

*Privy Council Appeal No. 81 of 1913.*

Mildred Howard - - - - - *Appellant,*

*v.*

William Miller and another - - - - - *Respondents.*

FROM

THE SUPREME COURT OF CANADA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 6TH NOVEMBER 1914.

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*Present at the Hearing:*

LORD MOULTON.

LORD PARKER OF WADDINGTON.

LORD SUMNER.

[*Delivered by* LORD PARKER OF WADDINGTON.]

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In this case the Plaintiffs claim specific performance of an agreement dated the 1st of June 1908, and made between the Defendant, Mary Jane Sheard, of the one part, and the Plaintiff, Miller, of the other part, whereby the Defendant, Mary Jane Sheard, contracted to sell, and the Plaintiff, Miller, to purchase, some 4.14 acres of land in the Vancouver District in British Columbia. The Plaintiff, Nicholson, is made a co-Plaintiff as sub-purchaser of the property from the Plaintiff, Miller. The Defendant Mildred Howard is joined as co-Defendant on the ground that she claims an interest in the property adversely to her co-Defendant. In their Lordships' opinion this

joinder is misconceived and the judgment given at the trial, and confirmed on appeal for specific performance against the Defendant, Mildred Howard, and the vesting of her interest in a trustee for the Plaintiffs is erroneous and cannot be sustained. There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorise to be made on his behalf. The action should have been dismissed with costs so far as the Defendant, Mildred Howard, was concerned.

So far the case presents little difficulty, but there is a more important question which must be decided before this appeal is finally disposed of. Besides resisting the claim for specific performance as against her, the Defendant, Mildred Howard, set up her own title to the property. She was, she said, entitled to it as heiress-at-law of the late Harry Howard, the former husband of the Defendant, Mary Jane Sheard, subject, nevertheless to the dower interest of her mother, the last-named Defendant, and she counterclaimed against the Plaintiffs and her co-Defendant for a declaration to that effect with certain consequential relief. The Defendant, Mary Jane Sheard, did not defend the counterclaim, which against her must be taken as admitted. As against the Plaintiffs, however, who did defend the counterclaim, the Defendant, Mildred Howard, was put to the proof of her title. In order to prove it she put in three Indentures. First, she put in an Indenture dated the 23rd August 1893, whereby a certain block of land, of which the 4·14 acres in question formed part, was conveyed to Harry Howard and his wife, the Defendant, Mary Jane Sheard, in fee simple, as joint tenants. Secondly, she put in an Indenture dated the 14th of June 1905, whereby Harry Howard conveyed to his wife,

the Defendant, Mary Jane Sheard, an undivided moiety of the whole block in fee simple, thus vesting the whole block in her. Thirdly, she put in an Indenture, also dated the 14th of June 1905, whereby the Defendant, Mary Jane Sheard, conveyed to Harry Howard the entirety of the 4.14 acres in question. The two deeds of the 14th of June 1905 in fact operated as a partition of the block between husband and wife.

The Indentures above referred to, if admissible in evidence, are, in their Lordships' opinion, sufficient proof of the title set up by the Defendant, Mildred Howard, but the Plaintiffs contend that the second Indenture of the 14th day of June 1905 is not admissible in evidence against them, because of the provisions of section 75 of the Land Registry Act (chapter 23 of the statutes of the Province of British Columbia, 1906), being an Act consolidating the existing statutes as to the registration of titles to land.

On reference to this statute it will be found that it contemplates and provides for four registers. First, there is a Register of Indefeasible Fees. A certificate of title to an estate so registered is, as long as it remains uncanceled, conclusive evidence against all the world that the holder is entitled to the estate mentioned in the certificate (sections 15, 16 and 81). Secondly, there is a Register of Absolute Fees. The registered owner of an absolute fee is to be deemed to be the *primâ facie* owner of the land referred to in the register for such an estate as he legally possesses therein, subject only to such registered charges as appear existing thereon, and to the rights of the Crown (sections 15 and 24). The certificate of title is not conclusive but only *primâ facie* evidence of the title of the registered owner. It is to be observed that nothing

less than a legal fee simple can be registered as an absolute fee. Thirdly, there is a Register of Charges (section 25), that is, according to the definition clause (section 3), any less estate than an absolute fee, and any equitable interest in land, and any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.

The registered owner of a charge is to be deemed to be *primâ facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (section 29). The certificate of title is not conclusive but only *primâ facie* evidence of the title of the owner of a registered charge.

It is to be observed that an applicant for the registration of a charge has in his application to state the nature of the charge in respect of which he requires registration (Form D in 1st Schedule to the Act), and the register has also to state the nature of the registered charge (Form E same Schedule).

Lastly, there is, under section 116, a register in which are entered copies of all instruments affecting land. The 74th section of the Act provides that no instrument executed after and taking effect after the 30th June 1905, and no instrument executed before the 1st July 1905 and taking effect after the 30th June 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (with an immaterial exception) shall pass any estate or interest, either at law or in equity, in such land, until the same shall have been registered in compliance with the provision of the Act; and the 75th section provides that instruments executed before and taking effect before the 1st July 1905, transferring, charging, dealing with, or affecting land or any estate or interest

therein, unless registered before the said date (with an immaterial exception) shall not be receivable by the court or any court of law or any registrar or examiner of titles as evidence or proof of the title of any person to such land as against the title of any person to the same land registered on or after the 1st July 1905, except in an action before the court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded. This section, in their Lordships' opinion, imposes a penalty on non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further operation.

Returning to the facts of this case it appears that, after Harry Howard's death, the second deed of 14th June 1905 came into possession of the Defendant, Mary Jane Sheard, and that on the 30th July 1907 she took both the deeds of the 14th June 1905 to the Land Registry Office in Vancouver for registration. What happened in the office is obscure, but owing possibly to some misconception on the part of the registrar, the Defendant, Mary Jane Sheard, ultimately signed an application prepared by him declaring she was owner of the land in question, and claiming to have it registered in her name in the Register of Absolute Fees, and obtained such registration; the second deed of the 14th June 1905 being absolutely ignored, though the registrar had possession of it and ought to have been aware of its effect. In this, if there was no fraud, there was evidently a serious miscarriage, and the Plaintiff, Miller; in entering into the agreement of the 1st June 1908 to purchase the land in question was, undoubtedly, misled by the register and the certificate of title obtained by the Defendant, Mary Jane Sheard.

The agreement of the 1st June 1908 was, in their Lordships' opinion, an instrument purporting to affect land, and, therefore, required registration under the 74th section of the Act. When so registered (but not before) it would confer on the Plaintiff, Miller, an equitable interest in his title to which would be registrable in the Register of Charges. On the day after the agreement was signed the Plaintiff, Miller, lodged an application for the registration of his title to a charge by virtue of the agreement, but in such application he did not, as he ought to have done, state the nature of the interest in respect of which he claimed registration. It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a court of equity would under all the circumstances of the case grant specific performance of the contract.

The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the Plaintiff, Miller, had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase money, he would have been usurping the function of

the court, and affecting to decide how far the contract ought to be specifically performed. As a matter of fact the registrar did not, any more than the Plaintiff, Miller, attempt to define the interest in respect of which registration was granted. He granted registration, having (their Lordships will assume) first entered a copy of the agreement in the register of instruments under section 116, but the register merely shows that the Plaintiff, Miller, is entitled to a charge under the agreement on the land in question, and leaves the nature of the charge to be inferred. At most, therefore, the Plaintiff, Miller, became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement.

Their Lordships are now in a position to deal with the question as to whether the second deed of the 14th June 1905 was admissible in evidence. First, as regards the Defendant, Mary Jane Sheard, it was not (having regard to the 75th section of the Act) admissible to disprove the *prima facie* title conferred on her by her entry on the register as owner of the absolute fee, unless such entry had been obtained by fraud in which she had participated or colluded. But as a matter of fact it was quite unnecessary to adduce the deed as evidence against her at all. She did not defend the counterclaim, thereby admitting the title of the Defendant, Mildred Howard, as alleged in the counterclaim, and, further, she had on two several occasions admitted this title before the commencement of the litigation, first in her affidavit for the purpose of obtaining letters of administration to Harry Howard's estate, and, secondly, in proceedings which she took (apparently at the instigation of the Plaintiff, Miller) to have the agreement of the 1st June 1908 adopted by the court on

behalf of the Defendant, Mildred Howard. These admissions, unless satisfactorily explained, would in their Lordships' opinion, be sufficient to rebut the *primâ facie* title conferred by registration.

Again, as regards the Plaintiff, Miller, it is quite true that by reason of the 75th section, the second deed of the 14th June 1905 is not admissible in disproof of his registered title, but if, as their Lordships have pointed out, he is registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of the agreement of the 1st June 1908, the Defendant, Mildred Howard, is not under the necessity of in any way disputing the title in question. She adduces the deed of the 14th June 1905, not as disproving the Plaintiffs' title, but as a material circumstance which the court must take into account in deciding the extent to which specific performance ought to be granted. In their Lordships' opinion, therefore, the objection to the admissibility in evidence of the second deed of the 14th June 1905 cannot be sustained, and the Defendant, Mildred Howard, is therefore entitled to the declaration of her title as alleged in her counter-claim.

The Defendant, Mildred Howard, asks also for certain consequential relief by way of rectification of the register and cancellation of existing certificates of title. The court under section 92 of the Act has jurisdiction in an action contesting a registered title to make such order as may be just and appropriate under the circumstances. According to this section, before such an action can be brought, the proposed Plaintiff should file an issue and give security to the satisfaction of the registrar, and it is possible that the Plaintiffs

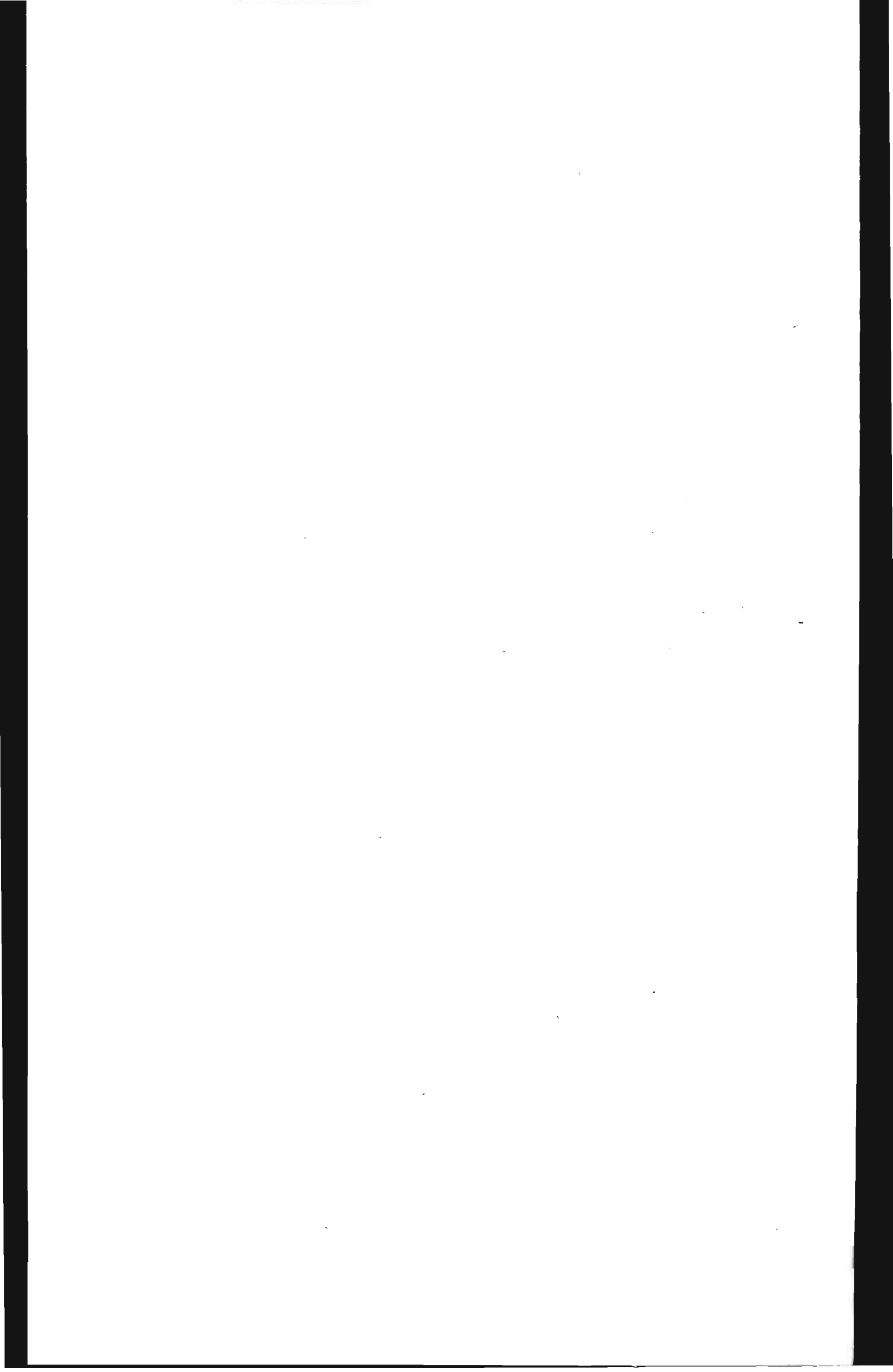


might have obtained a stay of the counter-claim till this had been done. They did not, however, apply for such a stay, nor did they make any objection before their Lordships' board on the ground that no security had been given and no issue filed. In their Lordships' opinion, therefore, was open to the courts below to make and is open to their Lordships to advise His Majesty to make such order under the 92nd section as may meet the justice of the case.

With regard to the relief to which the Plaintiffs are entitled in this action, it would be contrary to all principle to order the Defendant, Mary Jane Sheard, to convey an interest which she has not got and which she cannot convey. The Plaintiffs are, however, entitled to repayment of all monies paid to her under the agreement of the 1st June 1908, with interest at 4 per cent. per annum, and their costs of action (except in so far as increased by the joinder of her co-Defendant), and a lien for such monies, interest, and costs on her dower interest in the land in question.

Taking all the circumstances into consideration, their Lordships are of opinion and will humbly advise His Majesty (1) that the orders appealed from should be discharged; (2) that the action should be dismissed with costs throughout as against the Defendant, Mildred Howard; (3) that on the counter-claim of the last-named Defendant there should be a declaration that notwithstanding the entry on the register she is absolutely entitled to the land in question subject to the dower interest therein of the Defendant, Mary Jane Sheard, and that the register should be rectified by striking out the entry of the Defendant, Mary Jane Sheard, as owner of the absolute fee in

the land in question and entering the Defendant, Mildred Howard, as owner of such absolute fee subject to the dower interest of the Defendant, Mary Jane Sheard, which dower interest should be entered in the Register of Charges, and that the certificate of title granted to the Defendant, Mary Jane Sheard, should be delivered to the registrar for cancellation, and that the Plaintiffs should pay the costs of the counter-claim; (4) that the Defendant, Mary Jane Sheard, should be ordered to repay to the Plaintiffs the monies already paid by the Plaintiff, Miller, under the agreement, with interest at 4 per cent. per annum, and the costs of the action (except so far as increased by the joinder of the Defendant, Mildred Howard), and that it should be declared that such monies, interest, and costs, are a lien on the dower interest of the Defendant, Mary Jane Sheard, in the land in question, and that the registrar amend the certificates of title issued to the Plaintiffs so as to conform with this report; and (5) that Plaintiffs should pay the costs of this Appeal.



In the Privy Council.

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MILDRED HOWARD

v.

WILLIAM MILLER AND ANOTHER.

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DELIVERED BY LORD PARKER OF  
WADDINGTON.

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