reiterate the facts which are stated by the Judges of both those Courts. They have found that Edward McEllister obtained the certificate of title as to lot No. 23, except as regards McKew’s piece, by fraud. There are concurrent judgments upon that point, and their Lordships think that those judgments were warranted by the evidence. Guthrie obtained a judgment in ejectment against McEllister. Section 137 of the Colonial Act 22 of 1861 enacts that “ Upon the recovery of any  
“ land estate or interest by any proceeding at law  
“ or in equity from the person registered as pro-  
“ prietor thereof, it shall be lawful for the Court  
“ or Judge, in any case in which the proceeding is  
“ not herein-before expressly barred, to direct the  
“ Registrar General to cancel any certificate of  
“ title or other instrument or any entry or memo-  
“ rial in the register book relating to such land,  
“ and to substitute such certificate of title or entry  
“ as the circumstances of the case may require ;

“ and the Registrar General shall give effect to  
 “ such order.” The First Court, as already  
 stated, upon the recovery in ejectment, ordered  
 the certificate of title to McEllister as to lot  
 No. 23, with the exception of McKew’s piece, to  
 be cancelled.

It was contended on the part of the Appellants  
 that the deeds under which the Plaintiffs derived  
 title from Guthrie, not having been registered in  
 pursuance of section 39 of the Act to which  
 allusion has already been made, passed no  
 interest in the lands. That section enacts  
 that “ No instrument shall be effectual to  
 “ pass any estate or interest in any land under  
 “ the provisions of this Act, or to render such  
 “ land liable as security for the payment of money,  
 “ but upon the registration of any instrument  
 “ in manner herein-before prescribed the estate  
 “ or interest specified in such instrument shall  
 “ pass.” Their Lordships are of opinion that,  
 although the deeds did not pass an interest in  
 the land, still they passed to the Plaintiffs the  
 equitable right which Guthrie had to set aside  
 the certificate of title to McEllister upon the  
 ground of fraud. By section 114 it was pro-  
 vided that “ Except in the case of fraud, no  
 “ person contracting or dealing with or taking  
 “ or proposing to take a transfer from the regis-  
 “ tered proprietor of any registered estate or  
 “ interest shall be required or in any manner  
 “ concerned to inquire or ascertain the circum-  
 “ stances in or the consideration for which  
 “ such registered owner or any previous regis-  
 “ tered owner of the estate or interest in question  
 “ is or was registered.” But the case of fraud  
 is excepted; and fraud has been found by both  
 the Courts upon the evidence before them.

Then it was contended that the Plaintiffs did  
 not come under clause 4 of section 124. That  
 clause enacts that “ No action of ejectment or

“ other action for the recovery of any land shall  
“ lie or be sustained against the registered pro-  
“ prietor under the provisions of this Act for the  
“ estate or interest in respect to which he is so  
“ registered, except in any of the following  
“ cases.” Then one of the cases excepted is  
“ The case of a person deprived of any land by  
“ fraud, as against the person registered as pro-  
“ prietor of such land through fraud.” Guthrie  
was a person who fell within that exception,  
and he therefore had a right to maintain the  
action of ejectment. Their Lordships are of  
opinion that, by reason of that judgment, the  
equitable right to rely upon which has been  
transferred to the present Plaintiffs, they had  
a right to come into Court and ask to have  
the certificate of McEllister set aside upon the  
ground of fraud; and the Courts below, having  
found fraud, were right in decreeing for the  
Plaintiffs that the certificate should be set aside.

A further objection was made by the learned  
Counsel for the Appellants to the form of decree,  
which orders the certificates of title to be deli-  
vered up to be cancelled and to be cancelled  
accordingly, but does not order the Registrar  
General to substitute such certificate of title or  
entry as the circumstances of the case might  
require. Section 137 says: “ Upon the re-  
“ covery of any land estate or interest by any  
“ proceeding at law or in equity from the person  
“ registered as proprietor thereof, it shall be  
“ lawful for the Court or Judge, in any case in  
“ which such proceeding is not herein-before  
“ expressly barred, to direct the Registrar  
“ General to cancel any certificate of title or  
“ other instrument, or any entry or memorial in  
“ the register book relating to such land, and to  
“ substitute such certificate of title or entry as  
“ the circumstances of the case may require, and  
“ the Registrar General shall give effect to such

“ order.” If when the decree of the Primary Judge was pronounced the objection had been made, the decree might have been rectified, but no such objection was then made nor was it made on the appeal. Their Lordships, therefore, think that it is now too late for the Appellants to object to the form of the decree. When the decree is carried out, and the certificates are delivered up to the Registrar General to be cancelled and are cancelled accordingly, an application may be made to the Registrar General to obtain the proper certificates of title.

Under these circumstances their Lordships think that the judgment of the Supreme Court was correct, and they will humbly advise Her Majesty to affirm that judgment. The Appellants must pay the costs of this Appeal.



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