McKILLOP & BENJAFIELD (DEFENDANTS) ..... APPELLANTS;

AND

CHARLES I. ALEXANDER (PLAINTIFF) ..... RESPONDENT.

1911
*Oct. 10.
1912
*Feb. 20.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Title to land—"Torrens System"—Priority of right—Registration—Caveat—Notice—Construction of statute—Saskatchewan "Land Titles Act," 6 Edw. VII. c. 24—Equities between purchasers—Assignment of contract—Conditions—Right enforceable against registered owner.

Under the provisions of the Saskatchewan "Land Titles Act" (6 Edw. VII. ch. 24), the lodging of a caveat in the land titles office in which the title to the lands in question is registered, prevents the acquisition of any legal or equitable interest in the lands adverse to or in derogation of the claim of the caveator.

A company, being registered owner of lands under the Act, entered into a written agreement to sell them to P., who assigned his interest in the contract to G., who then agreed to transfer the equitable interest, thus acquired, to A. Subsequently, without knowledge of A.'s interest, McK. & B. acquired a like interest from G. A caveat claiming interest in the lands was then lodged by A., in the proper land titles office, and, without inquiry or actual notice of the registration of the caveat, McK. & B. afterwards obtained the approval of the company to the assignment which had been made to them. In an action for specific performance,

Held, per Davies, Idington, Anglin and Brodeur JJ., that, as the purchasers from G. were on equal terms as to equities, A. had priority in point of time at the date when his caveat was lodged; that such priority had been preserved by the registration of the caveat, and that the subsequent advantage which would, otherwise, have been secured by the company's approval of the assignment to McK. & B. was postponed to any equitable right

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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which A. might have to a conveyance. And, further, *per* Idington J., that, irrespective of the lodging of the caveat, A. had prior equity to the subsequent assignees.

The agreement by the company provided that no assignment of the contract should be valid unless it was for the whole of the purchaser's interest and was approved by the company, and also that the assignee should become bound to discharge all the obligations of the purchaser towards the company. Until the time of the approval of the assignment to McK. & B., none of these conditions had been complied with.

Held, per Davies, Idington, Anglin and Brodeur JJ., that the conditions in restriction of such assignments of the original contract could be invoked only by the company.

Held, per Duff J., dissenting, that, as the rights of G. against the company had never become vested in A., according to the provisions of the contract, he had acquired no enforceable right against the company, the registered owner of the lands, and, consequently, he had no legal or equitable interest in them which could be protected by caveat.

Judgment appealed from (4 Sask L.R. 111) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), reversing the judgment of Johnstone J. and maintaining the plaintiff's action with costs.

The circumstances of the case and the questions in issue on the appeal are stated in the judgments now reported.

Ewart K.C. for the appellants.

Chrysler K.C. for the respondent.

DAVIES J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Anglin.

IDINGTON J.—The Canadian Northern Railway Company were registered owners of land under the

(1) 4 Sask. L.R. 111, *sub nom. Alexander* v. *Gesman.*

"Torrens System" and gave to a subsidiary company named the Canadian Northern Prairie Lands Company the management of these lands.

The latter company, under powers thus given, sold a section to one Potter who in turn sold it to one Gesman, and he, on the second of November, 1909, sold a half of the section to the respondent Alexander who paid $100 cash and was to pay balance of what accrued due to Gesman in respect of his equity, for the selling company had not been paid their price.

Then on the 4th of November, 1909, Gesman sold the same half section and the other half of the section to the appellants. Each of these transactions was reduced to writing and was so far as respects mere form a valid contract.

On the 6th of November aforesaid, respondent Alexander executed a caveat setting forth his claims against the half-section he had so purchased, and registered same on the 10th of November aforesaid.

On the 14th of December, 1909, Gesman was paid by appellants the balance of the $1,800 purchase money and they received from him an assignment of the original agreement of sale from the Prairie Lands Company to Potter.

The Prairie Lands Company had given a written agreement in which there was a provision guarding against the recognition of sub-purchasers.

The assignments to Gesman and by him to appellants were approved by the Prairie Lands Company on the 29th of November, 1909. I will hereafter refer to this feature of the case.

The respondent began this action on the 21st of February, 1910.

There is little if any dispute of fact.

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By their respective agreements of sub-purchase appellants and respondent Alexander each acquired an equitable interest in said lands.

Alexander invokes for his protection the maxim *qui prior est tempore potior est jure.*

It is an undoubted principle of law that as between owners of equitable interests the first in time prevails unless he who has acquired it has either done or omitted to do something he is by law required to do and thereby has lost this prior right.

Alexander had not done anything to taint his right and so far as I can see omitted nothing he was required to do.

His registration of notice of his claim may not have been requisite on the facts here presented, but was, if I understand the practice, exactly what is usually done by prudent purchasers under a time bargain.

And prudent buyers are well advised in making search for such notice of prior purchase. But though claimed to be here notice to the subsequent purchasers I desire not to express my opinion on that point, for in my view of this case that need not be considered merely from the point of view of notice.

An argument was presented by the appellants founded on the practice relative to the assignments of choses in action in pursuance of which notices of the assignment thereof are given to the debtor or trustee of the fund provided for the discharge of the obligation in question in the assignment.

I do not think the argument is well founded. Indeed, the mass of authority against it seems overwhelming.

In the case of *Taylor* v. *London and County Bank-*

ing Company (1), at page 254, in appeal, Stirling L.J. states as follows:—

> Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land" and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty.

He proceeds to quote from Sir William Grant in *Jones* v. *Gibbons* (2), at page 410, and cites *Wilmot* v. *Pike* (1845) (3).

The authorities cited bear out his statement of the law which is laid down to the same effect in Halsbury's Laws of England, vol. 13, page 79, where other authorities are collected.

There is nothing in this case in hand of what sometimes happens when the party holding the subsequent equity has been able to fortify it by the acquisition of the legal estate or its equivalent a declaration by him holding the legal estate that he so holds as trustee for him claiming.

Nor can I find anything in a minor suggestion made that the respondent purchaser should have possessed himself of the prior contracts or agreements on which his title of recognition must rest. The thing was impossible.

The next way it is put is that the respondent should have had an indorsement on the contract of Gesman or, perhaps, one on each contract all along the line to the company. Who ever heard of a sub-purchaser looking for such a thing? And there is no evidence appellants did so. No case is cited to support these remarkable propositions save such cases as arise from

(1) (1901) 2 Ch. 231. (2) 9 Ves. 407.
(3) 5 Hare 14.

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mortgages by deposit of deeds or the like where possession of the deeds is of the essence of the transaction.

Indeed, in transactions such as this, to require that would be, if not a manifest absurdity, most unusual. Nor can I find anything to distinguish, as against respondent Alexander, the case of assignment of a mortgage from that of an assignment of a purchase of land. Any distinction between them is in favour of Alexander, who in truth acquired an interest in the land, but not by way of security only, as a mortgagee does.

Dart in his work on Vendors and Purchasers (5 ed.), page 837, in a section devoted to the subject, treats purchasers of equitable title as bound by the same rule.

In this case we have then the ownership registered in the name of the Canadian Northern Railway Company, who were holders of the certificate of title, and then the agreement of sale to Alexander and notice thereof by the registration of his caveat founded thereon, and the holder of the certificated title acknowledging the authority of the Canadian Northern Prairie Lands Company to sell and submitting its rights and duties to the direction of the court. Can there be anything more to do than declare the equities between the other parties and direct accordingly ?

I agree with the reasoning of the judgment of the court below speaking through Mr. Justice Newlands wherein he relies on sections 136 and 139 of the "Land Titles Act," now sections 125 and 123. By accident it is in the judgment made to appear as if the first of these sections itself declared the effect, whereas it is the caveator who makes the claims and the result is to

render the acquisition of the legal estate by another impossible if the caveator's claim is rightly founded. It is pointed out in argument here the legal estate is not in question, but that does not dispose of the whole argument, for it only shifts the point and does not get rid of many reasons beginning with the scope of these sections and applying others in same Act which together tend to demonstrate that, considering, as in regard to interests in land we must, the equity of a purchaser filing a caveat, it must be held stronger than who does not. I need not elaborate for this case does not need it.

I still adhere to the views I expressed in the unreported case of *McLeod* v. *Sawyer-Massey Co.* (in 1910) that the clause in agreements of sale denying the right of any purchaser to assign unless with approval of the vendor are, as between others, of no consequence.

They are designed to protect a vendor from annoying entanglements and that unless and until the vendor sets up for his own protection any of such stipulations in case of a claim made against or through him no one else has a right to do so.

The appellants here try to present the approval in a somewhat different light from what was presented in the former case by suggesting that the first purchaser not having got approval, the second was entitled to assume there was no prior purchaser.

This is a new contention I gather from the judgments below and we are not pointed to a line of evidence shewing either ever searched or inquired at the company's land office.

Without such like evidence there is, in my opinion, no foundation for such an argument. It was not until

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long after purchase that the appellants applied to and got the approval in the vain hope it might in some way help. Meantime the respondents' caveat was entered and he became entitled, indeed bound, to assert in court his right which could not be defeated by such contrivance; without at least the co-operation of the owner cancelling the original agreement, much less when the owner assumes the attitude it takes here of merely submitting to the direction of the court.

I have referred to numerous authorities cited in appellants' factum as if to support some argument to be derived therefrom but fail to see their relevancy save to the point I have fully dealt with as to giving notice, and what I am about to refer to.

Two of these authorities are worthy of notice. *Rice* v. *Rice*(1), is a case where a vendor's lien existed yet the purchaser got his assignment with receipt for purchase money indorsed and therewith got the title deeds and by means thereof had by depositing them and this assignment raised a sum of money and absconded.

In the face of such a clear equitable mortgage induced by the very acts of the vendor claiming the lien, it was found possible to argue for the vendor's lien being prior. And why so ? Because the position of lien prior in time is so strong as to encourage the hope of overcoming such a later title fortified as this was.

And in the case of *Cave* v. *Cave*(2), the rule set out in the maxim was followed after a full examination of *Rice* v. *Rice*(1), and *Phillips* v. *Phillips*(3), and the principles underlying them.

(1) 2 Drew. 73. (2) 15 Ch. D. 639.
(3) 4 DeG. F. & J. 208.

I need not set forth the complicated facts of that case. Suffice it to say there seems, to my mind, a great deal more in the facts there than in those here to tempt a judge to discard the maxim, yet it was followed.

Here the man Gesman had in truth and law nothing to sell when he sold to the appellants.

It is only by a fiction, as it were, that we can refer to the second assignment, as an assignment, at all. It can only become an assignment by virtue of some act or omission on the part of him holding the prior assignment that may raise an equity in him getting the second to have the man holding the first restrained from setting it up and thus let the later one operate. How can the approval of the vendor in ignorance of another assignment have any such force as the statutory effect gives the first by virtue of the caveat and all it implies.

The appeal should be dismissed with costs.

DUFF J. (dissenting). — On the 28th February, 1906, the Canadian Northern Railway Co. (acting through the Canadian Northern Prairie Lands Company) agreed by two several agreements to sell to one Potter the two quarter-sections forming the south half of section one in township 32, and range 15 west of the Third Meridian in the Province of Saskatchewan. Before the whole of the purchase price was paid Potter assigned his rights under these agreements to one Gesman, who in turn on the second day of November, 1909, agreed with the respondent Alexander (the plaintiff in the action out of which this appeal arises) to assign his rights to Alexander. On the 4th day of the same month Gesman agreed with the appel-

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lants to assign the same rights to them. On the 10th day of November Alexander filed a caveat forbidding any transfer of the lands in question and, on the 29th of that month, the assignment from Gesman to the appellants was completed and, on the 15th of December, the consideration was fully paid. In February, 1910, Alexander brought his action in which he claimed specific performance of his agreement with Gesman and in which he also prayed for an order directing the appellants and the Canadian Northern Railway Co. to execute a proper conveyance to him of the lands that were the subject of these various dealings. The trial judge dismissed the action. The full court reversed this judgment on the ground that, while the appellants had the better equitable rights to a conveyance from the company, the respondent Alexander by filing his caveat had gained priority.

The agreements between the Canadian Northern Railway Company and Potter are both in the same form, were executed upon the same day and may for the purposes of this case be considered as if they had been one agreement embodied in one instead of two formal instruments. The purchase money (over and above a certain sum that was paid in cash) was to be paid in five annual instalments the last of these instalments being due the 28th February, 1911. The agreement contemplates and makes careful provision for the assignment of the purchaser's rights; and it will be necessary to dwell a little upon the effect of the stipulations upon this subject as they appear to me to be a governing ingredient in the considerations which determine the relative priority of the claims upon which we have to pass. The stipulations on part of the purchaser are formally declared by the instru-

ment to be binding upon his assigns; and the instrument contains this clause:—

> No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorized person, and no agreement or conditions or relations between the purchaser and his assignee, or any other person acquiring title or interest from, or through the purchaser, shall preclude the company from the right to convey the premises to the purchaser, on the surrender of this agreement and the payment of the unpaid portion of the purchase-money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said company as aforesaid. But no assignment shall in any way relieve or discharge the purchaser from liability to perform the covenants and pay the monies herein provided to be performed and paid.

By these provisions it seems to me the parties have expressed their intention to give to the obligations of the company under the agreement the character of rights which should be personal to the contracting parties to the extent at least that they should be enforceable against the company only by the purchaser or his representatives or by such persons as with the consent of the company should become invested with the purchaser's rights and should become bound to assume his obligations under the agreement.

> No assignment shall be valid unless the same shall be for the entire interest of the purchaser.

That is to say, the purchaser cannot validly make any partial disposition of his rights; he cannot merely charge them, he cannot attach sub-equities to them; he can only affect them by a disposition which wholly divests him of them and vests them in an assignee who is substituted as purchaser for him. No assignment, moreover, though satisfying this condition, can take effect until it has been assented to by the vendors, until the vendors, that is to say, have accepted and approved of the assignee. The purchaser under such

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a contract stands, of course, in a position very different from that of a vendee of land under a contract of sale which is in the ordinary form and contains no such stipulation. A purchaser under such a contract may multiply sub-equities to any extent he pleases and the holders of such sub-equities again may each in his turn repeat the same process indefinitely. Where lands are sold under terms by which the payment of the purchase money is deferred for a considerable period during which the contract remains *in fieri* it is obvious that such sub-equities may become a source of embarrassment to the vendor; and it is doubtless in part with the object of escaping such embarrassment that railway companies (holding large areas of land for the purpose of sale only and having, of course, in repect of such lands a very great number of dealings) customarily introduce this clause into the form of contract which they commonly use when small parcels of lands are sold, upon credit.

But while the clause is thus beneficial to the company it is of even greater value to the purchaser and his assignee. The assignee whose assignment has been accepted gets the advantage of being placed in direct contractual relations with the vendor and being freed from the necessity of concerning himself about possible equities created by the purchaser in the meantime; and as to the purchaser (who cannot, of course, get a registered title so long as the purchaser's money remains unpaid) the advantage to him of being enabled to transfer to a sub-purchaser an unimpeachable title to his rights is obvious.

That the assignee under an approved assignment does get such a title (I am, of course, assuming now that the assignee is free from any imputation of *mala*

fides) is sufficiently apparent. It is manifest that the assignment contemplated and provided for by the agreement is intended to result, when accepted by the company, in a new agreement between the company and the assignee. By the express terms of the contract the obligations of the purchaser are declared to bind his assignees; and the assignee in presenting his assignment for approval undertakes, of course, to submit to this as well as the other terms of the contract. The company, on the other hand, comes under an obligation to the assignee to perform on its part the contract of sale — whether because of an implied undertaking with the assignee arising out of the acceptance of the assignment or *ipso jure* in consequence of the assignment vesting in him the purchaser's rights is immaterial. The original purchaser is not relieved from responsibility under his covenants, but the effect of the transaction is that the assignee is introduced as a party to the contract of sale; and under the contract so re-constituted the assignee is entitled to the rights, and assumes the primary burden of the correlative obligations of the purchaser as those rights and obligations are therein declared. Now one of the terms of the original contract is as we have seen that no rights under it shall be acquired through any disposition by the purchaser unless such disposition complies with conditions which are only fulfilled by the assignment to the accepted assignee; and consequently nobody claiming rights under the contract through any disposition by the purchaser (which rights obviously cannot be constituted in defiance of the express terms of the contract itself upon which they are founded) can dispute the title of the accepted assignee to the benefit of the purchaser's rights. The company, in a

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word, by its acceptance of the assignment becomes a trustee of the land for the purposes defined by the terms of the contract thereby constituted, and according to those terms the land is to pass to the assignee on the performance of the conditions defined. It is argued that the provisions we have been considering are for the benefit of the vendor alone, and that he alone can take the benefit and claim the protection of them. It would be sufficient to say that such a proposition applied to the facts of this case means in the last analysis that the company being under no legal disability to carry out its contract with the assignee may lawfully refuse to do so, for it is perfectly obvious that appreciating the rights of the parties as rights governed by the contract alone the company is legally bound to convey this property to the appellants and is under no sort of legal duty or obligation to Alexander, which creates an impediment in the way of its doing so. The contention, moreover, overlooks the circumstance that a new contract has been formed by which the assignees have come under obligations to the company. In entering into that relation the assignees were entitled to rely on this provision. They were entitled to rely upon it because it was one of the terms of the contract to which it was proposed that they should become parties and it was obviously as much for their benefit as for that of the company; and it is to be presumed that they did rely upon it. As against parties to the contract or persons claiming under the contract either directly or indirectly they are indisputably entitled to any protection which that provision may afford.

Indeed, as I have pointed out, it is an unwarrantable assumption to say that this clause was originally

framed exclusively in the interests of the company. It is obviously to the interest of all parties that sub-purchasers under such an agreement shall be able to pay their purchase money with perfect confidence in the title they are acquiring and on an unsophisticated reading of it, it is manifest that one of the main objects of this clause is to secure to the sub-purchaser an unimpeachable title as against the vendors. That being so, it is impossible to argue that the sub-purchaser is not entitled to the benefit of it or that his rights under it can be neutralized by any action of another party to the contract.

From all this it is clear enough that the respondent Alexander cannot succeed in this action unless there is some other fact or circumstance in addition to his agreement with Gesman which gives him some right of action against the company or the appellants. That he has no right of action against the company is clear, and it is clear also, as a result of the special terms of the agreement, that he can only succeed against the appellants by establishing that he is entitled to have the rights vested in them exercised for his benefit — that the appellants, in a word, are trustees of their rights for him. The contention on behalf of Alexander is that such a trust arises on one of these grounds: 1st, that his caveat bound Gesman's interest under the agreement for sale from the time it was filed and that the appellants took that interest charged with an obligation to carry out Gesman's contract with Alexander; 2ndly, that the caveat was, in law, notice to the appellants of Gesman's contract with Alexander and that they consequently must be held to have acquired Gesman's interest with notice of Gesman's breach of trust; and 3rdly, that the appellant's failure

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to search the register before paying the purchase money to Gesman was such negligence as to deprive them of the benefit of their legal position under the contract or to require the court to impute to them constructive notice of the facts stated in the caveat which, of course, would have been ascertained if the register had been examined.

The first and second of these contentions are, I think, based upon a misconception of the purpose for which the machinery of caveats was devised by the authors of this Act. The fundamental principle of the system of conveyancing established by this and like enactments is that title to land and interests in land is to depend upon registration by a public officer and not upon the effect of transactions *inter partes*. The Act at the same time recognizes unregistered rights respecting land, confirms the jurisdiction of the courts in respect of such rights and, furthermore, makes provision — by the machinery of the caveat — for protecting such rights without resort to the courts. This machinery, however, was designed for the protection of rights — not for the creation of rights. A caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of; but the caveator's claim must stand or fall on its own merits. If the caveator has no right enforceable against the registered owner which entitles him to restrain the alienation of the owner's title, then the caveat itself cannot and does not impose any burden on the registered title. Alexander's caveat consequently conferred no right upon him, it could only operate to protect such rights as he had and could enforce against the land, that is to say, against the

registered owner of the land. It is quite clear, as I have pointed out, that he had no such rights and the filing of the caveat, therefore, was a wrongful interference with the proprietary rights of the company for which Alexander might have been answerable in damages if the company had sustained any loss in consequence of it. It seems equally clear that the caveat could not affect the appellants as bringing home to them notice of the transaction between Alexander and Gesman. The statute does not say that the caveat shall operate as notice of the facts stated in it to intending purchasers, and there is not anything in the statute giving the least ground or colour for attributing to it any such operation. If an intending purchaser chooses to close his purchase by paying his purchase money without first acquiring a registered title, he runs the risk of finding that he cannot get a registered title until some unregistered claim has been satisfied or some unregistered interest acquired. But he incurs this risk not because he is deemed to have had notice of the claim and for that reason to be bound in good faith to recognize it, but because he can only acquire a title by registration and registration he cannot have free from an enforceable claim against the registered title in face of a caveat founded upon such a claim until that claim has been satisfied or the superiority of his claim has been established.

Section 173 of the Act, when read together with the provisions respecting caveats, would seem to establish beyond controversy that this view of the effect of a caveat correctly interprets the intention of the statute. "No person," the section reads,

> contracting or dealing with * * * owner of land for which a certificate of title has been granted shall except in case of land by such person * * * be affected by any trust or unregistered in-

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terest in land any rule of law or equity to the contrary notwithstanding.

It would be strange if after this formal declaration the legislature had proceeded to provide a statutory method of affecting the conscience of the purchaser with notice of unregistered interests. The assumption that the legislature has provided such a method in the system of caveats seems to be unwarrantable. The operation of the caveat according to the design of the Act (as affecting a purchaser) is, I think, aptly expressed in Lord Redesdale's language in *Underwood* v. *Lord Courtown*(1), at page 66; it is to "bind his title not his conscience."

The third ground of relief is put in this way. Alexander, it is said, had an equitable right which was prior in time to the equitable right of the appellants, and the subsequent right of the appellants ought not to be permitted to displace his prior right, 1st, because the appellants, in failing to search for caveats before closing their purchase from Gesman were guilty of such gross negligence as to make it inequitable to permit them to retain the advantage arising from their contract with the company; or 2nd, because the appellants, by reason of their neglect to search the register, had constructive notice of Alexander's claim.

To the first of these contentions, there is an objection which seems to me to be absolutely fatal, and it is this. The maxim *qui prior est tempore potior est jure,* is (as a great equity judge, Turner, L.J., said, in *Cory* v. *Eyre*(2), at page 167) :—

> founded * * * on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the

(1) 2 Sch. & L. 41.

(2) 1 DeG. J. & S. 149.

trust in the person in whose favour the trust is created or declared. Where, therefore, it is sought, * * * to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it.

Lord Westbury explains the maxim in the celebrated case of *Phillips* v. *Phillips*(1), in language which is to the same effect. The maxim has never been applied in favour of persons who have neither by themselves nor by those whose rights they are asserting, had any legal or equitable interest in the land which was the subject of the dispute.

It is clear, as I have said, that Alexander never acquired any right which he could compel the registered owner to recognize and, therefore, he never had a right which in any lawyerly use of the words could be described as an interest in land. His right was and remained a personal right against Gesman, enforceable no doubt by equitable remedies, both against Gesman and against others who might be implicated in Gesman's breach of faith, but still only a personal right because of the special provisions of the contract with the company under which Alexander could acquire no claim against the registered proprietors until they had assented to his assignment. It is argued that Gesman was the owner of the land in equity, but this seems really to be an abuse of language (see Fry, Specific Performance, p. 675, sec. 1382; and *Ridout* v. *Fowler*(2), at pages 661 and 662, *per* Farwell J.). The company, it may be admitted, was a trustee in a limited sense. It is inaccurate to say that the company held the land in trust for the purpose of fulfilling the agreement of sale. But as I

(1) 4 DeG. F. & J. 208.

(2) [1904] 1 Ch. 658.

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have pointed out, that trust is defined by the agreement; and only those can in any admissible sense of the words be said to have acquired a beneficial interest in the land who have acquired or in other words are entitled to enforce some rights under the agreement. In this Alexander fails; his right (in the sense indicated) though in process of consummation was never consummated. The wrong done him by Gesman was not to aid in defeating an unregistered right in the land (or against its registered owner) already constituted, but in preventing Alexander from constituting such a right by effectively transferring to the appellants the rights he had agreed to vest in Alexander. If the appellants were implicated in this wrong the court would find a means of making them account for what they acquired by means of it. But that must at least involve finding in them either guilty knowledge or guilty ignorance of Gesman's wrong-doing — neither of which is suggested.

The contention, moreover, fails because there is no adequate ground for imputing any such misconduct or negligence to the appellants as would justify the court in holding them accountable as trustees for Alexander.

The test to be applied is stated by Lindley, M.R., in *Oliver* v. *Hinton*(1), at page 274:—

> To deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate, it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority.

It may be observed in passing that Lindley L.J. is not here dealing with constructive notice; he is

(1) [1899] 2 Ch. 264.

assuming an absence of notice, either actual or constructive, and even in the absence of notice, the case from which his observation is taken decides that gross negligence, such as a failure to require the production of the title deeds, may deprive even a purchaser for value without notice of the right to retain his legal advantage, whatever it may be, to the disadvantage of the holder of a prior equitable interest. I have pointed out that Alexander is not the holder of such an interest — but putting aside that objection, we come to consider whether the appellant's negligence (so called) in failing to examine the register is of the kind or degree which Lindley L.J. had in view.

I should say before proceeding to apply this doctrine to the facts that I think it is doubtful whether the doctrine is one which can safely or properly be applied to impeach the rights of a purchaser contracting directly with a registered owner under the Act. I think there is something to be said in favour of the view that it cannot be applied consistently with the objects to be obtained by registration of title and that the design of the Act is that, as against such a purchaser, unregistered interests should depend for their protection upon caveats operating directly to bind the title of the registered proprietor. Doctrines developed under the old system of conveyancing for the protection of equitable rights ought no doubt to be applied very guardedly for the purpose of deciding controversies respecting unregistered interests in registered land; and the utmost vigilance ought to be observed to avoid the mistake of yielding a punctilious allegiance to the letter of a rule evolved under widely different conditions without determining to what extent the

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principle which underlies the rule is in the circumstances properly applicable. For the purposes of this case, however, I assume that the doctrine as stated by Lindley L.J., is applicable. If I am right in the opinion I have expressed as to the effect of the appellants' contract with the company, it is perfectly clear that negligence cannot be imputed to him because of his failure to make inquiries respecting dealings of Gesman. Gesman produced his agreement with the company and the assignment approved, and the appellants were entitled to rely upon that. A cautious or suspicious man might have done more, but they were not bound to be suspicious, and they are not to lose their legal rights because they might by "prudent caution" (to use Lord Cranworth's phrase in *Ware* v. *Egmont*(1), at page 473), have obtained more information than they did unless they have been guilty of "gross and culpable negligence." As Lord Selborne said in *Agra Bank* v. *Barry*(2), at page 157, the purchaser owes no duty to the "possible holder of a latent title" to exercise care with regard to the title of his vendor. A purchaser is under no legal obligation to investigate his vendor's title. *Bailey* v. *Barnes*(3), at page 35. The only relevant question is, were the assignees (from the point of view exclusively of their own interests) guilty of "gross and culpable negligence" in not examining the register? As regards the absence of concern respecting dealings by Gesman — which could not affect him — the point seems clear; it is only "by falling into the error attributed to those who are wise after the event" (see *per* Lindley

(1) 4 DeG. M. & G. 460. (2) 2 L.R. 7 H.L. 135.
(3) [1894] 1 Ch. 25.

L.J., in *Bailey* v. *Barnes*(1), at page 34), that one could charge the appellant with negligence in that respect. Then, can it be fairly said that in view of possible dealings by the company itself their failure to search was "gross and culpable negligence ?"

It is quite clear that a purchaser acquiring property in the ordinary way under an arrangement such as that entered into by Potter with a great railway company, cannot avoid such risks as there may be in the possibility of fraud by the company with which he deals. No amount of vigilance on his part could, for example, prevent the ultimate registration of a transfer in course of transmission to the registry at the moment of the execution of his agreement for purchase. In the absence of fraud, however, there is no risk; and suffice it to say, that in such purchases the possibility of such frauds does not enter into the calculations of purchasers unless at least they are abnormally given to suspicion. It, in my judgment, would be laying down a rule utterly at variance with the habits and modes of thought of people who engage in such transactions, to hold that it was gross and culpable negligence or indeed negligence in any degree for a purchaser in such a transaction to act upon the assumption that the company's good faith could be relied upon with absolute confidence. I think, for these reasons, that the suggestion that there was negligence of such a character as to be material here is utterly baseless.

As to constructive notice I am inclined to think that as regards purchasers dealing with the registered owner, the doctrine has been swept away by section 173 of the Act, and that the protection for unregis-

(1) [1894] 1 Ch. 25.

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tered interests substituted for it is the filing of caveats. As regards titles completed by registration it clearly has no place in the scheme of the Act. I am aware that in the Australasian courts, the first of these propositions appears to have been doubted, but I have seen no case in which the decision depended in any way upon a recognition of the doctrine as applicable to determine the rights of a purchaser from a registered owner. Knowledge and notice, of course, must often present themselves as ingredients in fraud or in the facts from which fraud may be inferred, or in the circumstances giving rise to an estoppel or an equity of some description affecting the relative priorities of unregistered claims; but notice of an unregistered right or interest in itself cannot, I think, affect the right of a purchaser dealing *bonâ fide* with a registered owner.

There is no necessary analogy between the position of a proposed purchaser dealing with a registered proprietor of land under a system of title by registration, and the position of a purchaser of land where no such system exists. In the course of centuries an elaborate system of rules has been developed touching the proof of title which such a purchaser is entitled to demand from his vendor and the practice of conveyancers points out the course a prudent solicitor will follow in order to protect the purchaser's rights. It was to avoid the delay, the uncertainty and the expense attendant upon the investigation of titles that the system of title by registration was devised; and one of the most fruitful sources of uncertainty and expense which the authors of this system designed to clear out of the way, was this doctrine of constructive notice. See Report of Commissioners on Registration, 1857, Hogg, "Incumbrances," pages 8 and 26.

Not the least of the difficulties attending upon the application of the doctrine of constructive notice has always been the vagueness of the doctrine itself.

Every one who has attempted to define the doctrine of constructive notice has declared his inability to satisfy himself,

said Lord St. Leonards in the 14th edition of his work on Vendors and Purchasers. An attempted definition inserted in a bill introduced by that great property lawyer in 1862 proved to be so unsatisfactory that it was struck out with the consent of the author of the bill. Again and again eminent judges in both common law and equity courts have declared that the doctrine has been carried too far and is not to be extended. In *English and Scottish Mercantile Investment Co.* v. *Brunton*(1), at page 708, Lord Esher, M.R. said:—

In a series of cases Lords Cottenham, Lyndhurst and Cranworth, Lord Justice Turner and the late Master of the Rolls, Sir George Jessel, have said that the doctrine ought not to be extended one bit farther; all the judges seem to have agreed upon that. In *Allen* v. *Seckham*(2), I pointed out that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them.

Bowen and Kay L.JJ. accepted this view. In the *"Birnam Wood"*(3), at page 14, Farwell L.J. said:—

The courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever.

And in the last edition of Dart on Vendors and Purchasers, at page 902, it is stated that

the tendency is to restrict the doctrine of constructive notice so far as is compatible with the rules of the court applicable to fraud.

(1) [1892] 2 Q.B. 700. (2) 11 Ch.D. 790.
(3) (1907) P. 1.

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In the latest decision of the Court of Appeal dealing with the subject, the view expressed by Lindley L.J. is that the doctrine comes into play only when there are facts justifying an inference of knowledge or circumstances indicative of wilful ignorance.

It is not necessary to decide whether or not the doctrine has any application in this case, because if I am right in the view I have just expressed, that the facts do not warrant any imputation of gross negligence — *à fortiori* they do not support an imputation of fraud or of that wilful departure from the usual course of business "in order to avoid acquiring a knowledge of a vendor's title" or that "wilful ignorance of defects" which according to the view expressed by Lindley L.J., in the case above referred to (*Bailey* v. *Barnes*(1), at pages 34, 35), it would be necessary to shew in order to impute constructive notice to the appellants. As Lindley L.J. said in that case "the doctrine of constructive notice," *i.e.,* as expounded in his judgment,

> is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known as the doctrine itself.

ANGLIN J.—The defendants, McKillop & Benjafield, appeal from the judgment of the Supreme Court of Saskatchewan *en banc* reversing the judgment of Johnstone J., who dismissed the plaintiff's action for specific performance holding that the defendants, although subsequent purchasers, by their diligence in procuring an actual assignment of their immediate

(1) [1894] 1 Ch. 25.

vendor's interest and the approval thereof by the original vendor, the railway company, in which the legal estate was vested, and by obtaining possession of the original contract of sale made by the company with such approval indorsed thereon, had acquired a position "much stronger in equity than that of the plaintiff," who "had nothing more than an agreement to assign."

The sale to the plaintiff was of one-half of the section purchased by his vendor: the sale to the defendant was of the whole section.

The court *en banc* was of opinion that the registration by the plaintiff of a caveat in respect of his claim, prior to the defendants' completing their purchase and obtaining the assent of the original vendor to the assignment to them of the interest of the original vendee, prevented the defendants from acquiring any right or interest in the land except subject to the plaintiff's claim.

The facts of the case are briefly, but sufficiently, summarized by Newlands J., as follows:—

> The plaintiff first obtained an equitable estate in the said half-section of land. Subsequently, but without notice of the plaintiff's equitable estate, the defendants, McKillop and Benjafield, also obtained an equitable estate in the said land. Before anything further was done by the said defendants, the plaintiff filed a caveat in the proper land titles office against the said lands, after which the said defendants completed their purchase and had the assignment to them approved of by the owner of the legal estate.

Apart from the effect of the "Land Titles Act" of Saskatchewan (6 Edw. VII. ch. 24), and of the caveat lodged by the plaintiff pursuant to its provisions, I incline to the view that the defendants would have been entitled to succeed, because, although subsequent purchasers, they had the best right to call for a conveyance of the outstanding legal estate and were,

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therefore, in equity entitled to its protection. Dart on Vendors and Purchasers (7 ed.), p. 845. They held this position not because they had given notice of their purchase to the holder of the legal estate, which the plaintiff had omitted to do, *Hopkins* v. *Hemsworth*(1), nor because the plaintiff had omitted to have a note of his purchase indorsed on the original contract from the railway company, *Jones* v. *Jones* (2) (points much insisted on at bar), but because they had obtained the consent of the railway company to the assignment to them of their vendor's interest in the land. As a result of the original sale the railway company became a trustee of the property for its purchaser, who in the eye of a court of equity was the real beneficial owner, *Shaw* v. *Foster*(3), at page 338. The defendants were purchasers of his interest for value and without notice of the plaintiff's claim. They procured the railway company to become a party to the conveyance to them of that equitable interest by obtaining its consent to the assignment under which they claim. Although the company did not formally convey or declare a trust of the legal estate in favour of the defendants, its privity and consent to the assignment to them gave them a position which (apart always from the effect of the "Land Titles Act" and of the caveat lodged by the plaintiff under it) was such that a court of equity would not interfere to deprive them of the better right so obtained to call for the conveyance of the legal estate; *Wilkes* v. *Bodington* (4); *Wilmot* v. *Pike*(5), at page 22; *Taylor* v. *London and County Banking Co.* (6), at pages 262-3. The

(1) [1898] 2 Ch. 347.
(2) 8 Sim. 633.
(3) L.R. 5 H.L. 321.
(4) 2 Vern. 599.
(5) 5 Hare 14.
(6) [1901] 2 Ch. 231.

effect of this consent of the railway company on the defendants' rights is certainly not lessened by the presence in the company's original agreement for sale of the following special clause:—

No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorized person, and no agreement or conditions or relations between the purchaser and his assignee or any other person acquiring title or interest from or through the purchaser shall preclude the company from the right to convey the premises to the purchaser, on the surrender of this agreement and the payment of the unpaid portion of the purchase-money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said company as aforesaid.

But before the defendants obtained the assent of the railway company and when they had paid only $700 on account of their purchase money and there was still $1,800 unpaid, the plaintiff lodged in the land titles office his caveat forbidding

the registration of any transfer or any instrument affecting (the half-section in which he claimed an interest) unless such instrument is expressed subject to my claim.

The agreement for purchase held by the plaintiff was an "instrument" within the meaning of clause 11 of section 2 of the "Land Titles Act." Under section 136 the plaintiff was entitled to lodge a caveat in respect of his interest under that agreement; and when so lodged and while it remained in force, under section 139 the caveat had the effect of preventing the registrar from registering

any memorandum of any transfer or other instrument purporting to transfer, encumber or otherwise deal with or affect the land in respect to which such caveat was lodged except subject to the claim of the caveator.

That the caveat remained in force is not questioned. Although challenged on the ground that it

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did not shew the interest of the caveator, the caveat, in my opinion, sufficiently complied with the requirements of section 137. It stated the claim of the caveator to be as

> the owner of the south half-section one, in township thirty-two (32), and range fifteen (15) west of the third meridian in the Province of Saskatchewan, under and by virtue of an agreement for sale in writing of the said property to me from G. A. Gessman of the City of DesMoines in the State of Iowa, one of the United States of America, agent.

It did not give the number of the certificate of title as prescribed in the form "W." But, in view of the complete description of the land which it contained, that was, in my opinion, unnecessary. The provision of section 137 should, I think, be regarded as directory and intended for the guidance of registrars. *Wilkie* v. *Jellett*(1). If a caveat enables the registrar to identify the land in respect of which it is lodged and if the interest claimed is stated with reasonable certainty, he properly receives it and, when duly lodged, it has the effect contemplated by the statute, although in some particular it should not be in strict compliance with the prescribed form.

A certificate of title to the land in question had been granted to the Canadian Northern Railway Company. Section 73 of the statute is as follows:—

> After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any (*sic*) land except a leasehold interest not exceeding three years or render such land liable as security for the payment of money.

By section 74 it is provided that

> upon the registration of any instrument * * * the estate, or interest specified therein shall pass;

(1) 2 Terr. L.R. 133 at p. 143; 26 Can. S.C.R. 282 at p. 288.

and by section 80, it is enacted that

> every instrument shall become operative according to the tenor and intent thereof, so soon as registered and shall thereupon create, transfer, etc., the land, or estate or interest therein, mentioned in such instrument.

Under clause 11 of section 2, "instrument" means

> any grant, etc., or any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title thereto.

Under this definition the contracts both of the plaintiff and of the defendants were "instruments." Neither of them created or transferred any interest under the Act because unregistered. But the equitable interests or estates conferred by them would nevertheless be recognized and dealt with and would be enforced against the registered owner and others adverse in interest, in the exercise of the jurisdiction of a court of equity, *Re Massey and Gibson*(1). The plaintiff's caveat from the time it was lodged prevented the registration of any instrument except subject to his claim (section 139). *Primâ facie* that means subject to his claim as it stood at the time when the caveat was lodged. At that time both the plaintiff and the defendant had equitable rights as purchasers. The plaintiff had an agreement for a sale to him in respect of which he had paid $100 on account; the defendants had a like agreement in respect of which they had paid $700 on account. Inasmuch as every conveyance of an equitable interest is innocent, the defendants not having at that time taken any steps which would entitle them to priority or, which is the same thing, would entitle them to ask a court of equity not to interfere to deprive them of any

(1) 7 Man. R. 172.

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acquired right to call for a conveyance of the legal estate, and the plaintiff not having done or omitted to do anything whereby his priority would be impaired or affected, the defendants' claim as purchasers was still subject to his prior equity in respect of the half-section bought by him. That the plaintiff's caveat, if it had been lodged only after the defendants had obtained the formal assignment of their vendor's contract and had procured the assent of the railway company thereto, would still have sufficed to entitle him to prevent the registration of the defendants as owners under a conveyance to them from the railway company seems to me improbable, inasmuch as, apart from the provisions of the "Land Titles Act," the defendants would then have had a better right to call for the conveyance of the legal estate and would in equity be entitled to the protection of it against the plaintiff's prior equitable claim. But that question it is not now necessary to determine.

Whether a caveat duly lodged should be deemed notice is apparently an open question. *General Finance, Agency and Guarantee Co.* v. *The Perpetual Executors and Trustees' Association*(1), at page 744. Whether the plaintiff's caveat was in the present case notice to the appellants, in view of the fact that before it was lodged they had already made their contract and paid part of their purchase money, is, in the opinion of Newlands J., open to considerable doubt. But whatever its effect as notice, (and I incline to the view that it must be deemed notice to every person who claims to have acquired, subsequently to its being lodged, any interest in the lands, or to have increased or bettered any such interest already held), inasmuch as it is the

(1) 27 V. L.R. 739.

only means provided for the protection of unregistered interests and it was obviously intended by the legislature thus to afford adequate and sufficient protection for them, I am of the opinion that a caveat when properly lodged prevents the acquisition or the bettering or increasing of any interest in the land, legal or equitable, adverse to or in derogation of the claim of the caveator — at all events, as it exists at the time when the caveat is lodged. This, in my opinion, is the necessary result of a fair construction of sections 73, 74, 80, 81, 136 and 139 of the "Land Titles Act." I would refer to *General Finance, Agency and Guarantee Co.* v. *Perpetual Executors and Trustees' Association* (1); and *Re Scanlan* (2).

Moreover, as a document affecting the transfer of land, a caveat is an "instrument"; and section 81 provides that

> instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other according to the time of registration and not according to the date of execution.

It was, I think, incumbent upon the defendants McKillop & Benjafield before completing their purchase, to ascertain that no caveat had been lodged against the land, and, in default of their having done so, they cannot complain if the prior equity of the plaintiff, protected by his caveat, is held to be paramount. As put by Lilley C.J. in *Re Scanlon* (2), it is a

> plain, practical precaution for a purchaser * * * to ascertain that there is no caveat (in the registry) before he pays his purchase-money. * * * People cannot learn too soon that dealings outside, and without reference to the registry, are hazardous.

(1) 27 V. L.R. 739.

(2) 3 Queens. L.J. 43.

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The judgment for specific performance, against the defendants Gesman and McKillop & Benjafield appears to be unimpeachable. The Canadian Northern Railway Company having submitted their rights to the court may be taken to have waived any right which they might have had to refuse to approve of or recognize the assignment from Gesman to the plaintiff. Since they do not set up against the plaintiff the special clause in their agreement above quoted, their co-defendants cannot do so. The judgment for specific performance as against the company would, therefore, appear to have been quite proper. I express no opinion as to what the result should have been, if, in answer to the action, the railway company had pleaded and relied upon the special clause referred to and the exercise of any discretion which it conferred upon them.

For these reasons I would dismiss this appeal with costs.

BRODEUR J.—I concur in the opinion expressed by Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellants: *Embury, Watkins & Scott.*

Solicitors for the respondent: *Ferguson & McDermid.*