APPLIED 49 ALR 229

[PRIVY COUNCIL.]

ABIGAIL . . . . . APPELLANT;
DEFENDANT,

AND

LAPIN AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

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LAPIN AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

ABIGAIL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1934. June 19.

*Torrens System—Priorities—Conflicting equitable titles—Transfer absolute in form—Intended as security only—Registration—No caveat lodged by transferor—Subsequent unregistered mortgage from registered proprietor of land to third party—Estoppel—Agency—Real Property Act* 1900 (*N.S.W.*) (*No.* 25 *of* 1900).

*Money-lender—Solicitor—Loan transactions—Money-lenders and Infants Loans Act* 1905 (*N.S.W.*) (*No.* 24 *of* 1905), *sec.* 8.

The registered proprietors of land under the *Real Property Act* 1900 (N.S.W.), by transfers absolute in form and expressed to be made in consideration of a money payment, transferred the land to the nominee of a creditor as security for the debt. The transferee was registered as proprietor in pursuance of the transfer. The creditor without the knowledge or consent of the transferors, who had not lodged a caveat, raised a loan for himself upon the security of the

* Present—Lord Blanesburgh, Lord Tomlin, Lord Wright, Lord Alness and Sir Lancelot Sanderson.

land and caused his nominee, as the registered proprietor, to execute a registrable mortgage over the land in favour of the lender. The lender had no notice that the transferors had any interest in the land. He did not search the register, and did not register his mortgage.

*Held* that the lender had a better equity than that of the transferors, because the transferors were bound by the consequences of their acts in arming their transferee with the power to deal with the land as owner, and, as the title on the register was clear, the lender's failure to make a search was immaterial: Also, the case was one of an agent exceeding the limits of his authority but acting within its apparent *indicia*.

A solicitor repeatedly lent large sums of money at interest in the course of his business. The trial Judge held that in all the circumstances the evidence did not establish that he carried on the business of a money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.).

*Held* that the finding should not be disturbed.

Decision of the High Court: *Lapin* v. *Abigail*, (1930) 44 C.L.R. 166, reversed, and the order of *Long Innes* J., as varied by the Supreme Court of New South Wales (Full Court): *Lapin* v. *Heavener*, (1929) 29 S.R. (N.S.W.) 514, restored.

APPEAL from the High Court to the Privy Council.

This was an appeal by Ernest Robert Abigail from the decision of the High Court: *Lapin* v. *Abigail* (1), reversing the decision of the Full Court of the Supreme Court of New South Wales that Abigail had a better equitable title to certain lands under the *Real Property Act* 1900 (N.S.W.) than Mark Lapin and Pearl Lapin, the other parties to the appeal, and a cross-appeal by the Lapins from the decision of the High Court affirming a decision of the Full Court that the evidence did not sufficiently establish that Abigail was a money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.).

Abigail having died subsequently to the institution of the appeals, he was represented at the hearing thereof by his legal representative, Perpetual Trustee Co. Ltd.

LORD WRIGHT delivered the judgment of their Lordships, which was as follows:—

The appellants are the representatives of Ernest Robert Abigail, a solicitor at Sydney, who was a defendant in the action but has

(1) (1930) 44 C.L.R. 166.

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since died ; he will hereafter be referred to as Abigail. The respondents are the Lapins, Mark and Pearl, husband and wife, who were plaintiffs in the action. Other defendants in the action were one Heavener, a solicitor, and his wife, Mrs. Heavener, who was in the matter in question his nominee. On 5th December 1923, Mr. and Mrs. Lapin executed two memoranda of transfer, duly witnessed by a solicitor in the statutory form required by the *Real Property Act* 1900 of New South Wales, of two properties, in respect of which they were then respectively registered as proprietors of an estate in fee simple, to Mrs. Heavener ; in the one case the consideration money was expressed to be £1,800, and in the other case £1,200 ; the receipt of these sums respectively was acknowledged on the transfers. The titles of the Lapins were at the time subject to a registered mortgage of £1,320 to the Union Bank, which was discharged on 7th December 1923. On 18th December 1923, Mrs. Heavener, or Heavener on her behalf, lodged these transfers and the certificates of title which she had received from the respondents, at the Land Registry, where the transfers were entered in the Land Registry books, and particulars were endorsed on the certificates of title which the Heaveners held and which accordingly showed Mrs. Heavener as the proprietor in fee simple of the estates. On 14th March 1924, Mrs. Heavener mortgaged the properties in statutory form to the English, Scottish and Australian Bank ; this mortgage was duly registered, as appears on endorsements on the certificates of title, which the mortgagee bank held. On 2nd September 1925, as appears from further endorsement on the certificates of title, these mortgages were discharged, as is sufficiently clear, out of moneys lent by Abigail to the Heaveners on or about 2nd September 1925 ; these moneys, which amounted in all to £5,500, were secured by a statutory mortgage dated 2nd September 1925, granted by Mrs. Heavener in terms as " being the registered proprietor of an estate in fee simple " in the specified properties, including the two properties in question ; the mortgage was also signed by Abigail as being correct. Abigail thereafter held the certificates of title. On 4th September 1925, Abigail as mortgagee lodged a caveat under the Act in respect of these two properties. On 24th February 1926, Abigail lodged the mortgage for registration, but it was referred

back by the Registrar for the correction of some minor formal defects; before it was finally relodged the respondents lodged caveats and in due course brought the present action.

The respondents claimed as against the Heaveners that the register should be rectified by registering them as full proprietors of the lands and that the certificates of title should be delivered up to them; they alleged that they had handed over the certificates of title solely as collateral security for a loan in respect of another transaction, but the loan had since been discharged; they further alleged as regards the transfers that they did not sign them at all or if they did, were induced to do so by Heavener's fraud in the belief that they were by way of further security for the other transaction. Heavener by way of answer alleged that the lands were transferred absolutely in order to discharge the Union Bank mortgage and in payment of costs due to him. Abigail was joined as defendant by the respondents, as having no better title than the Heaveners because not taking bona fide as a purchaser for value and without notice. It was also alleged that the security was void because Abigail was acting as a money-lender in the transaction without being registered as such.

The trial before *Long Innes* J. took a somewhat unusual course: after evidence had been given and closed on these issues, the respondents were allowed to amend as against the Heaveners, though not in terms as against Abigail, by alleging that, if they knowingly signed the transfers, they did so on the terms that Heavener would hold the transfers as security for his professional costs and not otherwise, and that he registered the transfers in fraud of that understanding and without their knowing what he had done until October 1925. This was a new case, contrary to the evidence given by both parties.

By his judgment delivered on 22nd March 1929, *Long Innes* J. did not accept the evidence of the respondents, but found that they did sign the transfers, and signed them, moreover, knowing that they were signing transfers of the properties, that they were signing as transferors, and that the transferee was Mrs. Heavener: he did, however, further find that they understood the transfers were to be by way of security only for Heavener's costs and for

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repayment of the mortgage debt to the Union Bank. In so finding, the Judge took a midway course, disbelieving the sworn evidence of both parties. As to Abigail, who gave, so the Judge said, his evidence with great frankness and whose evidence the Judge accepted, he found that it was not established that he was a money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905: the Judge also found that Abigail, as regards the mortgage in question, discharged the onus of establishing that he was a bona fide purchaser for value without notice: he further found that Abigail made the advance in question on the faith of the transfers of 5th December 1923, and of the certificates of title in Mrs. Heavener's name and of the mortgage executed by Mrs. Heavener as registered proprietor. He accordingly held in regard to the mortgage of 2nd September 1925 that the respondents were estopped by their representations from asserting as against Abigail that their equity was prior in point of time to that of Abigail.

A later mortgage given by the respondents to Abigail on the lands, which stood on a different footing, is not here material.

This judgment was on appeal affirmed by the Full Court of New South Wales. The Court agreed with the findings of fact of the trial Judge: in effect, the Court held that the case was covered by the decision of the High Court of Australia in *Butler* v. *Fairclough* (1): that Abigail's equity, though subsequent in time, was the better equity: that the respondents' conduct " in executing a memorandum of transfer on the face of it clear and unfettered, and the failure to place on the register any embargo which would prevent the Heaveners from using those transfers at their face value, is such unreasonable and negligent conduct as to make their equity inferior " to Abigail's. They also agreed with the Judge's finding that Abigail was not carrying on business as a money-lender. They accordingly dismissed the appeal.

The respondents then appealed to the High Court of Australia, the Judges of which by a majority (*Knox* C.J., *Isaacs* and *Dixon* JJ.) allowed the appeal, *Gavan Duffy* and *Starke* JJ. dissenting (*Lapin* v. *Abigail* (2)).

(1) (1917) 23 C.L.R. 78.

(2) (1930) 44 C.L.R. 166.

It is difficult fairly to summarize these carefully reasoned judgments: but taking the crucial issue to be whether the equitable interest of the respondents was to be postponed to that of Abigail, the conclusion on that point of the late learned Chief Justice, Sir *Adrian Knox*, long a distinguished member of the Judicial Committee, may be found in substance in the following passage from his judgment:—"The registration of Mrs. Heavener as proprietor in fee simple was consistent with the existence of an equitable interest outstanding in some other person, and not inconsistent with the whole beneficial title to the lands being in the appellants. Mrs. Heavener was in a fiduciary relation to the appellants, and was entitled under the arrangement between them and Heavener to become registered as proprietor and to hold the documents of title until the debt intended to be secured was paid off. The decisions in *Shropshire Union Railways and Canal Co.* v. *The Queen* (1), *Carritt* v. *Real and Personal Advance Co.* (2), and *Taylor* v. *London and County Banking Co.* (3), and the observations of *Farwell* J. in *Rimmer* v. *Webster* (4) and *Burgis* v. *Constantine* (5), seem to me to indicate that the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence. On the evidence as it stands no such act or omission on the part of the appellants has, in my opinion, been proved. The transfers did not amount to such an act, for there is no evidence that Abigail ever saw them. The certificates of title showing Mrs. Heavener as registered proprietor were consistent with the beneficial ownership of the lands being in the appellants or any other persons, and did not indicate that she held the beneficial as well as the legal interest. The omission to lodge a caveat can have had no effect in inducing Abigail to advance the money, for it is not proved that any search was made before the money was advanced" (6). *Isaacs* J., dealing with the same issue, said: "The Full Court's concurrence on that point is open, as I think, to the observation that too great significance is attached to

(1) (1875) L.R. 7 H.L. 496.
(2) (1889) 42 Ch. D. 263.
(3) (1901) 2 Ch. 231.
(4) (1902) 2 Ch. 163, at p. 172.
(5) (1908) 2 K.B., at p. 501.
(6) (1930) 44 C.L.R., at pp. 183, 184.

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the single fact of Heavener's registration, and too little both to the lack of evidence as to Abigail's conduct being in part influenced by the absence of a caveat, and to the silence of Harris " (1). *Dixon* J. lays emphasis on the fact that " although the appellants did not caveat, it does not appear that any search for caveats was made on Abigail's behalf or that he acted in the belief that there was no caveat. The default of the appellants—if default it be—therefore did not contribute directly to any assumption upon which Abigail may have dealt with the Heaveners " (2). On the other hand, the final conclusion of *Gavan Duffy* and *Starke* JJ. is summed up in the following words : " In our opinion, the Lapins are bound by the natural consequences of their acts in arming Oliver Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons, and they ought to be postponed to the equitable rights of Abigail to the extent allowed by the Supreme Court " (3).

In this conflict of eminent judicial opinion their Lordships find themselves in agreement with *Gavan Duffy* and *Starke* JJ., in regard both to their reasoning and their conclusion.

The *Real Property Act* 1900 of New South Wales embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system which is in force throughout Australasia and in other parts as well. It is a system for the registration of title, not of deeds ; the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title ; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto belonging or appertaining is to pass to the transferee. No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognized under the *Real Property Acts*. This was held in *Barry* v. *Heider* (4), and in *Great West Permanent Loan Co.* v. *Friesen* (5) ; for the protection of such equitable interests or estates,

(1) (1930) 44 C.L.R., at p. 188.
(2) (1930) 44 C.L.R., at p. 205.
(3) (1930) 44 C.L.R., at p. 198.
(4) (1914) 19 C.L.R. 197.
(5) (1925) A.C. 208.

the Act provides that a caveat may be lodged with the Registrar by any person claiming as *cestui que trust*, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed. In the registry all statutory transfers are filed and duplicate certificates of title are kept and noted up from time to time with all registered dealings; the other duplicate certificate of title is held by the registered proprietor. The register is open to inspection and search.

Provision is made by the Act for mortgages in statutory form, and for their registration; in such a case the legal estate remains in the registered proprietor of the fee simple, and the mortgage constitutes a charge of debt on the land; hence it may not be technically correct, though it is common, to speak of the mortgagor as having the equity of redemption, though the legal title remains in him. But a practice has sprung up of effecting what amounts to a mortgage by registering an instrument of transfer of the legal title from the mortgagor, and at the same time executing a document certifying that it was by way of security only. This is no doubt done for the purpose of facilitating dealings with the land by the transferee. Such a practice has been recognized in various decisions of the Courts, and in particular in *Currey* v. *Federal Building Society* (1). In the present case the same result was effected, as the Judge found, as between the parties by an oral agreement; but all that appeared in the registry was the absolute grant of transfer as for full consideration paid and received; no document of qualification was executed and no caveat was lodged. In the result the public register showed to all the world, that is, to anyone who cared to inspect, that the fee simple was in the two estates

(1) (1929) 42 C.L.R. 421.

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vested in Mrs. Heavener; the equity of redemption (if it is so to be called for convenience) was in no way indicated to any searcher of the register.

The Full Court of New South Wales regarded the present case as governed in principle by *Butler* v. *Fairclough* (1), where there was a conflict of equities between a prior equitable encumbrancer who had lodged no caveat and a subsequent transferee who had, after a search of the register and without notice of the unregistered equitable charge, paid the purchase consideration. It was held that the former was to be postponed: *Griffith* C.J. thus summed up the position:—"It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it. Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat. In the present case the plaintiff might, if he had been sufficiently diligent, have registered his charge of 30th June on that day. The defendant, having before parting with the purchase money to Good

(1) (1917) 23 C.L.R. 78.

found on searching the register that Good had a clear title, and relying on the absence of any notice of defect in Good's title, paid the agreed price" (1). Their Lordships think that case was rightly decided, though it may be that the statement as to retention of the title deeds needs some qualification. But the only distinction between *Butler* v. *Fairclough* (2) and the present case appears to be that in the present case it was not proved that (though he had no notice of the prior charge) Abigail made any search before lending the money: he said he instructed his conveyancing clerk Harris to examine the title and left it to him. Though there is no reason why Harris should have neglected his duty, Harris was not called, it seems because of the unfortunate course taken at the trial of raising fresh issues after the evidence was closed. That the question whether or not a search of the register had been made might be regarded as of decisive importance, does not emerge on the record or in any of the judgments until those in the High Court. The question is whether in such a case as this, where the title on the register was clear, the failure to prove a search by the second encumbrancer can make any difference. There is no reason to think that Heavener would have ventured to claim that Mrs. Heavener was proprietor in fee simple unless she was so registered, and in that sense the grant of the transfer by the respondents to her did cause or contribute to Abigail's lending the money. A search by or on behalf of Abigail would merely have shown that the transfer purported to be for full consideration, thus excluding any idea of it being by way of security. The case is closely parallel to that of *Honeybone* v. *National Bank of New Zealand* (3), where the second encumbrancer's equity was preferred, on the ground that the act of the plaintiff in falsely representing the transaction with the first encumbrancer to have been a sale and not a mortgage, and in placing him in a position to obtain a title as registered proprietor and so obtain an advance from the bank, the second encumbrancer, disentitled him to put his equity in competition with the later equity. No question is raised in that case whether the second encumbrancer made any search or inquiries: the emphasis is placed on the conduct of the mortgagor. This is in

(1) (1917) 23 C.L.R., at pp. 91, 92. (2) (1917) 23 C.L.R. 78.
(3) (1890) 9 N.Z.L.R. 102.

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accordance with the judgment of *Kindersley* V.C. in *Rice* v. *Rice* (1), where the question was whether the equity of the plaintiff in respect of his lien as unpaid vendor should be preferred to that of a subsequent equitable mortgagee, who had lent his money to the purchaser against a deposit of the title deeds and of an assignment showing payment of the purchase money in full. The opinion of the Vice-Chancellor no doubt has not been approved in so far as he says that priority in time is only taken as the test where the equities are otherwise equal: it is now clearly established that prima facie priority in time will decide the matter unless as laid down by Lord *Cairns* L.C. in *Shropshire Union Railways and Canal Co.* v. *The Queen* (2), that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose. The Vice-Chancellor did not treat the possession of the title deeds as necessarily decisive: he said that the conduct of the parties having the equitable interests and all the circumstances must be taken into consideration in order to determine which has the better equity. He held that the second encumbrancer was not bound to go and inquire of the vendors whether they had received all the purchase money: he then describes the conduct of the vendors in this language:—" They voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity. In truth it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do " (*Rice* v. *Rice* (3)). These words can aptly be applied to the present case if for " deposit of the deeds " there is substituted that the respondents had authorized and enabled Mrs. Heavener to register herself as owner in fee simple. Apart from priority in time, the test for ascertaining which encumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim; in the present case the respondents on the one hand enabled the Heaveners to represent themselves as legal owners in

(1) (1853) 2 Drew. 73; 61 E.R. 646.
(2) (1875) L.R. 7 H.L. 496.
(3) (1853) 2 Drew., at pp. 83, 84; 61 E.R., at p. 650.

fee simple, while on the other hand it cannot be said that Abigail did or omitted to do anything which he should have done in lending the money on the security, though he might, by registering the mortgage, have secured the legal title; it may be that he accepted Heavener's word that he or his wife were registered as having the legal title, but that was a true statement and no search or inquiry that could have been made would have displaced it.

The majority of the High Court refer to the English cases which have held that the equitable interest of a beneficiary is not in general to be postponed to that of a subsequent encumbrancer who has taken for value under the trustee without notice that the trustee was not absolute owner but was committing a breach of trust. Such a rule is well established in England, and has been applied in the *Shropshire Union Railways Case* (1) and many other later cases which it is not necessary here to cite; Lord *Cairns* bases the rule primarily on the fact that "there is a large, well-known, recognized, and admitted system of trusts in this country" (2), and concludes, proceeding upon that well-established system, that he could not find that there was anything done by the *cestuis que trust* which ought to forfeit and displace their equitable title. It may be that the application of this rule has been induced by the partiality of Courts of equity for their protegé, the *cestui que trust*; but even the equity of a *cestui que trust* may be defeated, as Lord *Cairns* said "by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and take away the pre-existing equitable title" (3). But the rule is one which has been applied to trusts, and not to equitable estates or interests, such as those of unpaid vendors and equitable mortgagees, or to equities like an equity to set aside a conveyance for fraud; it cannot be said that in regard to such equities there is any recognized system of trusts which ought to put the parties on inquiry in dealing with the party clothed with the legal estate. It is not here necessary to consider whether the same rule is applicable where there is a system of registration of legal titles and for protection of equitable interests by caveats such as

(1) (1875) L.R. 7 H.L. 496. (2) (1875) L.R. 7 H.L., at p. 507.
(3) (1875) L R. 7 H.L., at p. 506.

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prevails under the Torrens system. Lord *Selborne* in *Agra Bank Ltd.* v. *Barry* (1), pointed out that what has been called a duty of a purchaser or mortgagee to investigate title is not a duty owing to the possible holder of a latent title or security, but is simply a prudent course in the purchaser or lender's own interest; he adds, with reference to the policy of the *Irish Register Act*, that it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. It is unnecessary here to add that when these questions need to be considered, it is always understood that the purchaser or mortgagee has not either express or constructive notice of the prior charge.

But it may be that the majority judgment in the High Court laid emphasis on the absence of search of the register by Abigail because they were of opinion that there must be something in the nature of a direct representation by the respondents to Abigail. In fact, in this case the only documents under the hand of the respondents or either of them which a search would have revealed are the transfers, the terms of which embody a transfer out and out as for full consideration: and if these had been seen by or on behalf of Abigail they might in one sense be construed as a direct representation from them to him; but it seems that the transfers were put on the register by the Heaveners, not by the respondents: the transfers could thus only in an artificial sense be described as representations made by the respondents to Abigail. In truth, the essence of the matter was the conduct of the respondents in giving the transfers to Heavener: so far as there was any representation in any strict sense to Abigail, it was made by Heavener. In *Dixon* v. *Muckleston* (2), Lord *Selborne* in terms distinguishes the case of an express representation from the case of acts or of negligence: a man, he says, " is not entitled to deny being bound by the natural consequence of his acts, if it be a case of positive acts " (3). He adds, in much the same language as that of *Kindersley* V.C. quoted above (*Rice* v. *Rice* (4)): " By one or other of those means he may have armed another person with the power of going into the world

(1) (1874) L.R. 7 H.L. 135, at p. 157.
(2) (1872) L.R. 8 Ch. 155.
(3) (1872) L.R. 8 Ch., at p. 160.
(4) (1853) 2 Drew. 73; 61 E.R. 646.

under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power" (*Dixon* v. *Muckleston* (1)). Lord *Selborne* also adds that the equitable charge will be good if there has been a positive statement honestly believed.

It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed, as, for instance, in *King* v. *King* (2). But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred: the actual representation is, in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often as here because that party has vested in him a legal estate or has given him the *indicia* of a legal estate in excess of the interest which he was entitled in fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate. Such is the position here, which in their Lordships' judgment entitles the appellants to succeed in this appeal.

In the High Court *Gavan Duffy* and *Starke* JJ. also relied on a further or supplementary reasoning, based on the principle of an authority being acted upon to create the later equity, but acted upon either contrary to or in excess of the authority actually intended to be given. As they point out, the form of actual transfer was adopted "so that Olivia Sophia Heavener might deal with the lands as if they were her own, and without the restrictions created by an instrument of mortgage under the *Real Property Act* 1900" (3): she was thus necessarily trusted by the respondents as to the time and method of realization (that is, in order to pay the cash due to her husband) and not to exceed the limits of her security. On this view the case falls within the general principles laid down in *Brocklesby* v. *Temperance Permanent Building Society* (4). Lord

(1) (1872) L.R. 8 Ch., at p. 160.
(2) (1931) 2 Ch. 294.
(3) (1930) 44 C.L.R., at p. 197.
(4) (1895) A.C. 173.

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*Herschell* L.C. thus sums up the rule : " Where a person has thus been entrusted with the possession of title deeds with authority to raise money upon them, the owner of the deeds cannot take advantage of any limitation in point of amount which he has placed upon the authority to raise money as against a lender who had no notice of it " (1). The same principle, it was held, had been applied in equity in the case of *Perry Herrick* v. *Attwood* (2). This decision of the House of Lords was followed in the later case of *Rimmer* v. *Webster* (3), where certain stock had been transferred to a broker by the owner with instructions to sell it, but the broker abused his position as transferee of the stock in order to borrow money for his own purposes on its security : it was held by *Farwell* J. that the borrower's equity must prevail : Sir *George Farwell* thus stated the principle :— " When the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee " (4). The foundation of the rule is that there has been an authority to deal with the property, as *Gavan Duffy* and *Starke* JJ. in the High Court have here found that there was ; no doubt they have so found as an inference from all the facts, but their Lordships accept the finding. The case then becomes one of an agent exceeding the limits of his authority but acting within its apparent *indicia*. *Rimmer* v. *Webster* has been approved by this Board in *Tsang Chuen* v. *Li Po Kwai* (5). *Burgis* v. *Constantine* (6), contains nothing contrary to this rule ; as Sir *George Farwell* there points out (7), the case before the Court was to be distinguished from *Rimmer* v. *Webster*, because it was one of trustee and *cestui que trust*, to which he thought the principles of the *Shropshire Union Railways Case* (8) were applicable. Their Lordships agree with *Gavan Duffy* and *Starke* JJ., that on this ground also the appellants should succeed.

(1) (1895) A.C., at pp. 180, 181.
(2) (1857) 2 De G. & J. 21 ; 44 E.R. 895.
(3) (1902) 2 Ch. 163.
(4) (1902) 2 Ch., at p. 173.
(5) (1932) A.C. 715.
(6) (1908) 2 K.B. 484.
(7) (1908) 2 K.B., at p. 503.
(8) (1875) L.R. 7 H.L. 496.

This conclusion renders it unnecessary to consider the contention raised on behalf of the appellants on sec. 43 of the *Real Property Act* 1900, viz., that the section is not limited to the case of a registered mortgagee or other transferee. But the question has now become immaterial in this appeal.

A contention was put forward on behalf of the respondents that on any view the respondents were in possession of at least one of the pieces of land at all material times, so that in this way Abigail was put on inquiry as to their title. No reference is made to any such point in any of the judgments. It is enough here to say that the evidence on the record is wholly inadequate to justify any finding that there was such possession.

As their Lordships are of opinion that the equity of the appellant should be preferred, it becomes unnecessary to consider further the order of the High Court that there should be an inquiry on the footing that the appellants' security was bad, to ascertain whether any part or the whole of the money lent by Abigail was used to pay off an encumbrance then existing on the property, that is, the registered mortgage of the English Scottish and Australian Bank. But on the basis that the appellants' security is good, but was created by the Heaveners beyond or contrary to their rights as between themselves and the respondents, there will need to be an adjustment between the Heaveners and the respondents ; their Lordships have no figures as to the value of the two properties or as to the value of the other properties included in Abigail's mortgage, nor do they know how much, if any, of the debt in respect of which the properties were charged to Mrs. Heavener remains outstanding. But it is clear that the respondents will have a claim against Mrs. Heavener if, or to the extent that, they are now unable, by reason of the encumbrance created in favour of Abigail, to get a reconveyance of their properties on payment to Mrs. Heavener of principal, interest and costs.

As some reflections seemed to be directed by the respondents' counsel against Abigail in the course of the argument before this Board, it seems right to say that no ground appears for any such reflections, which find no countenance in any of the judgments ; indeed, the trial Judge, as already observed, accepted his evidence.

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It has not been thought necessary here to deal in any detail with the plea based on the *Money-lenders and Infants Loans Act* 1905, except to say that in their Lordships' opinion the trial Judge properly applied the provisions of the Act to the facts as he found them; but as the Full Court and the High Court have supported his decision, this concurrence of findings would in itself in the absence of any error in law conclude the matter before this Board.

In the result their Lordships are of opinion that the appeal should be allowed, the order of the High Court should be set aside and the order of the trial Judge, as varied by the order of the Full Court, should be restored; the cross-appeal should be dismissed; the respondents should pay the costs of the appeal to the High Court and of these appeals.

They will humbly so advise His Majesty.