Privy Council Appeals Nos. 67 and 90 of 1924.

The Great West Permanent Loan Company - - - - *Appellants*

v.

Jacob E. Friesen and others - - - - - - *Respondents.*

The Mennonite Land Sales Company, Limited - - *Appellants*

v.

Jacob E. Friesen and others - - - - - *Respondents.*

The Mennonite Land Sales Company, Limited - - - *Appellants*

v.

Jacob E. Friesen and others - - - - - *Respondents.*

(*Consolidated Appeals.*)

FROM

THE COURT OF APPEAL FOR SASKATCHEWAN.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER, 1924.

Present at the Hearing:

VISCOUNT CAVE.
LORD BLANESBURGH.
MR. JUSTICE DUFF.
SIR ADRIAN KNOX.

[*Delivered by* SIR ADRIAN KNOX.]

These appeals are brought from judgments of the Court of Appeal of Saskatchewan in two actions. In one, the respondents Friesen and others, trustees of the Mennonite Colony, who will be referred to as "the Mennonite Trustees," were plaintiffs, and The Saskatchewan Mortgage and Trust Corporation, Limited (hereinafter called "the Trust Company"), The Mennonite Land Sales Company, Limited (hereinafter called "the Sales Company"), John Murphy, The Great West Permanent Loan Company

(hereinafter called "The Loan Company"), J. J. Logan, J. F. Taylor, Geddie-McKay, Limited, and J. A. Campbell were defendants. In the other the Sales Company was plaintiff and the Mennonite Trustees were defendants.

In connection with its appeal the Loan Company presented a petition praying for leave to refer to and read on the hearing of the appeal an agreement under Seal dated the 2nd April, 1921, to which reference will be made hereafter. On the hearing of the appeals their Lordships allowed this petition. The facts and transactions out of which the litigation arose may be stated as follows :—

The members of the Mennonite Colony were the owners of a tract of land near Swift Current in the province of Saskatchewan, comprising 105,789 acres known as the Mennonite Reserve. Individual members of the Colony were registered under the Land Titles Act of Saskatchewan as the owners of the several parcels of land comprised in the Reserve, and a certificate of title under the Act had been issued to each individual for the parcel in respect of which he was registered as owner. Some of these certificates of title had been deposited as security for advances made to the owners. In the year 1920 the members of the Colony desired to sell the whole of the Reserve, and on the 28th October, 1920, the Mennonite Trustees entered into an agreement with Geddie-McKay, Limited, for the payment of a commission of $4 per acre "upon the sale, and execution and delivery of a contract for the sale of the said lands." No question was raised as to the authority of the Mennonite Trustees to make either this agreement or the agreements into which they entered later, on behalf of the individual members of the Colony who were registered as owners, or as to their right to sue on behalf of and as representing such registered owners.

On the 27th November, 1920, an agreement for the sale of the whole of the lands was made between the Mennonite Trustees and John Murphy. The purchase money under this agreement was $4,813,399·50, payable as to $5,000 on the execution of the agreement and as to the balance by instalments, the last of which was payable on the 21st April, 1921. The provisions of this agreement so far as relevant to the questions arising on these appeals were :—

(*a*) A covenant by the purchaser to pay the purchase money in the manner set forth in the agreement.

(*b*) A covenant by the vendors on payment of all sums payable by the purchaser to cause to be conveyed and assigned to the purchaser the parcels of land comprised in the Reserve by a transfer under the Land Titles Act to be prepared by vendors' solicitors.

(*c*) A provision that time should be of the essence of the agreement.

(*d*) A clause in the words following, viz. :—

"10. It is further agreed that the Purchaser shall have the privilege of paying off the whole or any part of the unpaid purchase price at any time previous to such becoming due, on paying all interest and arrears, if any, to date of such payment, without giving any notice or bonus.

"The Vendors hereby covenant and agree to transfer the said lands to the Purchaser forthwith at his (the Purchaser's) request, and at his (the Purchaser's) option, in parcels of 5,120 acres, . . . whenever and so often as a sufficient sum of money shall be paid under this agreement to fully cover the purchase price, at $45·50 per acre, of the said parcel or parcels of land so requested to be transferred and to leave thereafter a reserve fund in the hands of the Vendors of $25,000·00."

The deposit of $5,000 was the only sum paid under this agreement, and on the 1st March, 1921, default had been made in payment of instalments amounting to more than $500,000. In the month of March, Mr. Geddie, of Geddie-McKay, Limited, was negotiating with J. J. Logan and J. F. Taylor to finance the purchase of the Reserve, and they agreed to form a Company to take over Murphy's contract with certain modifications.

On the 1st April, 1921, the Mennonite Trustees, as a result of discussions with Logan, submitted an offer to amend the terms of Murphy's contract. The material alterations were as follows :—

"1. To reduce the purchase price of the lands therein described to forty-four (44) dollars an acre.

"2. To alter the terms of payment to read in effect as follows :

"(*a*) Five thousand (5,000) dollars cash, the receipt whereof is acknowledged.

"(*b*) The sum of one million (1,000,000) dollars immediately upon the deposit with the trustee hereafter referred to, of transfers of at least 90 per cent. of the said reserve computed on the basis of the lands set out in the agreement of the 27th day of November, A.D. 1920.

"(*c*) The sum of one million (1,000,000) dollars on the first day of November, A.D. 1921.

"(*d*) The sum of one million (1,000,000) dollars on the first day of April, A.D. 1922.

"(*e*) The balance of the said purchase price on the first day of July, A.D. 1922.

"3. Nothing herein contained to affect the term of the agreement of November the 27th, 1920, as to the transfer of the parcels of 5,120 acres as therein specified.

"4. That the Saskatchewan Mortgage and Trust Corporation, Limited, be appointed as trustee to accept the transfers referred to above, and to perform such other duties as may be required of it by the terms of a Trust Agreement, its fees and charges to be paid share and share alike."

On the 2nd April, 1921, the agreement to which reference has already been made was entered into, that is to say, an agreement under seal between the Mennonite Trustees and Geddie-McKay, Limited, whereby the Mennonite Trustees, both as trustees and in their individual capacity, acknowledged and declared that Geddie-McKay, Limited, was entitled to payment of its commission of $423,156 in securing John Murphy as purchaser of the Reserve. Apparently this acknowledgment was given in anticipation of the acceptance of the offer of the 1st April, and of the formation

of a company to take over Murphy's contract. The offer of the 1st April, 1921, was accepted by letter dated 9th April, and on the 22nd April, 1921, the solicitor for John Murphy called upon the Mennonite Trustees under the modified agreement to transfer to the Trust Company as trustee two parcels of land each containing 5,120 acres.

On the 2nd May, 1921, the Sales Company was incorporated, and by an assignment bearing date the 13th May, 1921, John Murphy assigned to the Sales Company the agreement for sale of the 27th November, 1920, as amended by the accepted offer of the 1st April, 1921, and all his right, title and interest thereunder.

On the 12th May, 1921, an agreement (hereinafter referred to as "the Trust agreement") was made between the Mennonite Trustees (thereafter called "the Vendors") of the first part, the Sales Company (thereafter called "the Assignee") of the second part, and the Trust Company (thereafter called "the Trustee") of the third part, whereby, after reciting the dealings hereinbefore referred to, including the assignment to the Sales Company, it was agreed as follows, viz. :—

> "(*a*) That the trustee shall receive from the Vendors or their solicitors, and hold the transfers of the lands of the members of the said Mennonite Colony and shall deliver them to the assignee in accordance with the terms of the said agreement for sale dated the 27th day of November, A.D. 1920, and the said accepted offer dated the 1st day of April, A.D. 1921.
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> "(*b*) That the said trustee shall receive and hold bills of sale of such of the said personal property as is required to be transferred by the said agreement for sale dated the 27th day of November, A.D. 1920, and more particularly described in the book of the Mennonite Association as of date the 28th day of October, 1920, and shall release to the assignee the personal property or equipment belonging to each portion of property for which the assignee calls for the title and to which the assignee may be entitled to title according to the terms of the said agreement for sale, dated the 27th day of November, A.D. 1920, and the said accepted offer dated the 1st day of April, A.D. 1921.
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> "(*c*) That the trustee shall pay to the said Geddie-McKay, Limited, on demand out of the monies received under the said agreement for sale, dated the 27th day of November, A.D. 1920, and the said accepted offer, its said commission, and being the sum of $423,156·00. A written receipt shall be taken by the trustee from the said Geddie-McKay, Limited, for any and all monies paid them on the said commission, and such receipt shall be treated as cash in all settlements between the trustee and the Vendors."

On the 17th May, 1921, the solicitors for the Mennonite Trustees handed to the Trust Company transfers duly executed in the form prescribed by the Land Titles Act of 90 per cent. of the lands of the Mennonite Reserve. The transfers were accompanied by a letter stating that they were to be used only in accordance with the agreement for sale and the Trust agreement, and asking the Trust Company to advise the purchasers that the transfers had been deposited and to request the payment of one million dollars as required by the amended agreement for sale.

On the 18th May the solicitors for the Mennonite Trustees handed to the Trust Company certain bills of sale of chattels accompanied by a letter stating that they were not to be used in

any way until the payments required by the amended agreement had been made and suggesting that the Trust Company should advise the solicitors before handing over any bills of sale or any transfers of land.

On May 20th a meeting was held at which were present Mr. Casey and Mr. Dawson, solicitors for the Sales Company and for the Trust Company; Mr. McWilliam and Mr. Cathrea, solicitors for the Mennonite Trustees; Mr. Smith, manager of the Trust Company; and J. E. Friesen, one of the trustees. At that meeting McWilliam insisted that, as transfers of 90 per cent. of the land had been deposited with the Trust Company, the sum of $1,000,000 was payable by the Sales Company in accordance with the provisions of the amended contract of sale. Casey disputed the liability of the Sales Company to make this payment on the ground that the obligation to deposit transfers had not been performed, the relative certificates of title not having been deposited with the transfers. On the evening of that day McWilliam and Cathrea handed to Smith, as manager of the Trust Company, the duplicate certificates of title of the lands comprised in the two parcels of 5,120 acres each, at the same time again warning him that the $1,000,000 was due, and that no transfers were to be handed over until that sum was paid in addition to the purchase money of any parcels transferred. During the month of May, 1921, Logan applied to the Loan Company for an advance on security of first mortgages of 10,020 acres, portion of the 10,240 acres, and on the 28th May, 1921, the Directors of the Loan Company agreed to lend $221,750 on that security. Mr. E. L. Taylor, solicitor for the Loan Company, was thereupon instructed to prepare the necessary mortgages, and having prepared them went to Swift Current to complete the transaction, arriving there on the 30th May. He proceeded to examine in the Land Titles Office the titles to the land proposed to be mortgaged, for the purpose of ascertaining whether they were in order and what encumbrances were in existence. Murphy, Geddie, J. F. Taylor and Logan were at Swift Current when E. L. Taylor arrived, and Smith arrived there on the 31st May, bringing with him the transfers and duplicate certificates of title of these parcels. All the persons named were employed until the evening of the 3rd of June in putting the titles and the transfers and mortgages in order for registration in the Land Titles Office, and on that evening, all the documents were ready to be lodged for registration. Smith gave McWilliam and Cathrea no information about the work on which he was engaged, and no indication that it was intended to transfer any of the lands, until the evening of Friday, June 3rd. On that evening he told McWilliam that the transfers of the two parcels of 5,120 acres each were to be lodged in the Land Titles Office for registration on the next day and that the Sales Company had not paid the instalment of one million dollars and he did not think they intended to pay it. McWilliam then insisted that Smith must obtain payment of the million dollars before transferring any

lands, in addition to the purchase money of any land he might transfer.

He obtained, however, no promise from Smith to that effect, and his telephone enquiry next morning at the Land Titles Office, to which reference will be made later, indicates very clearly that he had no assurance that the transfers would not be made as proposed. But he took no steps either to give notice that the transfers could not properly be used until the $1,000,000 instalment had been paid or to protect the interests of his clients, the Mennonite Trustees, and of the registered owners whom they represented, by lodging in the Land Titles Office caveats against the registration of any dealings with the land or otherwise. If caveats had been lodged before the transfers and mortgages were handed in for registration the Loan Company would presumably have refused to advance any money on the security of these lands until they had been withdrawn or removed. The reason assigned by McWilliam for taking no action in the matter was that he "thought the protection of the vendors was in the Trustee."

On the morning of the 4th June, before going to the Land Titles Office, Logan and Taylor, representing the Sales Company, Smith, representing the Trust Company, and Geddie, representing Geddie-McKay, Limited, met for the purpose of arranging the method of payment of the purchase money for the 10,240 acres. The total amount of purchase money was $476,440. It was arranged that this should be satisfied by handing to the Trust Company a receipt from Geddie-McKay, Limited, for $423,156 (the amount admitted by the agreement of 2nd April to be due to that Company for commission), by allowing against the purchase money deductions (*a*) in respect of mortgages and other encumbrances on the lands transferred, $12,947·56; (*b*) in respect of alleged shortages in chattels delivered, $11,925·50; and (*c*) in respect of encumbrances to be discharged and other small charges, $1,023·97, and that a cheque for the balance should be handed to Smith, representing the Trust Company. Pursuant to this arrangement a cheque for $28,410·95 was handed to Smith before the transfers were deposited at the Land Titles Office. It does not appear why the cheque was drawn for this amount, the sum to be paid on the basis of the arrangement being $27,386·97.

After this transaction had been completed, E. L. Taylor, Smith and Logan met by appointment at the door of the Land Titles Office a little before 10 o'clock on the morning of the 4th June. As soon as the Office opened, Smith and Logan handed in for registration the transfers to the Sales Company with the relative duplicate certificates of title, and E. L. Taylor immediately afterwards handed in for registration the mortgages from the Sales Company to the Loan Company, having been present at the counter while the transfers and certificates were being lodged. Then Logan handed in for registration second mortgages in favour of himself, J. F. Taylor, J. A. Campbell and Geddie-McKay, Limited. Before being lodged for registration all these documents

had been checked by the staff of the Land Titles office and found to be in order. After lodging the documents the parties went back to their hotel, and E. L. Taylor, on behalf of the Loan Company, handed to Logan and J. F. Taylor, representing the Sales Company, a cheque for $194,472·60, the balance of the agreed loan after deducting payments made by him in discharge of encumbrances and other charges.

Between 11 o'clock and noon on the same day McWilliam enquired by telephone from the Land Titles Office whether any transfers of the Mennonite land had been lodged for registration and was informed that some had been lodged.

On Sunday, June 5th, McWilliam learnt that mortgages to the Loan Company of the land covered by the transfers had been lodged for registration.

On Monday, the 6th June, the statement of claim in the first action was filed, the Mennonite Trustees being plaintiffs and the Trust Company, the Sales Company and John Murphy defendants. The plaintiffs claimed (*inter alia*) an injunction restraining defendants from dealing with the transfers and the duplicate certificates of title, and an order forbidding the Registrar of the Swift Current Land Registration District to register any of the transfers. An order was made on the same day in accordance with these claims.

At this time all the documents lodged for registration had been entered in the receiving book of the Land Titles office in accordance with S. 23 of the Land Titles Act, and some of the documents had been entered in the day book in accordance with S. 25, but none had been entered in the register on the folios constituting the existing certificates of title (Sec. 27). Their Lordships agree with the learned Judges of the Court of Appeal in thinking that in these circumstances none of the transfers or mortgages in question were "registered" within the meaning of Section 58 or of Section 195 of the Act.

At the trial of this action in October, 1921, after evidence had been taken, the statement of claim was amended by adding the Loan Company, Geddie-McKay, Limited, and Messrs. Logan, J. F. Taylor and J. A. Campbell as defendants. The action having come on for further hearing on the amended pleadings, a settlement was arrived at between the plaintiffs and the defendants, Geddie-McKay, Limited, and judgment was entered in accordance with the terms of settlement against that defendant. Judgment against the other defendants was entered as follows, viz. :—

1. Against the Trust Company declaring that it committed a breach of trust in delivering the transfers and duplicate certificates of title to the Sales Company, removing it from its position as trustee, and for accounts.
2. Against all defendants except the Loan Company that the injunction order made on the original statement of claim be made permanent.

3. Against the defendants Logan, J. F. Taylor and Campbell for an injunction restraining them from registering or attempting to register the mortgages given to them.
4. An injunction restraining the Registrar from registering any of the transfers or mortgages mentioned in paragraphs 1 and 3 and an order making permanent the interim injunction granted on the action so far as it related to defendants other than the Loan Company.
5. A declaration that the mortgages given by the Sales Company to the Loan Company be registered against the lands affected by such mortgages and a direction to the Registrar to receive and register such mortgages as if they had been given by the registered owners of the lands instead of by the Sales Company.
6. An order for costs which need not be set out in detail.

From this judgment appeals were taken to the Court of Appeal for Saskatchewan by the plaintifis, the Trust Company, and the Sales Company, the result being that the judgment was varied by setting aside so much as upheld the mortgage to the Loan Company and awarded costs to it; by varying the order as to costs; by declaring that the Loan Company was subrogated to the rights of the mortgagees, encumbrances and lien holders whose mortgages, encumbrances and liens it had paid, and by ordering that nothing in the judgment should be deemed to affect or dispose of the rights of any of the parties to the sum of $28,410·95 in the possession of the Trust Company. The appeal of the Trust Company against the plaintiffs was dismissed and the appeal of the Trust Company against the Loan Company was allowed. The appeal of the Sales Company was dismissed with costs.

The other action—that by the Sales Company against the Mennonite Trustees—was for specific performance of the agreement of 27th November, 1920, as varied by the agreement of April, 1921. In this action the defendants counter-claimed for rescission of the contract and a declaration that it was null and void. McDonald, J., dismissed the action for specific performance, and on the counter-claim made a decree *nisi* for cancellation of the contract, holding that default had been made in the payment of the instalment of a million dollars on the transfers being depositied with the Trust Company. No question has been raised before the Board in respect of the form of this order.

The appeal by the Sales Company from this judgment was dismissed with costs. Against the judgments of the Court of Appeal in these two actions the present appeals are brought, and an order for consolidation of the appeals of the Sales Company in both actions having been made, those appeals and the appeal of the Loan Company in the first action were heard together.

The grounds upon which the decision of the Court of Appeal was based were :—

1. That upon the transfers of 90 per cent. of the lands being deposited with the Trust Company on the 17th May, 1921, the Sales Company became liable to pay a million dollars as an instalment of the purchase money, and that the Sales Company, being in default in payment of this instalment, was not entitled to insist on the transfers of the two parcels of 5,120 acres each on payment of the purchase money of such parcels. (2) That consequently the Trust Company committed a breach of trust, of which the Sales Company had knowledge or notice, in handing over the transfers of these parcels to the Sales Company. (3) That the purchase money of the parcels transferred to the Sales Company was not effectively paid or satisfied by the transaction of the 4th June above referred to. (4) That in the circumstances the Sales Company, by obtaining delivery to it of the transfers and by lodging them for registration, acquired no right against the registered owners of the lands in question and were not entitled to have such transfers registered. (5) That the Sales Company, being in default in the performance of its obligations under the agreement, was not entitled to specific performance. (6) That the Loan Company knew or had notice that the delivery of the transfers to the Sales Company was a breach of trust and was consequently in no better position than the Sales Company. (7) That the payment by the Loan Company to the Sales Company of the amount advanced was brought about by the carelessness or negligence of the Loan Company and not by any conduct or representation of the Mennonite Trustees, and that consequently there was no ground for postponing the prior interests of the registered owners of the land to the equitable interest claimed by the Loan Company.

The argument on the appeals to this Board was directed to these points, and it will be convenient to deal with them in the order which they are set out above.

(1) and (2) Their Lordships agree with the conclusion at which both the Court of Appeal and the trial judge arrived on these points. The amended agreement provides for the payment of a million dollars immediately on the deposit with the trustee of "transfers" of at least 90 per cent. of the lands. The word "transfer" when used in connection with a system of registration of titles to land has generally, if not universally, the meaning ascribed to it by Sec. 2 (20) of the Saskatchewan Land Titles Act, 1917, viz. :—"The instrument by which one person conveys to another an estate or interest in land under the Act." It is unquestionably used in that sense in clause 4 of the agreement of November, 1920, and their Lordships can find nothing in the context of the original or of the modifying agreement which indicates that the word is used in clause 2 (*b*) of the latter agreement otherwise than in its ordinary and primary meaning. The words of the agreement being, in their Lordships' opinion, unambiguous,

there is no occasion to speculate on the objects or motives of the parties, or on the probabilities. The Sales Company was therefore in default on the 4th June, 1921, and it follows that in handing over on that day the transfers of part of the land sold, the Trust Company committed a breach of trust. The evidence shows clearly that the Sales Company through its agents, Logan and J. F. Taylor, and its solicitors, Casey and Dawson, knew or had notice of all the relevant facts, and that it was a party to the breach of trust committed by the Trust Company.

(3) On this point their Lordships are unable to agree in the conclusion of the Court of Appeal. That conclusion was based mainly, if not entirely, on the view that Geddie-McKay, Limited, had not earned and was not entitled to be paid the commission of $423,156·00, the receipt for which was relied on as constituting an effective payment by the Sales Company to the Trust Company of an equivalent amount of the purchase money. The agreement of 2nd April, 1921, in their Lordships' opinion, establishes conclusively as against the Mennonite Trustees and their principals, the registered owners of the lands, that Geddie-McKay, Limited, was entitled to be paid commission amounting to $423,156·00. This agreement was not put in evidence at the trial and was consequently not before the Court of Appeal. The omission to put it in evidence was apparently due to the fact that at the trial no question was raised as to the right of Geddie-McKay, Limited, to commission, the objection to the receipt being treated as payment of part of the purchase money being founded on other grounds. Their Lordships cannot but think that the conclusion of the Court of Appeal that Geddie-McKay, Limited, was not in June, 1921, entitled to payment of its commission would not have been reached if the agreement of 2nd April, 1921, had been before that Court. The Trust Company was required by clause (*c*) of the Trust Deed to pay the amount of the commission on demand out of the monies received under the agreement for sale, and it was by the same clause provided that the written receipt of Geddie McKay, Limited, for monies paid them in respect of commission should be treated as cash in all settlements between the Trust Company and the vendors. The sum of $423,156·00 was in effect paid to Geddie-McKay, Limited, out of the purchase money of the 10,240 acres, and the receipt for that sum should therefore be regarded as between the Trust Company and the vendors as evidencing the payment in cash by the Trust Company to Geddie-McKay, Limited, of that amount in satisfaction of its admitted claim for commission. The propriety of the allowance by the Trust Company of a deduction in respect of alleged shortages of chattels delivered was also questioned. This objection was not seriously pressed in argument before this Board, and it is sufficient to say that in their Lordships' opinion the Mennonite Trustees and their principals are not entitled, having regard to the terms of the

Trust Deed, to complain, as against the purchasers, of the action of the Trust Company, in the absence of proof of any want of *bona fides* or of anything in the nature of fraud or collusion with the purchasers.

(4) This point involves the consideration of the position of the transferee under a transfer in due form, executed by the registered owner, but not registered, as against such registered owner.

Sec. 58 (1) of the Land Titles Act provides that after a certificate of title has been granted no instrument shall, until registered, pass any estate or interest in the land therein comprised . . . . or render such land liable as security for the payment of money, except as against the person making the same. Sec. 59 of the same Act provides that the owner—*i.e.*, the registered owner—of land for which a certificate of title has been granted shall hold the same subject . . . to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes such certificate of title absolutely free from all other encumbrances, liens, estate or interests whatsoever, with certain exceptions not material in this case.

The effect of provisions similar to, but not identical with, those quoted, contained in the Real Property Act, 1900, of the State of New South Wales, on the position of the holders of unregistered transfers and subsequent mortgages by the transferees was considered by the High Court of Australia in the case of *Barry* v. *Heider*, 19 C.L.R. 197. In that case the contest was between Barry, the registered owner, and Heider and Gale, holders of successive unregistered mortgages given by one Schmidt, the transferee under an unregistered transfer executed by Barry. The transfer to Schmidt had been set aside at the instance of Barry on the ground that it was obtained by fraud, and the question of the rights of the mortgagees from Schmidt was directly in issue. The provisions of the Saskatchewan Act are in some respects different from those of the New South Wales Act, but for the purpose of the point now under discussion the differences are immaterial. In that case Griffith, C.J., said (at p. 208) :—

> "In my opinion equitable claims and interests in land are recognised by the Real Property Acts.
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> "It follows that the transfer of 19th October, if valid as between the appellant and Schmidt, would have conferred upon the latter an equitable claim or right to the land in question recognised by the law. I think that it also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest.
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> "It further follows that the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice of Barry's right to have it set aside, that Schmidt had such an assignable interest."

Applying this statement to the facts of the present case, the effect of the delivery to the Sales Company of transfers in its favour executed by the Mennonite owners was to confer on the

Sales Company an equitable claim or right to the land comprised in such transfers, but since that equitable claim or right was acquired with notice of the breach of trust committed by the Trust Company, the Sales Company is precluded from relying on its equitable title as against the legal title of the registered owners. Their Lordships are, therefore, of opinion that the Sales Company by obtaining the transfers did not, while such transfers remained unregistered, acquire any estate in or right to the land comprised in the transfers which it could set up against the registered owners of the land.

(5) Their Lordships have already expressed the opinion that the Sales Company made default in the performance of its obligations under the agreement for sale by failing to pay the instalment of a million dollars. This instalment has ever since remained unpaid, and the Sales Company, being in default under the contract, is not entitled to enforce specific performance.

(6) Their Lordships are unable to agree with the decision of the Court of Appeal on this point.

The transfers to be regarded are those covering the 10,240 acres of land now in question. It is true that on the face of these transfers it appeared that the purchase money had not been paid at the dates of their execution, and the Loan Company must be taken to have had notice of this fact through its solicitor, E. L. Taylor, who examined the transfers on its behalf. The purchase money remained unpaid up to and including the 3rd June, but on the morning of the 4th June, before the documents were deposited at the Land Titles Office, and before the Loan Company advanced its money, the purchase money of these parcels, with which alone it was concerned, had in fact been paid or satisfied by the transaction before referred to. The registered owners, therefore, were not, when the Loan Company lodged its mortgages and advanced its money, unpaid vendors in respect of these parcels. It is also true that in handing over the transfers before receiving payment of the instalment of a million dollars then payable the Trust Company committed a breach of trust. The Sales Company is precluded from relying on its equitable title under the transfers because it obtained them with notice of this breach of trust, but the Loan Company is in a different position. The evidence in the case does not show that either the Loan Company or E. L. Taylor, or any other person through whom the Loan Company might have been affected with notice, knew or ought to have known any facts showing that the Trust Company in handing over the transfers had committed, or that the Sales Company in obtaining them had been party to, a breach of trust. The position of the Loan Company as against the registered owners is therefore not the same as that of the Sales Company—for the latter Company had, while the former had not, notice at the time of acquiring its equitable right or claim of the breach of trust committed by the Trust Company.

(7) Applying the statement quoted above from the report of *Barry* v. *Heider* (*supra*) the executed transfers of these lands operated as a representation to any person into whose hands they might lawfully come without notice of the right of the registered owners to prevent registration of them that the Sales Company—the transferees—were entitled to the interest defined in such transfers and that such interest was assignable provided the purchase money of the land comprised in the transfers had been paid. Before the Loan Company lodged their mortgages for registration or paid over the amount of the loan the purchase money of these lands had in fact been paid. It was not proved that any fact was within E. L. Taylor's knowledge which ought to have put him on enquiry whether the Trust Company was committing a breach of trust in handing over the transfers to the Sales Company in order that they might be registered. The purchase money having been paid, E. L. Taylor was entitled to treat the transfers as a representation that the Sales Company was entitled as against the registered owners to be registered as transferee of an estate in fee simple in the lands comprised in the transfers. Their Lordships can find nothing in the evidence which establishes any carelessness or negligence on the part of E. L. Taylor, who appears to have been the only person concerned in the completion of the transaction on behalf of the Loan Company. On the contrary, he appears to have taken all reasonable precautions in dealing with the matter. On the evidence their Lordships are of opinion that the payment by the Loan Company to the Sales Company of the amount of the loan was induced by the conduct of the registered owners in depositing with the Trust Company executed transfers of these lands and by the conduct of Smith in handing over these transfers to the Sales Company. Smith was the agent of the owners to deal with these transfers, and E. L. Taylor was entitled to assume, in the absence of any indication to the contrary, that he was acting properly in handing them over. Moreover McWilliam and Cathrea, the solicitors for the owners, knew on the night of 3rd June that Smith intended to hand over the transfers on the following morning, and that it was intended that they should then be lodged for registration. Having this knowledge, they abstained from giving notice to any person other than Smith of their contention that the transfers could not properly be handed over or registered, or from taking or attempting to take any step by communicating with the Registrar or by lodging a caveat or otherwise to prevent the transaction being completed. The inaction of the solicitors at this time, with the knowledge they possessed, is directly imputable to their clients, the Mennonite Trustees and the Mennonite owners themselves. It is as if they had all been personally present and had allowed the transaction with the Loan Company to go through without protest or objection. In these circumstances their Lordships are of opinion that the decision

of the Court of Appeal on this point cannot be supported, and that McDonald, J., was right in holding that, as against the registered owners, the Loan Company was entitled to the benefit of the mortgages given to it by the Sales Company.

For the above reasons their Lordships will humbly advise His Majesty that the appeal of the Loan Company in the first action be allowed, that the appeals of the Sales Company in both actions be dismissed, and that the judgment of the Court of Appeal be varied as follows, viz. :—

(1) By discharging so much of the judgment as is contained in the following clauses (*a*), (*b*) 1, (*b*) 2, and (*b*) 3, and (*d*).

(2) By restoring so much of the judgment of McDonald, J., dated the 8th September, 1923, as is contained in clause 5 thereof.

(3) By ordering that the Mennonite Trustees, the plaintifis in that action, do pay the costs of the Loan Company of the action and of the appeal to the Court of Appeal of Saskatchewan and of this appeal.

There will be no order as to the costs of the Trust Company or of the Sales Company of this appeal.

The Sales Company will pay the costs of the appeal in the second action.

In the Privy Council.

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(*Consolidated Appeals.*)

DELIVERED BY SIR ADRIAN KNOX.

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