

WAIMIHA SAWMILLING CO., LTD. V. THE WAIONE TIMBER CO., LTD.

1922, October 18; 1923, March. 29. Court of Appeal, Wellington. Stout, C.J., Hosking, Stringer, Salmond, and Adams, JJ.

Land Transfer—Registration—Indefeasible title—Whether land bought subject to existing agreement—Whether doctrine as to purchase of land pendente lite applicable in respect of land under Land Transfer Act—Whether purchaser guilty of fraud—Land Transfer Act, 1915, ss. 58, 197.

In December, 1916, Howe, being the owner of certain land under the Land Transfer Act, granted to the plaintiff Company by agreement in writing certain timber-cutting rights over the land. It was decided by the Court of Appeal (1921 G.L.R. 35: 1920 N.Z.L.R. 681) that this agreement was not an agreement for a lease of the land, but an agreement for the sale and purchase of the standing timber with a license to enter and cut the timber, and that the Court had therefore no jurisdiction to relieve against rescission of the agreement for breach of its provisions. In August, 1917, the plaintiff Company, in order to protect its rights under the agreement, registered a caveat against the land. In July, 1919, in consequence of alleged breaches of the agreement, Howe purported to determine the agreement and excluded the plaintiff Company from the land. The plaintiff Company then commenced an action against Howe, claiming that he was not entitled to determine the agreement and that it remained in full force and effect. In May, 1920, Sim, J., held (1921 G.L.R. 1: 1922 N.Z.L.R. 339) that Howe had lawfully determined the agreement. In the same month notice of appeal from this judgment was given, but was allowed to lapse. In August, 1920, Howe issued a summons for removal of the caveat. On the 9th September, after the summons had been heard, but before it was determined, the plaintiff Company gave a fresh notice of appeal. On the 20th September, Sim, J.,

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ordered the removal of the caveat (1921 G.L.R. 22: 1921 N.Z.L.R. 110). On the 25th September Howe entered into an agreement with W. for the sale of the land to him for £18,650, this agreement superseding a previous agreement between the same parties dated the 29th March, 1920. On the same day Howe executed a transfer to W., and this transfer was registered a few days later. Shortly afterwards W. transferred the land to the defendant Company, which accordingly became the registered proprietor thereof. It was admitted that the defendant Company's title to the land was not better than that of W. In July, 1921, the Court of Appeal held (1922 G.L.R. 1: 1922 N.Z.L.R. 339) that the plaintiff Company's agreement with Howe had not been lawfully determined. The agreement between Howe and W. was for the sale of the land free from encumbrances, and provided that the purchase was to include all timber trees standing on the land. If the vendor was unable to give a clear title within six months the agreement was to become null and void. At the time the agreement was signed and the transfer executed Howe gave W. a written undertaking to indemnify him against all actions, claims, and demands which might be brought or made by the plaintiff Company in assertion of any title to the land or timber included in the transfer. Counsel had appeared on behalf of W. on the hearing of the summons for the removal of the caveat. The plaintiff Company now claimed a declaration that the defendant Company held the land subject to the timber rights acquired by it under its agreement with Howe.

HELD by the Court of Appeal,—

(1) That W. did not purchase the land subject to the rights of the plaintiff Company.

(2) That the equitable doctrine as to the purchase of land pendente lite was not in force with respect to land under the Land Transfer Act.

(3) That the Supreme Court in ordering the removal of the caveat contemplated a sale of the land freed from the plaintiff Company's claim, and removed the caveat in order that such a sale might be effected, and that the judgment justified W. in believing, and that he did honestly believe, that Howe was entitled to sell and he was entitled to purchase the land freed from the rights claimed by the Company, whatever the ultimate result of the litigation might be, and that the defendant Company was therefore entitled to judgment.

Per Stout, C.J. (dissenting).—That the conduct of Howe and W. showed that they had a suspicion or belief that the judgment they had obtained was not correct and might be upset, and that the conduct of W. was such as to deprive him and the defendant Company of the right to rely on the conclusiveness of the register.

This was a motion for judgment removed into the Court of Appeal under s. 64 of the Judicature Act, 1908. The facts are set out fully in the judgments.

Skerrett, K.C., and *Anderson* for plaintiff.
Johnston and *Stanton* for defendant.

Skerrett, K.C.:

This is a case removed by order of the Supreme Court. It originally came before His Honour Mr. Justice Herdman, who delivered judgment in favour of the plaintiff, which judgment was reversed by this Court owing to an admission by counsel. The matter was referred back to the

Supreme Court. As to the original contract between Howe and the Waimiha Company, it will be found in *Howe v. Waimiha Co.* (1921 G.L.R. 35: 1920 N.Z.L.R. 681). It is submitted that that was a contract of which the Court would enforce specific performance: *Jones v. Earl of Tankerville* (1909, 2 Ch. 440, 444). Timber is included in the definition of "land" under the Land Transfer Act. The grant of the timber is not registrable under the Land Transfer Act. We submit that apart from the Land Transfer Act the Waione Company purchased this property with notice of our rights, and they are in exactly the same position as Howe was.

[SALMOND, J.: Have you not the right to an assessment of damages against Howe?]

Yes, if we so elect. All that was discussed at the last trial before this Court was whether Howe was entitled to re-enter on the land or not. If we assume that the Waione Company has not got a Land Transfer title then it is bound just as Howe is. The judgment against Howe does not estop us. All we have is a declaration that Howe's occupation of the land was illegal. At the time Wilson bought the property there was a judgment against us on the main fact, although there was an appeal pending. The first contract Wilson entered into, in March, 1920, was a contract to buy subject to our rights, and we could not object to that. On 28th July, 1920, the Court of Appeal reversed Mr. Justice Cooper's judgment. On 2nd August, 1920, Mr. Gould issued a summons for removal of caveat. On 23rd August, 1920, the matter was argued and Mr. Wilson's counsel appeared, he being instructed by Howe's counsel, Mr. Gould. Howe's counsel asserted that the Waimiha Company was insincere in its appeal. Sim, J., removed caveat because he thought the Waimiha Company was not *bona fide* in its appeal and that Howe was entitled to the fruits of his judgment: See *In re Waimiha Sawmilling Co., Ltd., ex parte Howe* (1921 G.L.R. 22: 1921 N.Z.L.R. 110).

[ADAMS, J.: Did not that mean that Howe could sell?]

No. A caveat prevents registration of any dealing with the land. His Honour meant that the absolute prevention of registration was to be removed, but not that an instrument should be registered which was not subject to our rights.

The judgment was not a determination that we had no rights. It did not defeat or destroy our unregistered interests. The 20th September, 1920, was the date of judgment removing *caveat*—the order was drawn up and *caveat* was removed next day. As soon as it was removed Wilson came to Auckland on 25th September and entered into a new contract, and that transfer was registered on 30th September, 1920. The purchase-money was paid on 25th October, 1920.

[SALMOND, J.: Howe's agreement was with Wilson, not with the Waione Company?]

Yet Wilson bought on behalf of the Waione Company.

[SALMOND, J.: We know nothing of the Company, yet you attack the Company's title.]

Johnston: We admit that Wilson's knowledge was the knowledge of the Company.

[SALMOND, J.: Must not you show that the Company was a party to the fraud of Wilson?]

That is admitted. It is submitted that it cannot be denied that on 25th September, 1920, and the 25th October, 1920, Howe and the Waione Company knew that the appeal was being *bona fide* proceeded with. The agreement was entered into with the very object of defeating the Waimiha Company's rights should they be established on appeal. The undertaking and indemnity on page 50 shows that the purchase by the Waione Company was subject to our rights. Wilson bought subject to our rights, and when we got registration he says, "We won't be bound by your rights." The undertaking on page 50 must be read in conjunction with the March agreement. I submit that the indemnity shows in substance that the land was purchased subject to our rights, with an indemnity against them if they exist. As to our obtaining an injunction against the sale, we could not have got an injunction, as we only had equitable rights over the property. I submit: (1) That where a purchaser of land under the Land Transfer Act knows of the existence of an equitable or unregistered beneficial interest in land which will be defeated by registration of a transfer to him, he is guilty of fraud if he claims to hold land freed or discharged from the equitable interest. (2) This principle is ap-

plicable unless (a) the purchaser can shelter himself behind the judgment of Mr. Justice Sim removing the *caveat*; (b) he is absolved from the consequences of committing a fraud because his solicitor did not recognise that what he was doing was in fact a fraud. (3) No equitable or unregistered interest in land can be treated as extinguished or non-existent by reason of an adverse judgment if it is known that an appeal is being prosecuted until dismissal of appeal on merits or for want of prosecution, or by clear abandonment of appeal. We rely on the maxim *pendente lite nihil innovetur*. My submission is that on 29th March Wilson bought subject to our rights. On 25th September he bought without reference to our rights. Wilson cannot shelter himself behind a solicitor who did not think a fraud was being committed. *Dolus* in this case consists in the Company disregarding our rights after having acquired the property. As to sheltering behind Mr. Justice Sim's decision, Mr. Justice Sim did not remove the *caveat* to give Wilson an indefeasible title. It was removed to enable the registration of an instrument while recognising our rights. The text-books all regard a profit *a prendre* as an incorporeal hereditament—it is an interest in land. Mr. Justice Sim found that the *caveat* protected an interest that was not *bona fide*. On 25th September they knew that Mr. Justice Sim was wrong in his facts and that he had been led into the belief that we were not sincere in our appeal. Is not that fraud? I cite *Mayor of Wellington v. Public Trustee* (1921 G.L.R. 283, at p. 287; 1921 N.Z.L.R. 423, at p. 433); *National Bank v. National Mortgage and Agency Co.* (1885, 3 S.C. 257, 262); *Locher v. Howlett* (13 N.Z.L.R. 584, 595); *Thomson v. Finlay* (5 N.Z.L.R. 203, 207); *Merrie v. McKay* (16 N.Z.L.R. 124, 127); *Hogg's Registration of Title to Land Throughout the Empire* 141; *Lake Yew v. Port Swettenham Rubber Co.* (1913 A.C. 491, 504); *In re Monolithic Building Co., Tacon v. The Company* (1915, 1 Ch. 643, 669); *Le Neve v. Le Neve* (3 Atk. 646; 2 *White and Tudor's Leading Cases* 196); *pendente lite nihil innovetur*; *Wigram v. Buckley* (1894, 3 Ch. 483, 492); *Price v. Price* (35 Ch. D. 297, 301, 302). As to a profit *a prendre* being an interest in land, see 11 *Halsbury* 340; *Endean v. Minister of Stamps* (1921 G.L.R. 567; 1922 N.Z.L.R. 168); *Thom on the Torrens System (Canadian)* (pp. 158, 165, 171).

Johnston for defendant:

I wish to refer to *Butler v. Fairclough* (1917, 23 C.L.R. 78, 97). *Smith v. Essery and Brown*

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(9 N.Z.L.R. 449) is the parent of *Assets Co. v. Mere Roihi* (1905 A.C. 176). It will only be on the clearest proof that this Court will find fraud on the part of Wilson. The Court can only find against the defendant by finding some degree of moral turpitude on the part of Wilson. I submit that this Court is entitled to look at the circumstances, the reputation and the position of the defendant: *Smith v. Essery and Brown* (*supra*).

[STOUT, C.J.: The question is one of law. Do the things done by Wilson come within the statute or do they not?]

That is so

[SALMOND, J.: There is no such word as "moral turpitude" in the Act. The word used is "fraud," and if what Wilson did was fraud he comes within the words of the statute.]

Yes, but "moral turpitude" is used frequently in the cases. My learned friend said that the facts disclosed fraud of two separate natures—(1) he said the defendant conspired with Gould, Howe's solicitor, to defraud plaintiff of its rights; (2) he said that after buying the property expressly subject to plaintiff's rights he deliberately used registration under the Land Transfer Act to defraud plaintiff of its rights. The first allegation is the more serious. If any fraud at all were found in this case the facts would be more in accord with this first allegation than the second one. The second allegation was fraud, with an eye on *McDonald v. Wellington City Corporation*, and Mr. Justice Salmond's remarks therein. We say that the first agreement was not subject to plaintiff's rights. The price which Wilson paid shows this.

Skerrett, K.C.: What I said was that Wilson bought subject to his obtaining a title clear from the plaintiff's rights.

Johnston: Then the second allegation falls to the ground.

[SALMOND, J.: If you had known that there were valid rights of the plaintiff over the property, would you have been guilty of fraud?]

Yes. But we had merely been informed that there were disputed rights. As to Mr. Skerrett's attempt to infect us with what he almost called

Gould's fraud, in the case stated which came before this Court Mr. Anderson admitted that Wilson acted in good faith: See *Waimiha Sawmilling Co. v. Waione Timber Co.* (1922 G.L.R. 223, 295; 1922 N.Z.L.R. 89). It is clear, therefore, that fraud was not obvious.

[STOUT, C.J.: But you cannot use the admission, as it was made only for the purposes of the argument.]

[SALMOND, J. — Do you say that Wilson believed that the appeal was abandoned?]

Most certainly.

[HOSKING, J.: Is he not, then, protected under the Land Transfer Act? That would remove all moral fraud.]

[HOSKING, J.: The *bona fides* of Wilson's belief as to the appeal going on is the crux of the whole matter?]

Yes. Mr. Justice Sim, in deciding as to removal of *caveat*, had to decide between two equities—(1) rights of Howe as vendor; (2) rights of Waimiha Company which he had already determined against.

[SALMOND, J.: Do you admit that Gould knew the appeal was a genuine one?]

No, certainly not. He thought the appeal was not a genuine one. He thought it was a bluff. Gould was not our agent. Gould acted for Howe. If he did not act with good faith it does not affect us. Wilson's evidence is not only consistent with a man acting *bona fide*, but, further, no suspicion of *mala fides* can be attached to him. He paid over £19,000. There is no suggestion that Wilson desired to act fraudulently. His solicitor, Harris, acted reasonably and properly.

[SALMOND, J.: You know why Gould was in a hurry to register, namely, that Waimiha might apply for an injunction?]

But Wilson was bound to complete at that date. As to specific performance, apart from land you cannot have judgment for specific performance and damages: *Dominion Coal Co. v. Dominion Iron and Steel Co.* (1909 A.C. 293). On the question of privity: *Bagot Pneumatic Tyre Co.*

v. Clipper Pneumatic Tyre Co. (1902, 1 Ch. 146). I refer to *Howell v. Union Bank of Australia* (6 N.Z.L.R. 567). In that case *caveat* was removed because specific performance of the agreement was impossible: *In re Thomson, ex parte Findlay* (5 N.Z.L.R. 52). If the *caveat* is protecting an agreement which cannot be performed and is not going to be performed the Judge will order it to be removed and leave the caveator to his remedy in damages if he has one: *Fooks v. Church Property Trustees* (Colonial Law Journal, p. 1); *Butler v. Fairclough (supra)* (at p. 92). The liquidator could not have obtained specific performance. A bankrupt cannot do so: *Fry on Specific Performance* (5th ed., p. 476); *McManaway v. Cleland* (1 C.A. 343). The Court will not readily grant specific performance when it cannot see it enforced. There was a condition precedent to the performance of the agreement which plaintiff relied on in the Court of Appeal, namely, as to grant of right of way, and which has become impossible of performance. This question was already raised and abandoned by plaintiff in first action on appeal from judgment of Mr. Justice Cooper. In the Waimiha main case it was clearly held that the facts in the main case were such as to bar specific performance. The Court will not grant specific performance of ancillary contracts if performance of main contract is impossible.

Stanton in support:

Gould suggested that Wilson should be separately represented by counsel. Howe's sole purpose was to sell the property to a purchaser to enable Howe to destroy the Company's rights. Mr. Justice Sim considered the conflicting claims of the two parties: *In re Waimiha Sawmilling Co.* (1921 G.L.R. 22; 1921 N.Z.L.R. 110). The view the Judge took was that Howe's claim must prevail in one respect, that he could deal with the property as if the Company's rights did not prevail.

[SALMOND, J.: But the permission to deal with the land should be subject to Waimiha Company's rights.]

The man that Mr. Justice Sim considered should not suffer an injustice was Howe. The inference from the judgment was that unless the *caveat* was disposed of Howe could not deal with his land. The Waione Company wanted the land discharged from Waimiha Company's rights. We do not go back beyond the judgment of Mr.

Justice Sim. We rest on his judgment. No misrepresentation has been shown to have taken place in the case as put before Mr. Justice Sim. Everything that Mr. Gould has been shown to have done is quite consistent with merely a keen regard for his client's interests. Gould was in no way our agent to affect us with notice or knowledge except so far as has been shown that he communicated to us.

[STOUT, C.J.: Sim, J.'s, judgment on *caveat* did not destroy your knowledge of the facts?]

One of the facts was the removal of the *caveat*.

[HOSKING, J.: There is nothing to show that Wilson believed these rights to be well founded.]

There is everything to show that he did not. This is not the first case in which the Supreme Court has removed a *caveat* to enable dealings to be registered: *Plimmer v. St. Maur* (9 G.L.R. 57). As to haste with which transaction was completed and the obtaining of the indemnity as indications of fraud, the reason for haste is explained by Gould, namely, that Howe was losing all the time. The haste was on Howe's side, not on defendant's. The doctrine of *lis pendens* has no application to land under Land Transfer Act. The pendency of litigation is only one of the matters to be taken into consideration in regard to transactions dealing with land. For the law on *lis pendens* in England see *Wigram v. Buckley* (1894, 3 Ch. 483). In New Zealand by our original deeds registration ordinance registration of *lis pendens* was provided for: *Fooks v. Church Property Trustees* (Col. Law Journal 1). The English doctrine of *lis pendens* being notice to all the world does not avail in New Zealand: Deeds Registration Act, 1903, s. 18. As to Land Transfer land and *lis pendens*, see *Re Tanner* (5 N.Z.L.R., S.C., 102). The *caveat* in our case brought the matter before the Court. I say there is a distinction between a disputed claim and an admitted right: *Nicholson v. Bank of New Zealand* (12 N.Z.L.R. 427). As to fraud and mistake: *Kerr on Fraud and Mistake* (5th ed., 474, 476). We take our stand on that and say that the evidence is consistent with fair dealing and honesty and with nothing else.

Skerrett, K.C., in reply:

My friend is quite incorrect when he says that in England you require registration of a

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memorial of *lis pendens*: 25 Halsbury (p. 358). *Fooks v. Church Trustees* (*supra*) does not affect the matter, as there it was a case of a purchase without notice.

[SALMOND, J.: How do you bring the matter under the Land Transfer Act?]

I merely point out that the *caveat* takes the place of registration of *lis pendens*. Fraud in this case consists in knowing that an appeal was being genuinely proceeded with and taking a transfer for the purpose of destroying what may be an existing right. In *Butler v. Fairclough* (*supra*) there was no notice of the charge at all, and it is completely distinguishable. Although notice of an unregistered instrument is nothing, yet if registration is acquired for the purpose and with the effect of defeating the unregistered instrument, that is fraud.

[HOSKING, J.: You must necessarily destroy the unregistered interest if you register. How can you be said to be fraudulent if you do what the Act says you can do?]

Wilson was not bound to complete under the first agreement. As to "a clear title," this must be read with the existing circumstances. Wilson bought the land under the first agreement only if Waimiha's rights were determined. This document was executed in March and the judgment of Mr. Justice Sim was not until April or May. I say it is fraud for a man to take a title under the Land Transfer Act knowing that such action will defeat an unregistered interest.

[STRINGER, J.: Notwithstanding that he has a Supreme Court judgment in his favour?]

But (1) Mr. Justice Sim's judgment did not deal with Waimiha Company's rights; and (2) Mr. Justice Sim's judgment was procured by Howe with the concurrence of Wilson, and if the judgment destroyed our rights Wilson cannot avail himself of it. The crucial date is 25th October, not 25th September, 1920. It is submitted that the opinion given by Mr. Harris that registration under the Land Transfer Act gave an indefeasible title is valueless on the question of whether Wilson was fraudulent or not.

[SALMOND, J.: Whether the conduct was fraud is a question of law, of course?]

Yes. Unless the agreement between Howe and the Waimiha Company creates an interest in land we cannot succeed. Waimiha Company's rights run with the land. I rely on *Jones v. Tankerville* (*supra*). This Court held that the agreement was one for the sale of timber, but also gave an interest in land. I rely on *Howe v. Waimiha Sawmilling Co.* (1921 G.L.R. 35: 1920 N.Z.L.R. 681).

[SALMOND, J.: How can it be both a profit *a prendre* and a sale of goods?]

That may be a criticism of the judgment, but I am entitled to rely on it so far as it is in my favour. The right to go on soil and cut and mill the timber can run with the land. It is an interest in land. A person who purchases with knowledge of the right takes subject to it: *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.* (1902, 1 Ch. 146, 157). The royalties are payable to the Waione Company, because it is entitled as against Howe to the use of his name for the purpose of enforcing the terms of the contract.

[SALMOND, J.: You are trying to make an elaborate timber agreement run with the land in equity?]

Privity of estate is unnecessary for my argument. All I say is that the Waione Company bought subject to Waimiha Company's rights. This Court is not being asked for a decree of specific performance. We are asking for a declaration of our rights and also for an injunction which is claimed under "further and other relief." I ask for an injunction in the terms of *Jones v. Earl of Tankerville* (1909, 2 Ch. 440). I submit that none of Mr. Johnston's points are applicable. This Court is not being asked for specific performance. None of these defences are pleaded and are not disclosed on the facts.

Cur. adv. vult.

STOUT, C.J.—This is a case moved into the Court of Appeal for judgment. The main and important facts are not in dispute.

One Thomas Howe was the registered owner of land known as Rangitoto Tuhua No. '05 1C. By an agreement in writing he sold certain rights to such land to the plaintiff Company. The Company lodged, in pursuance of the provisions of the Land Transfer Act, a *caveat* forbidding dealings with the land. It was assumed, ap-

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parently, that the agreement made between the plaintiff and Howe was not registrable. The Company entered into possession and erected buildings and other improvements on the land and cut down trees and removed timber in pursuance of the agreement. After a time Howe alleged that the plaintiff committed a breach of the conditions or agreements in the agreement and gave notice that he determined the agreement. He claimed to exclude the plaintiff from possession. The plaintiff then commenced an action to have it declared that its rights still existed and that Howe had no right to determine the agreement. It is not necessary to refer to other proceedings between Howe and the plaintiff. This action against Howe was heard in the Supreme Court before His Honour Mr. Justice Sim, and he gave judgment in favour of Howe, holding that the agreement had been rightfully determined. This judgment was given on the 13th May, 1920. Against this decision a notice of appeal was given, but this first notice was not completed by security. On the 2nd August Howe issued a summons to remove the *caveat*. He had prior to his summons being issued and whilst this *caveat* still remained registered against the land, namely, in July, entered into an agreement of sale with one Robert Adams Wilson as trustee for the defendant. One paragraph (hereinafter called "A") of this agreement was: "The vendor covenants that he will use his best endeavours to obtain a clear title to the said lands within a period of twelve months from the date hereof, provided that if he is unable to give such title within such period the purchaser may refuse to continue with the sale and may demand the return of the deposit of one hundred pounds, provided that the vendee shall not be liable to any action for damages or specific performance." This agreement referred to the plaintiff's rights, which it was assumed might bar a clear title being obtained. And it is to be observed that this agreement with paragraph A was made after the judgment had been pronounced. This shows that even then both parties were dubious as to Howe's right to sell.

The summons for the removal of the *caveat* came on before His Honour Mr. Justice Sim, and at the hearing of the summons counsel for Mr. Wilson was heard. This counsel stated in writing, *inter alia*, as follows: "I respectfully submit that rescission and re-entry and the granting of relief against forfeiture (assuming, contrary to the judgment of the Court of Appeal,

that there is any jurisdiction to grant relief) Waimiha Company has no estate or interest in the land which could support a *caveat*. I adopt Mr. Gould's argument that Waimiha Company's agreement is absolutely gone and the Court could not set it up again, and I rely upon cases cited by Mr. Gould—*Dendy v. Evans* (1910, 1 K.B. 268) and your Honour's decision in *Hemera te Whetu v. Beale* (32 N.Z.L.R. 710)."

This counsel could have been heard only on the assumption that his client had some interest in the matter litigated. Notwithstanding that an appeal properly lodged was pending His Honour ordered the *caveat* to be removed. The order was made on the 20th September.

The appeal had been lodged on the 9th September, 1920, and due security given, and Howe and Wilson both knew that the appeal was pending, security lodged, and that the necessary steps were being taken to get the case ready for hearing.

An appeal against a final judgment in an action is in time if made within four months after judgment has been pronounced. This time had not, therefore, expired when the notice of appeal was given.

On the 25th September Howe and the defendant entered into a fresh agreement for the sale of the land. It contained these provisions:—

"3. (b) The balance or sum of eighteen thousand six hundred pounds (£18,600) shall be paid within seven (7) days after the vendor shall have executed and registered under the provisions of the Land Transfer Act a proper and valid transfer of the freehold premises and a proper and valid assurance by way of sublease of the leasehold premises both free from encumbrances.

"11. Provided always and it is agreed that if Waimiha Sawmilling Company, Limited (in liquidation), shall by means of an injunction restrain the registration of the transfer and sublease to be executed pursuant to this agreement and thereby cause delay, then and in such case the interest payable under clause 4 hereof shall abate and cease to accrue during the period of delay.

"12. If the vendor shall be unable so to clear his title within six calendar months from date hereof as to allow registration of assurances of the land sold, then this agreement shall become null and of no further force or effect and the vendor shall repay the deposit of one hundred pounds herein-

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before mentioned and the purchaser's half costs of the aforesaid survey, but the vendor shall not be liable to any further or other demand or claim for damages, specific performance or otherwise."

This proviso was a variant of paragraph A in the first agreement, but it shows that even after the removal of the *caveat* both vendor and vendee had at least doubts as to their legal position.

Notwithstanding this agreement the appeal proceeded and was heard by the Court of Appeal, and the judgment pronounced by the Supreme Court that the agreement had been properly determined was reversed.

On the 25th September, however—that is, the same day as the agreement last referred to was made—a transfer of the land by Howe to Wilson as trustee was executed. Thereafter this action was commenced for a declaration that the plaintiffs are entitled as against defendant to—

(a) A declaration that the plaintiff is entitled as against the defendant to possession of all and singular the land, machinery, plant, and timber-cutting and other rights as set forth in the agreement mentioned in paragraph 3 hereof, and that it is entitled to exercise such rights against that portion of the said land purchased by the defendant:

(b) The costs of this action;

(c) Such further or other relief as to this Honourable Court seems meet.

And it appears to me that the sole question is whether by virtue of ss. 58 and 197 of the Land Transfer Act, 1915, the title of the defendant Company is secure and the plaintiff's rights have been destroyed. These sections are as follow:—

"58. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such incumbrances, liens, estates, or interests as may be notified on the folium of the Register constituted by the grant or certificate of title of such land, but absolutely free from all other incumbrances, liens, estates, or interests whatsoever:

"(a) Except the estate or interest of a proprietor claiming the land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and

"(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and

"(c) Except so far as regards any portion of land that may be erroneously included in the grant or certificate of title of such registered proprietor by wrong description of parcels or of boundaries.

"197. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase-money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

The question is, then, was the defendant Company guilty of fraud within the meaning of the statute? What is "fraud" is not defined in the statute. There have, however, been some cases in New Zealand in which a definition may be said to have been given.

The main case relied on is, no doubt, *The Assets Company v. Mere Roihi* (1905 A.C. 176), and by it this Court is bound. The principle laid down in that case is twofold: (1) that there must be fraud proved against a purchaser for value before a registered title is invalidated; (2) that the fraud of persons prior to their acquiring title shall not after registration invalidate the title of a purchaser for value unless knowledge of that fraud is brought home to the persons or their agents. The Court held that the directors of the appellants had no such knowledge. This really summarises that decision. In

my opinion this does not settle the question raised in this case. The question here is, was there fraud?

In *Thomson v. Finlay* (5 N.Z.L.R., S.C., 203) it was held that if a purchaser accepts a purchase subject to a contract in existence but not registered it would be a moral fraud for him to repudiate it even though it was unregistered.

In *Locher v. Howlett and Others* (13 N.Z.L.R. 584, at p. 595) it was said: "It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking. The question, then, is, did the defendant Gotch know that Locher was being improperly deprived of his equitable interest?"

After reviewing the facts Mr. Justice Richmond, who decided the case, held he was, and said that, "taking together all these circumstances, it is apparent that Gotch, if possessed of the common understanding of mankind, must have been made aware before he completed that he was in all probability buying a lawsuit." And His Honour ended by saying: "It may be going somewhat beyond what has been as yet expressly decided upon the subject, but I hold that, where the circumstances are such as should raise in the mind of a purchaser a strong suspicion that the transaction in which he is engaged is fraud on the right of another, he is bound to go no further in it without full inquiry, and that to omit such inquiry is a want of honest dealing. Voluntary ignorance is in law generally equivalent to knowledge. Gotch, in my opinion, if he were ignorant at all, was voluntarily ignorant. I hold, therefore, that he is not entitled to shelter himself under s. 189."

All that *Kirkpatrick and Barclay v. Hutchison* (6 G.L.R. 510: 23 N.Z.L.R. 665) held was that there must be fraud. The headnote thus sums up the decision: "The circumstances must be such as to raise a necessary inference of *dolus*, and must not merely amount to that *culpa lata* upon which the doctrine of constructive or equitable fraud is based." These three cases have been held authorities by our judicial tribunals, and they do not conflict in any way with *The Assets Company v. Mere Roihi*.

The case of *Fels v. Knowles* (8 G.L.R. 627: 26 N.Z.L.R. 604) has really no bearing on this case, as the lessee relied on s. 87 of the Act, which, it was held, gave the lessee a statutory right to enforce a contract of sale made by the registered proprietors, who were trustees, though under their trust deed the trustees had no power to sell.

In this case the *caveat* was removed, and, so far as I know, a *caveat* has never, until this case, been removed where there has been a reasonable question to argue. I said in *Plimmer v. St. Maur* (9 G.L.R. 57: 26 N.Z.L.R. 294, at p. 296): "In my opinion the *caveat* cannot be set aside unless the claim to the estate appears to be without any validity. If there is any reasonable question to argue the Court should not remove the *caveat*, but permit the matter to be litigated." In so making this statement I was following the universal practice. If it be said the plaintiff could have appealed against the removal of the *caveat*, the answer is that could have been of no avail, for by Rule 20 of the rules of the Appeal Court it is said: "An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal may so order, and no intermediate act or proceeding shall be invalidated except so far as the Court appealed from directs."

The Court of Appeal was not in session, and the Judge of the Supreme Court sitting at Auckland had determined that the *caveat* was to be removed so that Howe should sell and transfer the land, and it would have been futile to lodge an appeal, as before it could be heard the transfer would be registered, and the Court was not likely to prevent—in fact, could not consistently prevent—registration whilst it had removed the *caveat*.

The undeniable facts in the case are:

- (1) The defendant Company knew of the agreement between Howe and the plaintiff.
- (2) It knew that the Supreme Court had declared that agreement at an end.
- (3) It knew that an appeal was pending against that judgment.
- (4) It had taken part in the proceedings to get the *caveat* removed, notwithstanding the appeal.
- (5) It had made a purchase when the *caveat* was in existence and registered.

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(6) It got the *caveat* removed by His Honour the Judge assuming that an appeal was not to be proceeded with.

(7) It did not appear that His Honour the Judge was informed that the printing of the appeal was being proceeded with.

(8) In Mr. Gould's evidence (Mr. Gould was solicitor and counsel for Howe) it is said: "On the 21st September I did not express doubt as to the appeal going on. I knew the notice of appeal had been given and security had been given and the case was being printed."

(9) His Honour the Judge would, it must be assumed, not have ordered a removal of the *caveat* if he had known that the appeal pending was being proceeded with.

(10) The paragraph A in the first sale agreement which I have already quoted and the "variant" in the second sale agreement show that the vendor and vendee knew that Howe was selling, and the defendant Company, through its trustee, buying what Mr. Justice Richmond had called a "lawsuit." They were not convinced Howe had a right to sell, or else why these two provisions?

In my opinion the action of both Howe and Wilson was to get the *caveat* removed by any means, so that a transfer might be executed and registered and thus the title of a purchaser be made complete and the rights of the plaintiff destroyed.

Suppose the decision of a Judge in Chambers is wrongly made *per incuriam*, is there to be no relief to one whose rights are disregarded? If so, the Land Transfer Act, instead of being a great boon, will work a great evil.

In this case it must be assumed the Court was wrong in giving judgment for Howe, for the Court of Appeal decided the appeal in the plaintiff's favour, and that decision has not been appealed from.

It may be pointed out that in divorce proceedings up to the amending Act of 1912, though a rule *nisi* for divorce had been made absolute, nevertheless, there being a right of appeal, a marriage by either of the parties was not valid till the time for appealing had expired. Section 5 of the Divorce and Matrimonial Causes Amendment Act, 1912, had to be passed to validate such marriages. It said: "No marriage which has been heretofore celebrated after the making of a decree absolute for the dissolution of the prior

marriage of either of the parties shall be deemed to be or to have been invalid merely on the ground that it was so celebrated before the expiration of the time limited for appealing against that decree: provided that nothing in this section shall invalidate any marriage celebrated between any persons before the passing of this Act."

It has been argued, however, that as the Supreme Court had determined the *caveat* must be removed, the parties were free to carry out their contract and to get the property transferred. They were not free to do so if they believed that the judgment they got was not correct law and might be upset; and that they had such a suspicion or belief is, I think, shown by their conduct. They made a new agreement after the judgment, though the terms of the new agreement do not seem to have been different from the agreement made when the *caveat* was in existence. Judgment was given on 20th September, and on 25th September a new agreement was made and a transfer was executed, and the transfer on the same day was registered in the Lands Registry. Why this great haste? It is true the learned Judge had said it would be a hardship amounting to injustice to wait for the decision of the Court of Appeal, and he pointed out the delays that might occur if the Appeal Court's decision happened to be in Howe's favour and if a further appeal was taken to the Privy Council. These statements may be strong reasons for abolishing the right of appeal to His Majesty in Council or of not allowing even an appeal to a local Court of Appeal. But our law has given rights of appeal to litigants and they cannot be ignored. We must follow Lord Mansfield's judgment in *Rex v. Wilkes* (4 Burr. 2527) and repeat that we are bound to say, "*fiat justitia ruat cælum*," that is, to administer the law whatever may happen. But if the Court were called upon to consider the consequences of removing the *caveat*, surely there would be a greater injustice done to the plaintiff than to the defendant. All that the defendant could suffer was delay, and perhaps a preservation for a short time of a fast-receding kauri forest, whilst, on the other hand, the plaintiff's rights would be destroyed. And if this Court determines that the defendant is not bound to fulfil Howe's undertaking the plaintiff must suffer. Further, even in the "variant" provision in the second agreement of the 25th September the parties assumed six months might elapse before Howe's title was clear. Does this not conclusively show that both believed that the

destruction of the *caveat* had not ended the plaintiff's rights? If so, then the cases cited apply and the judgment must be for the plaintiff.

Has, then, any injustice been done? It has been attempted to be done by the defendant and Howe obtaining his Honour the Judge to cancel a *caveat*, His Honour being led to believe by them that the plaintiff did not intend to appeal. Can it be said that they were warranted by the facts in making such a representation, and if not, can their conduct be called honest?

This is not the case of a purchaser merely with a notice of existing rights of some other person, which rights make it dishonest for the registered owner to sell as he purposed to do. The purchaser had such notice, but the purchaser in this case is not a mere passive buyer; he aids and conspires with the seller to get that removed—the *caveat*—which if not removed prevented him getting a transfer. He had first purchased when the *caveat* was valid and existing.

The provisions in our Land Transfer Act for different *caveats* were meant to give some security to persons who were contracting about land held under the Act, but if this kind of action by a seller and a purchaser were upheld then those provisions may be deemed abrogated. In my opinion the Court ought to declare that the conduct of the defendant has been such as to deprive it of relying on the conclusiveness of the Register. In so deciding I am of opinion that the Court would be following two decisions of the Supreme Court, namely, the decision in *Thomson v. Finlay* and the decision in *Locher v. Howlett and Others*. They were decisions given by two of the greatest real property lawyers we have had in our judiciary—the late Sir Joshua Williams and the late Mr. Justice Richmond. In fact, to give judgment for the defendant would, in my opinion, overrule these two decisions. The defendant, through its trustee, did more than was done in these cases by those who relied on the validity of the Registry.

The judgment should therefore, in my opinion, declare, not that the transfer is invalid, but that the defendant as purchaser is bound by the rights granted to the plaintiff by Howe, and that the costs of the suit should be borne by the defendant.

HOSKING, J.—This is an action to have it declared that the plaintiff is entitled to certain rights in and over a parcel of land of which the defendant is registered proprietor under the

Land Transfer Act, it being alleged that the defendant's registration was obtained by fraud or is being improperly made use of to defeat the plaintiff's rights.

Evidence was taken before the Supreme Court in Auckland, and the plaintiff's motion for judgment comes before this Court under an order for removal made pursuant to s. 64 of the Judicature Act, 1908.

Originally one Howe was the registered proprietor of an estate in fee simple in the land in question, on which was a large quantity of growing timber. By an instrument in writing of the 23rd December, 1916, not registrable under the Act mentioned, Howe created in favour of the plaintiff certain rights affecting the land and the timber thereon. In order to protect these rights the plaintiff in 1917 lodged a *caveat* against dealings, claiming an estate or interest by virtue of the instrument referred to. For alleged breaches of conditions contained in the instrument Howe in July, 1919, affected to determine the rights. The plaintiff thereupon brought an action against Howe to have it declared that the determination was invalid. Certain preliminary questions arising out of the action came before this Court, as reported in *Howe v. Waimiha Sawmilling Co.* (1921 G.L.R. 35: 1920 N.Z.L.R. 681), and on the 28th July, 1920, it was held, reversing the decision of the Court below, that the instrument was not a lease within the provisions of the Property Law Act, 1908, relating to relief against forfeiture, but was in substance a contract for the sale of the growing timber, and therefore of goods within the Sale of Goods Act, 1908, with an incidental right of entry to cut, remove, and mill it, although as regards the mill site and, perhaps, the parts occupied by tram lines, ways, and dams the Court intimated, without deciding the question, that it might be held that there was a right of exclusive possession on the part of the Company. For the purposes of this present case I shall assume that there was a sufficient estate or interest in land to support the *caveat*.

Meanwhile the action was tried by the Supreme Court, and on the 29th April, 1920, judgment was given in favour of Howe and was formally entered on the 13th May following, as follows:—
“That plaintiff recover nothing against defendant on claim for damages and that judgment be accordingly entered for defendant, and that the plaintiff's prayer for relief against forfeiture of

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his rights and interests be reserved for further consideration, and that the question of the costs of the action be reserved for further consideration."

Notice of appeal against this judgment was served on the same day, but, due security not having been given within six days, that notice, in terms of Rule 22 of the rules of the Court of Appeal, must be deemed to have been abandoned.

Following up the judgment, Howe on the 2nd August, 1920, issued a summons against the Company for an order for removal of its *caveat*, and on the 20th September, 1920, judgment was given ordering the removal, and an order to that effect was lodged at the Land Transfer Office on the following day.

Now, after the action against Howe had been commenced, he on the 29th March, 1920, entered into an agreement with one Robert Adams Wilson for the sale of the freehold land mentioned, together with some leasehold and certain rights, at a price of which a small deposit was made, and the balance was to be paid when Howe should be in possession of a good clear and unencumbered title, with a provision that if a clear title was not obtained within twelve months the purchaser might refuse to complete and claim the return of the deposit. On the 25th September, 1920, a fresh agreement was entered into for the sale of the freehold land mentioned, together with the leasehold, and this was treated by the parties as superseding the agreement of the 29th March. The price was fixed at £18,650, subject to adjustment according as the areas should on survey be found to be greater or less than those mentioned in the schedule. Pursuant to this agreement a transfer to Wilson was executed on the 25th and registered on the 30th September, the *caveat* having, as stated, been already removed. The transfer was registered subject to certain mortgages, but these were a few days later paid off out of the purchase-money and released, so that on the register the fee-simple became vested in Wilson free from all encumbrances, liens, and interests.

The land was afterwards transferred to the defendant Company, but it is assumed that for the purposes of this action the defendant Company is to stand in the same position as regards the plaintiff as Wilson would have occupied if he had not transferred. It is to have the land declared, notwithstanding the transfer to the defendant Company, to be still subject to the rights created by the instrument of the 23rd December,

1916, that this action has been brought, the particular allegation of fraud being that the transfer from Howe was, with full notice of the plaintiff's rights, fraudulently obtained with the object of depriving the plaintiff of those rights, and that pursuant to an intention formed when the transfer was taken the defendant has fraudulently declined to allow such rights to be exercised, and fraudulently claims that it purchased and holds the land freed from the burden of such rights. These allegations are, of course, made so as to bring the case within the exception in case of fraud from the protection afforded to transferees by s. 197 of the Land Transfer Act. That section is as follows:—

"Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase-money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

It is now settled beyond dispute by the decision of the Privy Council that the fraud which must be proved in order to deprive a purchaser for value of the absolute title which is conferred by the Act is actual fraud—dishonesty of some sort and not constructive fraud—brought home to the person whose registered title is impeached, or his agents: *Assets Company v. Mere Roihi* (1905 A.C. 176). This, broadly speaking, had been the view to which the Courts of New Zealand strongly inclined prior to this decision: See *Kirkpatrick v. Hutchison* (6 G.L.R. 510: 23 N.Z.L.R. 665), where prior decisions are reviewed. Each of these decisions must, in order to be consistent with the law as laid down in *Mere Roihi's case*, be treated as ultimately involving a question of fact, namely, whether the person claiming the protection of the Act was, in fact, guilty of actual fraud in the sense of dishonesty. They, however, serve to show that a *bona fide* mistake

or negligence is not fraud, and that each case must depend upon its own particular circumstances.

I proceed now to examine the circumstances of this case, having regard to the contentions put forward by the plaintiff. In the first place there is the suggestion that Wilson took his transfer subject to the rights of the plaintiff and then turned round and refused to give effect to those rights, as in *Thomson v. Finlay* (5 N.Z.S.C. 203). Having regard to the fact that Wilson's object was to acquire the timber for milling purposes and to the terms of the agreement for sale and of the transfer and the price paid being a fair price, it appears to me that the clear intention of the vendor was to sell and transfer, and of the purchaser to buy and become transferee of the land free from all rights and interests claimed by third parties. In *Thomson v. Finlay* and such cases the intention of the disposition on both sides was that the purchaser should take subject to the specified outstanding rights of a third party, and it was held to be fraud on the part of the transferee for him when he became registered to turn round and refuse to give effect to those rights on the contention that he had an absolute title under the Act. While such a state of facts was held sufficient to found the inference of fraud, I might point out that it involved the consideration that if the vendor himself was under an obligation to the third party to give effect to those rights he would be exposed to an action for the breach of this obligation, although, doubtless, entitled to an action over against the purchaser for the loss sustained. In this case not only was there no intention that Wilson should be subjected to any rights claimed by the plaintiff, but it was made abundantly clear by the indemnity which Howe proffered and Wilson accepted that Wilson was not to be responsible to Howe for the consequences of refusing to recognise those rights.

Then there is the point that at the time of the purchase and transfer the plaintiff's claim was the subject of the action for relief pending against Howe, and that any transferee from Howe pending the action would be bound by the ultimate determination in the action. In England there is provision for registering a *lis pendens*, and a purchaser *pendente lite* will be bound by the result of any action at law or in equity affecting the property sold which is so registered, but he will not be bound thereby unless it is registered or unless he has had express

notice of it: *Williams on Vendors and Purchasers* (2nd ed., pp. 593, 594). In *Bellamy v. Sabine* (1 De G. and J. 566) Turner, L.J., said that the foundation of the doctrine with regard to a *lis pendens* affecting a purchaser was the impossibility of bringing an action or suit to a successful termination if alienation *pendente lite* were permitted to prevail: *Price v. Price* (35 C.D. 297, at p. 302). Now, we have no statutory provision for registration under the Land Transfer Act of a *lis pendens*. The provisions contained in the Code of Civil Procedure with respect to charging orders have no application to this case. But because of this absence of provision for registration it by no means follows that the ordinary rule applicable to an alienation *pendente lite* is to affect a transferee from a registered proprietor of land to which the *lis* relates. It is, I think, more consonant with the scope and purpose of the Act that a claim the subject of a *lis* should stand on the same footing as other interests which, though recognised, are yet incapable of registration under the Act. As laid down by this Court in *Fels v. Knowles* (8 G.L.R. 627, at p. 635; 26 N.Z.L.R. 604, at p. 620), "The cardinal principle of the Statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute." ("By statute" would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered."

It is therefore that I say that it is consonant with the principle of the Act that a claim which is the subject of a *lis pendens* affecting land under the Act should, as regards its binding operation on purchasers of the land, be in the same position as other recognised but unregistrable interests. The claim or the estate or interest the subject of the claim may therefore be destroyed by a transfer taken *bona fide* from the registered proprietor. If the claim is founded on some estate or interest in the land, it is open to the claimant by *caveat* to prevent adverse dealings. If adverse dealings are not so prevented and there is no order of the Court by way of

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injunction or otherwise to the contrary, then, putting aside cases of mistake, the registration can only be vacated on the ground of actual fraud on the part of the transferee of which notice of the adverse claim is in most, if not all, cases the common ingredient. As, in England, the doctrine that a *lis pendens* prevents a prejudicial alienation on the ground that the *lis* might thereby never be brought to an end has given way to convenience and is now limited to cases where the *lis* has been registered or there has been express notice, so under our Land Transfer Act the doctrine is subordinated to the paramount conclusiveness of the register except in cases of actual fraud. I think, therefore, the known fact that a claim to an adverse estate or interest in land proposed to be transferred under the Act is the subject of a pending suit is but a circumstance to be considered along with knowledge of the existence of the claim in determining the question whether there has been actual fraud on the part of the transferee in becoming the absolute registered proprietor. As a circumstance, it would for one thing bring home to an intending transferee that the claim was considered so well founded as to be worth asserting by litigation.

Then on the question whether in all the circumstances of the case actual fraud in acquiring his registered title had been brought home to Wilson or his agents, the conclusion I have come to is that it has not. I think that he took his transfer and became registered in the *bona fide* belief that the validity of the plaintiff's claim had been authoritatively negated by the Supreme Court, and that the order for the removal of the *caveat* was for the very purpose of enabling Howe to exercise without restriction the full rights of a registered proprietor unencumbered by the claim of the plaintiff. I also think that Wilson did not take his transfer and become registered knowing that thereby he was, to use the language of some decisions, improperly depriving the plaintiff of any right or interest in the land transferred.

It is important to bear in mind that the transaction did not have its origin at the time the agreement of September, 1920, was entered into. The transaction was not of that suddenness which an agreement entered into for the first time in September would import. The evidence of Wilson shows that he was led to negotiate for the property in the previous February owing to an advertisement that the timber was for sale. He was at that time informed by Howe that there

was litigation proceeding over the milling rights but that he had won all his cases up to that point and expected to be able to produce a clear title in a short period. The agreement for sale and purchase of March, 1920, providing for completion on a clear title being obtained within twelve months, was the result. At this time the preliminary question submitted to the Supreme Court had been decided in favour of the Company (January, 1920). But in April, 1920, the Company's action was tried and dismissed, and about the end of July, 1920, the decision of the Supreme Court on the preliminary questions was reversed by the Court of Appeal. This precluded any application for relief from the forfeiture. The Company's claims were thus completely disposed of unless the Court of Appeal should reverse the judgment given on the trial of the action. There had, as I have stated, been notice of appeal against this decision given on the 13th May, but which had been allowed to lapse. Then on the 25th June Dr. Bamford, counsel for the plaintiff, sent Mr. Gould, Howe's solicitor, a memorandum stating that the appeal (*i.e.*, from the dismissal of the action) was virtually dead, and that the existing appeal (that is, from the decision on the preliminary questions) would probably end the matter unless, of course, the result was to leave it open for the Company to go on with the motion for relief. The judgment of the Court of Appeal did not leave this course open, but negated it.

It was at this stage, on the 29th July, that Howe wrote to Wilson that his title was clear and he could complete with him, "but unfortunately the survey was not done owing to delay on the part of the surveyors," and he asked Wilson to get his solicitors to communicate with Messrs. Morpeth, Gould and Wilson, who were solicitors for Howe, Mr. Gould being the partner personally attending to the business. Howe then took out the summons of the 2nd August for the removal of the *caveat*. Wilson himself saw Gould shortly afterwards, with the result given in the letter to Wilson's solicitors of the 13th August. This letter makes certain suggestions which have nothing to do with any question of the plaintiff Company's rights, but which if acceded to would nevertheless involve a new agreement, and Wilson asked Gould to prepare the new agreement and send it to Wilson's solicitors for perusal. Gould points out some present difficulties in the way of drafting an agreement, and he suggests that he should draft an offer on the terms he was authorised to accept, "as soon as the titles are in

order to justify acceptance." There is nothing unusual calling for comment in Gould drawing the agreement, as the usage in the case of a sale of land is for the vendor's solicitor to prepare the agreement for sale. At the date of this letter the summons for removal of the *caveat* taken out on the 2nd August was still pending, and as between Howe and Wilson matters were proceeding without pressure for expedition on one side or the other. The letter also informs the solicitors that the summons for removal would be heard on the following Monday, and adds: "The present position of the litigation affecting that land is that our client has a final judgment of the Supreme Court dismissing the claim for damages against him upon the merits, one of the grounds of the decision being that he was lawfully entitled to rescind Waimiha Company's agreement, and the Court of Appeal has adjudged, so far as the other branch of the claim relating to relief against forfeiture is concerned, that the Court has no jurisdiction to relieve. There is some talk of continuance of the litigation by appealing, but to continue, the debentureholders of Waimiha Company would have to put up a tremendous amount as security for costs and for printing, and to appeal would be useless unless they extended the *caveat* and injunction against resale, to obtain extension of which the liquidator would have to enter into a personal undertaking as to damages involving a very large sum. So far as our information goes the talk of appeal is only talk, but we shall know definitely in the near future."

The summons was heard on the 23rd August and decision thereon was reserved. A telegram had been sent by Gould to Wilson's solicitors suggesting that it would help on the hearing "if Wilson appeared by counsel and opposed extension of *caveat*, asking alternatively for undertaking and security from liquidator to Wilson to pay damages sustained through extension." This was on the face of it sent on the assumption the hearing would take place the next day. A reply was sent on the 19th that Wilson was away, but Gould might instruct Skelton to appear for Wilson. Four days then elapsed before the hearing, so that Mr. Skelton had a fair opportunity of preparing, and at the hearing Mr. Wilson was represented by Mr. Skelton.

Some comment was made on this sudden importation of Mr. Skelton on behalf of Wilson at the suggestion of Mr. Gould, and on the fact

that Mr. Skelton derived his instructions for Wilson from Mr. Gould direct. It was suggested that there was something sinister in this procedure. I fail to see the force of this suggestion. It is obvious from what appears in the case that it was of importance to Wilson as well as Howe that the uncertainty about the title should be removed and the purchase completed as early as possible, and it would be of advantage to the Court that the position of the purchaser should be put before it on the responsibility of counsel separately representing Wilson. That Gould should instruct counsel was not unnatural, seeing that he was familiar with the facts from Wilson's point of view and that the distance of Wilson's solicitors from Auckland precluded them from conveying the instructions in time. They obviously trusted Mr. Gould as an honest practitioner, and it has not been suggested that Mr. Gould abused this confidence or that Mr. Skelton put before the Court anything that was inaccurate or misleading.

Now, it is a circumstance which I consider has turned out to be of the utmost importance in this case that written arguments were submitted by the several solicitors who represented Howe, Wilson, and the plaintiff respectively, so that what was put before the Judge is authentically preserved. It would appear from the account in the *Law Reports* and from Mr. Skelton's memorandum that authorities which I find not mentioned in Mr. Gould's written memorandum were submitted to His Honour. There may have been some attendance in person of which we are not informed, or some separate memorandum which is not before us. But from the written submissions which we have it is absolutely plain that the object of asking the Court to remove the *caveat* was to enable Howe to sell the land freed from the Company's claim. Howe's financial position was set forth showing what his daily loss was and would be until the purchase should be completed, and, indeed, that he would be ruined if an early completion were not had. The state of the case as regards appeal was specifically brought before the Court, and it was contended for Howe that there was no real intention to prosecute an appeal. Counsel for the plaintiff in his argument stated that an appeal was authorised subject to the opinion of outside counsel being favourable, and that he would at once inform the Court of the lodging of a notice of appeal. There is no suggestion that any relevant fact which would enable the Judge to cor-

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rectly appreciate the position was left undisclosed by Howe or Wilson, or that the Judge was in any respect misled. Before he gave his decision a fresh notice of appeal was given on the 10th September, and I assume that the Judge was so informed, inasmuch as plaintiff's counsel had undertaken to inform him and would hardly be likely to leave the Judge in ignorance of such a circumstance. By his decision His Honour ordered the *caveat* to be removed, stating that he was not satisfied that the Company was acting *bona fide* in the matter. That, he said, was a sufficient reason for removing the *caveat*, but apart from that it seemed to him that to deny Howe the fruits of his judgment would be to inflict on him hardship amounting to injustice, which the Court was not justified in doing. A clearer intimation that it was permissible for Howe, whose application was made for the very purpose, to deal with the land without regard to the claim of the plaintiff, and so reap the fruits of his judgment, could not, in my opinion, have been given. No appeal was made against this judgment, and Howe thereupon proceeded to reap the fruits of it by selling to Wilson freed from the plaintiff's rights. It is to be observed that the learned Judge had tried the action and was party to the Court of Appeal judgment on the preliminary questions, so that he was familiar with collateral aspects of the case not perhaps pointedly referred to in the proceedings for the removal of the *caveat*.

I might also note in passing that the appeal on the action proceeded in a very leisurely fashion even after the *caveat* was withdrawn, so much so that as late as the 3rd November Mr. Gould appeared to believe that the appeal was merely to embarrass Howe. Such was the impression which the plaintiff's solicitor put on record in his letter to Gould of that date.

It is argued for the plaintiff that Howe and Wilson were in no better position after the removal of the *caveat* than they were before—that they still remained affected with the notice of the plaintiff's claim and of an intention on its part to continue the litigation with regard to it, and that the subsequent sale and transfer were fraudulent in that they were made for improperly depriving the plaintiff of his rights in the land. For this contention one is referred to the correspondence and evidence of what took place after the *caveat* was ordered to be removed. Howe's solicitors on the 21st September wrote to Wilson's

solicitors informing them that the order for removal had been made and that they desired the utmost expedition to get a dealing in favour of Wilson on the register. "It is true," they added, "that an appeal against the judgment" (that is, the judgment dismissing the action) "is pending, but Mr. Justice Sim has ordered the removal of the *caveat* on a consideration of the facts, and that coupled with the fact that an appeal does not operate as a stay of proceedings seems to justify us in going ahead as though no appeal were pending."

"We cannot ask your client to pay out until he has a transfer actually on the register. Howe's mortgages aggregate rather less than £19,000. . . There can be no question that in such case the transferee would be a *bona fide* purchaser for value because he would be relying on the judgment already delivered."

Further correspondence with the solicitors ensued. On the 22nd September Mr. Gould, intimating that his desire was to get dealings on the Register instantly, asked that a member of the firm of solicitors acting for Wilson should come to Auckland, and stated that he, Mr. Gould, would in the meantime prepare as for them a transfer of the freehold and a sublease of the leasehold. Wilson and his solicitor, Mr. Harris, met Howe and Gould on the 25th September, when Gould produced to Harris the agreement which he had prepared; also a copy of Mr. Justice Sim's judgment ordering the removal of the *caveat*, against which he was told, as the fact was, that no appeal had been lodged. Harris says, "I told Gould that I did not feel very much concerned about the actions between Howe and the plaintiff Company. What we wanted was a clear title to the land. No question of fraud was mentioned. Gould handed me the section of the Land Transfer Act about fraud, but I satisfied myself about fraud." In cross-examination Harris said, "I don't think I had any discussion with Gould on the fraud clause of the Land Transfer Act." (By the "section about fraud" and "the fraud clause" the witness evidently intends to describe s. 197. Such a term for it is a misnomer, although good enough to identify it in the circumstances.) Mr. Harris further says, "My recollection of what happened is, Gould handed me the Land Transfer Act and the judgment" (that is, the judgment removing the *caveat*) "and told me to satisfy myself whether we would go on, and at the same time he told me he did not think the Waimiha Com-

pany were acting *bona fide* and ever seriously meant to go on with their appeal. I made no enquiries at all. I took the title believing it was clear. I did not think anything about the Waimiha rights. I believed that by taking the Land Transfer title we would get a clear title. We did not want to know the Waimiha Company at all, and we told Mr. Gould that the Waimiha Company's action had nothing to do with us, and if he could produce a clear title we would complete the deal. I knew the appeal had been lodged. I did not read the judgment" (that is, the judgment dismissing the action).

The position is, I think, summed up by Harris in further answer on cross-examination, namely, "The position was this: the first thing I perused was the judgment" (i.e., the judgment for removal of the *caveat*). "It seemed to me that Mr. Justice Sim had our purchase in his mind when that judgment was given, and that he actually removed the *caveat* to allow this to go through, and after reading that I did not bother much." Mr. Harris's conclusions from the judgment seem to me to have been amply warranted.

It is true that Harris did not go into the details of the matters which had been adjudicated upon by the Supreme Court on the trial of the action. He knew that the action had been dismissed by the Court on the merits, and it does not appear that he would have gained any further knowledge to direct the conduct of himself or his client in the way of morality by making investigation behind the judgment. I agree with his conclusion that the judgment removing the *caveat* rendered such an investigation unnecessary.

Wilson, who was not cross-examined, says: "I heard Harris's evidence of what happened on the 25th. The question of fraud was never discussed except that the section in the Land Transfer Act was read out and the word 'fraud' was in that section. The question whether this was fraud was never suggested in any way. I read the judgment of Mr. Justice Sim. It summarised the litigation, as far as I could see, as far as it had gone. It seemed to me that Howe had offered us a perfectly clear title and we would not be justified in refusing it."

The taking of the indemnity was urged as a matter indicative of fraud. This, as stated, was voluntarily offered by Gould after the agreement and transfers had been executed and just as the parties were leaving Gould's office. This shows that the purchaser had not bound himself to the

transaction on the assumption of any weakness of title for which an indemnity might have been asked. Wilson says: "The only reason I valued it was because the matter had not been properly completed" (the transfer was not yet registered, nor had the mortgages been released and the purchase-money had yet to be paid) "and the place properly surveyed. It seemed to me if we had the indemnity it would be useful if any small trouble arose in the readjustment."

The fact that Wilson, because Howe had bound himself to pay the purchase-money and complete at a later stage, chose to offer an indemnity, which Wilson accepted, against the costs of possible actions by the plaintiff against him does not, in view of the countervailing circumstances, appeal to my mind as a fact indicative of fraud on the part of Wilson.

It is argued that as the correspondence and facts show that the utmost expedition was urged by Gould and acquiesced in by Wilson lest the plaintiff should obtain an injunction restraining dealings before the purchase was completed there is sufficient proof that Howe and Wilson were consciously depriving the plaintiff of rights and interests which they knew he was entitled to assert. I do not agree that this is a proper inference. In the first place their conduct must be judged of in the light of the decision removing the *caveat* which, as already stated, I consider plainly warranted them in assuming that a sale might lawfully be effected. That each party should desire to have the sale carried out before any further cause of delay was interposed was perfectly consistent with good faith. Legal proceedings may be initiated resulting in prejudicial delay, although the ground for the proceedings may be baseless. On Howe's part the expedition was not for the purpose of consciously depriving the plaintiff of rights, but rather for the purpose of protecting his own, and Wilson responded to Howe's request for such expedition because the earlier the completion the more readily profitable the timber would be to him.

Knowledge on the part of a transferee that an unregistered interest exists is not sufficient to establish moral fraud. Otherwise the express provision of s. 197 that knowledge of the existence of the interest is not of itself to be imputed as fraud would be without effect. The registration of a transfer may therefore result in the owner of the unregistered interest being wholly deprived of it, but if so the owner of that interest can assert no claim as against the transferee unless

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in addition to the knowledge of its existence he shows circumstances bringing home to the registered proprietor or his agents moral fraud in so depriving him of the unregistered interest. That is the meaning which I consider must be attached to the expression "improperly deprived" used in some of the cases on this subject. If in those cases it means something less than fraudulently deprived, then it appears to me that those cases are in that respect contrary to *Mere Roihi's case*.

I am satisfied that in the present case there was no moral fraud. To repeat, I am satisfied that the judgment removing the *caveat* justified Wilson and his solicitor in believing, and that they did honestly believe, that Howe was entitled to sell and that Wilson was entitled to purchase the land free from the rights claimed by the plaintiff, whatever the ultimate result of the litigation might be, that it was in reliance upon the judgment that the purchase was completed by Wilson, and that in doing so he acted honestly.

For these reasons I consider that judgment must be entered in the Supreme Court for the defendant, with costs according to scale as if £2000 had been claimed, together with witnesses' expenses and disbursements to be ascertained by the Registrar at Auckland and together with allowances for second counsel at £10 10s. per day and £15 15s. for one extra day. Any interlocutory costs not fixed or agreed upon to be dealt with by a Judge of the Supreme Court at Auckland. The defendant is also entitled to judgment in this Court for the costs of the proceedings in this Court on the highest scale as from a distance, together with disbursements.

Stringer, J. STRINGER, J.—I have read and considered the judgment prepared by Mr. Justice Salmond in this case, and I agree with such judgment and with the reasoning upon which it is based.

Salmond, J. SALMOND, J.—This is a motion for judgment removed into the Court of Appeal under s. 64 of the Judicature Act, 1908.

In December, 1916, one Thomas G. C. Howe, being the owner of certain land under the Land Transfer Act, granted to the plaintiff Company by agreement in writing certain timber-cutting rights over that land. The material portions of this agreement are set out in the report of the case of *Waimiha Sawmilling Co. v. Howe* (1921 G.L.R. 35: 1920 N.Z.L.R. 681). It was decided in that case by the Court of Appeal that this agreement in its true nature was not an agree-

ment for the lease of the land, but an agreement for the sale and purchase of the standing timber, with a license to enter and cut that timber within a period of seventeen years. On 23rd August, 1917, the plaintiff Company, in order to protect its rights under the agreement, registered a *caveat* against the title of the land. In July, 1919, in consequence of certain alleged breaches of the agreement by the plaintiff Company, Howe purported to determine the agreement and excluded the plaintiff Company from entry on his land in pursuance of the agreement. The plaintiff Company thereupon commenced an action against Howe in the Supreme Court, claiming a declaration that he was not entitled to determine the agreement and that it remained in full force and effect. In May, 1920, judgment in that action was given by the Supreme Court against the plaintiff Company and it was declared that the agreement had been lawfully determined by Howe. On the 13th May notice of appeal from this decision was given but was allowed to lapse. In August, 1920, Howe issued a summons against the plaintiff Company for the removal of the *caveat* registered by that Company against his title. On the 9th September, 1920, after the summons had been heard, but before it had been determined, the plaintiff Company gave a fresh notice of appeal against the decision which had been so given by the Supreme Court, and gave due security for the prosecution of the appeal. Nevertheless, on 20th September, while that appeal was still pending, the Supreme Court ordered the removal of the *caveat*. The judgment of Sim, J., is reported in 1921 G.L.R. 22: 1921 N.Z.L.R. 110 (*Howe v. Waimiha Timber Co., Ltd.*).

Five days later, namely, on 25th September, 1920, Howe entered into an agreement with one Robert Adams Wilson to sell the land to him for the sum of £18,650. On the same day, in pursuance of that agreement, Howe executed a memorandum of transfer of the land to Wilson, and this transfer was registered under the Land Transfer Act a few days later. Shortly afterwards, on 8th June, 1921, Wilson, the new registered proprietor, transferred the land to the defendant Company, which became, accordingly, the registered proprietor thereof. The defendant Company was not incorporated until after Wilson had acquired the land. Wilson was a promoter and the managing director of that Company and acquired the land on its behalf. It is admitted by the defendant Company, accordingly, that its title to the land can be no better than Wilson's

title, and that if Wilson did not succeed in acquiring the land free from the plaintiff Company's timber rights, the defendant Company's title is equally subject to those rights. It is convenient, accordingly, in disposing of this case, to leave Wilson out of sight in the matter and to treat the sale of the land by Howe as if it was a sale directly to the defendant Company.

This sale took place, as I have said, on 25th September, 1920. Thereafter, on the 18th July, 1921, the Court of Appeal gave judgment in the appeal from the original decision of the Supreme Court as to the validity of Howe's determination of the plaintiff Company's timber agreement. The appeal was allowed and the judgment in favour of Howe was set aside. It was declared that the plaintiff Company's agreement had not been lawfully determined, and the action was remitted to the Supreme Court to give judgment for such relief as the plaintiff Company was entitled to. No such judgment has yet been given by the Supreme Court; but in the meantime the present action has been instituted by the plaintiff Company against the defendant Company, claiming a declaration that the defendant Company holds the land subject to the timber rights acquired by the plaintiff Company under its agreement with Howe.

I am of opinion that the plaintiff Company cannot succeed in this action. I shall assume in favour of the plaintiff Company that its agreement with Howe for the purchase of the standing timber on his land is one of such a nature that, if the land had not been subject to the Land Transfer Act, the burden of the agreement would have run with the land in equity and have bound the land in the hands of subsequent purchasers with notice of that agreement. On this assumption the defendant Company's title would have been subject to the plaintiff Company's rights, for it is not disputed that the defendant Company had notice of the agreement with Howe.

The defendant Company pleads, however, that it is the registered proprietor of the land under the Land Transfer Act, and therefore holds the land free from all prior equities and unregistered interests, and that the plaintiff Company's only remedy is an action against Howe for his breach of contract in destroying that Company's rights by a sale of the land on which the timber stood.

Three separate contentions are made on behalf of the plaintiff Company in reply to this plea

of the Land Transfer Act: First, that by the terms of the agreement whereby the defendant Company bought the land from Howe, it bought the land subject to the prior rights of the plaintiff Company to remove the timber from it, and cannot, therefore, now claim a title to the unencumbered freehold. Second, that the defendant Company purchased the property *pendent lite*, and is therefore subject, notwithstanding the Land Transfer Act, to any rights which may be established by that litigation in favour of the plaintiff Company. Third, that in purchasing the land with knowledge of the plaintiff Company's claim to the timber and of the pending litigation for the establishment of that claim, and with intent to deprive the plaintiff Company of the fruits of its litigation if successful, the defendant Company was guilty of fraud within the meaning of ss. 58 and 197 of the Land Transfer Act, 1915, and is therefore precluded from seeking the protection of those sections.

As to the first of these contentions, it is, I think, established law that where land under the Land Transfer Act is subject to a contract, equity, or other unregistered interest, and is transferred to a purchaser who takes it expressly subject to that contract, equity, or interest, the purchaser is bound thereby and cannot subsequently claim an unencumbered estate in reliance on the protective provisions of the Land Transfer Act. An example of this is *Thomson v. Finlay* (5 N.Z. S.C. 203), in which case a mortgagee in the exercise of his power of sale sold the land to the defendant expressly subject to an agreement entered into by the mortgagor to grant a lease to the plaintiff. The defendant in his evidence stated that he bought the land in a *bona fide* belief that the agreement was not binding and that he would acquire a right of immediate possession, and he relied on his registered title under the Land Transfer Act accordingly. But it was held that inasmuch as he purchased the land expressly subject to the contract with the plaintiff and inasmuch as the contract was in truth a valid one, he was bound to carry it into effect. Williams, J., says (at p. 207): "On the point of whether, in view of the provisions of the Land Transfer Act as to notice, the purchasers are bound, I think there can be no question. If there is a valid contract affecting an estate, and the estate is sold expressly subject to that contract, it would be a distinct moral fraud in the purchaser to repudiate the contract, and the Act does not protect moral fraud." Similarly, in *Merrie*

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v. McKay (16 N.Z.L.R. 124), Prendergast, C.J., says: "If the defendant acquired the title intending to carry out the agreement with the plaintiff, there was no fraud then; the fraud is in now repudiating the agreement and endeavouring to make use of the position he has obtained to deprive the plaintiff of his rights under the agreement. If the defendant acquired his registered title with a view to depriving the plaintiff of those rights, then the fraud was in acquiring the registered title. Whichever view is accepted, he must be held to hold the land subject to the plaintiff's rights under the agreement, and must perform the contract entered into by the plaintiff's vendor."

If, therefore, in the present case the facts were that the defendant Company's contract with Howe was a contract not for the purchase of an unencumbered freehold, but for the purchase of the freehold encumbered by the plaintiff Company's timber rights (if any), the timber company would be bound to recognise and give effect to these rights, even though it may have believed in good faith that all such rights had already come to an end by the act of Howe in determining the agreement. The facts of the case, however, do not support the contention of the plaintiff Company. It seems clear that the real bargain between Howe and the defendant Company was for the purchase of the unencumbered fee-simple, and not for the purchase of a title encumbered by and subject to the timber agreement of the plaintiff Company in the event of such agreement being established by a successful appeal from the judgment of the Supreme Court. The contract for the purchase of the land by the defendant Company is dated 25th September, 1920. It expressly provides that "the vendor agrees to sell and the purchaser agrees to purchase an estate in fee-simple free from encumbrances." It further provides that "the purchaser shall be entitled to possession of the said land or receipt of the issues and profits thereof as from the date hereof." It also provides that the balance of the purchase-money of £18,650 "shall be paid within seven days after the vendor shall have executed and registered a proper and valid transfer of the freehold premises . . . free from encumbrances." It also expressly provides that the purchase is to include all timber standing on the premises. It also makes provision for rights of way whereby the purchasing Company may remove the timber cut by it from the land. Finally it is agreed that if the vendor is unable to give a clear title

within six months the agreement shall become null and void. All this seems to me consistent only with the supposition that the subject-matter of the sale was the unencumbered freehold. It is true that on the same day on which the agreement was signed and the transfer executed in pursuance thereof a collateral contract of indemnity was executed by Howe in the following terms: "To Robert A. Wilson. In consideration of your accepting transfer and sublease as drawn and approved to-day of parts Rangitoto Tuhua 80B No. 1c Block, I undertake and agree that I will save and keep harmless and indemnified you and an intended company called the Waione Timber Company, Limited, and your respective estates and effects from all actions, proceedings, claims, and demands which may be brought or made by Waimiha Timber Company, Limited (in liquidation), in assertion of any title to the land or timber comprised in the transfer and sublease and all costs incidental thereto." It may be contended on behalf of the plaintiff Company that inasmuch as the defendant Company purchased the property with this indemnity against the plaintiff Company's rights, the intention must have been that the property should be acquired and held by the defendant Company subject to such rights if any. No such inference, however, can be properly drawn in face of the express provisions to the contrary contained in the agreement of sale and purchase. Although the defendant Company bargained for an unencumbered title and may have believed that they were getting such a title, it must have been obvious to them that they were probably buying a lawsuit at the same time, and the indemnity which they took from Howe may be sufficiently explained by reference to this contingency.

I proceed, therefore, to deal with the second contention of the plaintiff Company in answer to the defendant's plea of the Land Transfer Act—the contention, namely, that the defendant Company purchased this land *pendente lite* and therefore holds it subject to the rights of the plaintiff Company as subsequently established by the decision of the Court of Appeal in that litigation. The rule of common law and equity was that a party to litigation relative to real estate could not destroy or affect the rights of the other party by alienating or otherwise dealing with the estate *pendente lite*, and that a purchaser of the estate, even though he had no notice of the existence of the action or suit, was bound by the judgment or decree and took title subject thereto

In *Sorrell v. Carpenter* (2 P. Wm. 482) it is said: "Where there is a conveyance made *pendente lite* . . . even though the alienation be for never so good a consideration, yet is made *pendente lite*, the purchase is to be set aside; and this in imitation of the proceedings of a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation." So in *Bellamy v. Sabine* (1 De G. and J. 566, at 578) it is said: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings." The rigour of this doctrine has been relaxed by modern legislation relative to registration of *lites pendentes*, and this legislation is represented in this country by certain provisions of the Deeds Registration Act, 1908. Section 17 of that Act makes provision for the registration in the Deeds Registry Office of suits pending in the Supreme Court affecting the title to land, and s. 37 provides that "every suit pending shall so far as regards any land to be affected thereby be void and of no effect as against any person claiming for valuable consideration under a subsequent deed or contract duly registered before the registration of the subsequent deed or contract." Nothing in the Act, however, has any application to land under the Land Transfer Act. There is no provision in the Land Transfer Act or elsewhere as to the registration of a *lis pendens* affecting the title to land under that Act. The question for determination, therefore, is whether the equitable doctrine as to the purchase of real estate *pendente lite* is in force with respect to land under the Land Transfer Act. I think it is not so in force, but is excluded by the general terms of that Act as to the indefeasibility of the title of registered proprietors. Section 58 of the Land Transfer Act, 1915, provides that "notwith-

standing the existence in any other person of any estate or interest . . . which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the Register constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever," with certain exceptions not here material. The emphatic generality of this language is sufficient to exclude any application of the old equitable doctrine that a purchaser of land *pendente lite* takes his title subject to the result of the litigation and subject to any adverse rights established thereby.

The third and last contention of the plaintiff Company is that in purchasing the land with notice of the timber agreement and of pending litigation relative thereto, and with intent to destroy the plaintiff Company's rights under that agreement if they were established by that litigation, the defendant Company was guilty of fraud within the meaning of the protective provisions of the Land Transfer Act and is therefore precluded from relying on those provisions. The provisions in question are contained in ss. 58 and 197. The material provisions of the first of these sections have been already quoted by me. Section 197 provides that "except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any estate or interest . . . shall be affected by notice, direct or otherwise, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

The term "fraud" is not here used in its most restricted sense as including merely deceit, nor in its widest sense as including the constructive or equitable fraud of the Court of Chancery. It means dishonesty—a wilful and conscious disregard and violation of the right of other persons. In the words of the Privy Council in *Assets Co., Ltd. v. Mere Roihi* (1905 A.C. 176, 210), "By fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort." And although the Act provides that the knowledge of the existence of a trust or unregistered interest shall not of itself be imputed as fraud, it is well settled that know-

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ledge of a breach of trust or of the wrongful disregard and destruction of some adverse unregistered interest does itself amount to fraud. In *Locher v. Hewlett* (13 N.Z.L.R. 584, 595) it is said by Richmond, J.: "It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking."

Now, in the present case it cannot, of course, be contended that the defendant Company, when it purchased the land, had actual knowledge that the plaintiff Company possessed any rights which would be destroyed by the purchase. The Supreme Court had declared that no such rights existed. The defendant Company knew, however, that such rights were claimed and that an appeal was pending from the judgment of the Supreme Court. The defendant Company may have believed in good faith that the judgment of the Supreme Court was correct and that the appeal would be unsuccessful. But it knew also that the appeal might be successful, and it intended to acquire and hold an unencumbered freehold and to destroy by means of this purchase *pendente lite* any rights which the plaintiff might succeed in establishing on appeal. The defendant Company did not know that the plaintiff Company's rights existed, but it knew that such rights were claimed and might exist, and it intended to destroy them if they did exist. The question for determination is whether such action on the part of the defendant Company amounted to honesty or to dishonesty, fraud or *bona fides*, within the meaning of the Land Transfer Act.

Where a purchaser actually knows for certain of the existence of an adverse right which will be destroyed by his purchase, he is, as already indicated, guilty of fraud. Where, on the contrary, he has no knowledge that such a right exists or is even claimed, he is a purchaser in good faith. In between these two extremes there lie those intermediate cases in which, although there is no certain knowledge of the existence of an adverse right, there is knowledge of a claim and of the possibility of that claim being well-founded. The purchaser does not actually know that the right exists, but he knows that it may exist, or fears or suspects that it exists, or doubts whether it exists or not. If in such circumstances

and in such a state of mind he acquires the property intending to hold it for an unencumbered title and to destroy the right in question if it does exist, is the case one of fraud or one of *bona fides* within the meaning of the Act? An extreme view, which cannot be supported, would place all cases of this kind within the sphere of fraud. According to this view knowledge of the existence of an adverse claim, coupled with an intent to defeat that claim by a purchase of the property, is always inconsistent with good faith, even though the claim is not known or believed to be well-founded. This view, however, is not in conformity either with the spirit and purpose of the Land Transfer Act or with any reasonable standard of good faith and honest dealing. One of the main objects of the Land Transfer Act is to facilitate the alienation of land by eliminating the encumbering influence of unregistered interests and by relieving purchasers from the necessity of enquiring into the existence and validity of adverse equitable claims and interests. Moreover, a proper standard of honesty and good faith regards the interests of the owner no less than those of the adverse claimants. An owner of land is not necessarily bound to abstain from alienating his property because of the existence of some adverse claim which he does not know or believe to be well-founded, and because he knows that the effect of such alienation under the Land Transfer Act will be to destroy that claim. Nor is a purchaser necessarily bound to abstain from acquiring the property for the same reason. Good faith requires that due consideration be given to the conflicting interests both of the owner and of the claimant in such a case, and not that exclusive consideration be given to the interests of one of them only. Knowledge, therefore, that an adverse claim exists, that it may possibly be well-founded, and that it will be destroyed by an alienation of the property, is not in itself sufficient to stamp the transaction as fraudulent within the meaning of the Land Transfer Act.,

An equally extreme and equally unfounded view is that cases of this kind never amount to fraud, and that fraud necessarily involves actual knowledge or belief that the adverse right exists. According to this view a purchaser would always be entitled to say to the claimant: "I knew when I bought the property that you claimed a right over it; I feared and suspected that your claim was well-founded; I bought the property with intent to destroy your right if it did exist; but although I thought that you probably had the

right which you claimed, I did not actually know it for a certainty, and I was not bound to make any enquiry. I was therefore guilty of no fraud, and I now hold the property accordingly unencumbered by any right of yours."

The authorities show, I think, that such an attitude on the part of a purchaser will not be sanctioned, and that fraud is not limited to cases of actual and certain knowledge. The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further enquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further enquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights if they exist, he is guilty of that wilful blindness or voluntary ignorance which according to the authorities is equivalent to actual knowledge and therefore amounts to fraud.

Thus in *Assets Company, Ltd. v. Mere Roihi* (1905 A.C. 176, 210) it is said by the Privy Council with relation to fraud under the Land Transfer Act: "Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and made further enquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making enquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him." After examining the facts the judgment proceeds as follows: "No dishonesty by the company or its agents or by the liquidators of the City of Glasgow Bank was really established. Nor is there any proof whatever that the liquidators of the Assets Company dishonestly refrained from making enquiries which an honest purchaser would have made." Similarly in *Locher v. Hewlett* (13 N.Z.L.R. 584, 597) Richmond, J., says: "The purchaser's action must be judged of by considering what, with the knowledge he possessed, it was reasonable he should believe respecting the good faith of the transaction; and I can come to no other conclusion than that Gotch must have known that the forms of the law were not improbably being made use of to take an unjust

advantage. It may be going somewhat beyond what has been as yet expressly decided upon the subject, but I hold that where the circumstances are such as should raise in the mind of a purchaser a strong suspicion that the transaction in which he is engaged is fraud on the right of another, he is bound to go no further in it without full enquiry, and that to omit such enquiry is a want of honest dealing. Voluntary ignorance is in law generally equivalent to knowledge."

The same doctrine is applicable in considering the claim of the holder of a negotiable instrument to have acquired it in good faith. In *London Joint Stock Bank v. Simmons* (1892 A.C. 201, 221) Lord Herschell says: "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took it in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry." So in *Raphael v. Bank of England* (17 C.B. 161, 174) Willes, J., speaking of negotiable instruments, says: "Notice and knowledge means not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes—a suspicion in the mind of the party and the means of knowledge in his power wilfully disregarded."

In view of these authorities it seems clear that a purchase in destruction of an adverse equitable interest may be fraudulent within the meaning of the Land Transfer Act even though the purchaser had no actual and certain knowledge of the existence of that interest. It is sufficient that he had such means of knowledge as it was in the circumstances of the case the duty of an honest man to make use of. A failure to use such means is not mere want of care, but is want of good faith. His ignorance is wilful and dishonest ignorance, and is therefore imputed to him as knowledge.

Were it not for the material fact that the transaction impeached in the present case followed and was consequent upon the removal of a *caveat* by the Supreme Court, there would be much to be said in favour of applying to that transaction the principle to which I have just referred. It is true that the defendant Company

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had no actual or certain knowledge of the continued existence of the plaintiff Company's timber rights. It may well be that the defendant Company, in reliance on the judgment of the Supreme Court or on the advice of its own solicitors, believed in good faith that those timber rights had in all probability come to an end. But the defendant Company knew that those rights were being actively claimed by the plaintiff Company, that the judgment of the Supreme Court was under appeal, and that in a few months at the most the existence or non-existence of those rights would be determined on the hearing of that appeal. The defendant Company therefore had the means of knowledge at hand. All that was necessary was to defer the purchase until the determination of the appeal. If such delay would have been seriously prejudicial to the interests of vendor or purchaser, the purchase could without delay have been effected subject to the plaintiff Company's rights if any. On the assumption that vendor and purchaser honestly believed that those rights did not exist, there would seem to have been no sufficient reason against this course. Instead of adopting either of these alternatives the defendant Company proceeded forthwith to acquire a registered title to the unencumbered freehold. The financial position of Howe seems to have been such that his personal responsibility to the plaintiff Company was worth little or nothing, and that if the land itself could be freed from that Company's interests the Company would be deprived of any effective relief. There is much to justify the conclusion, therefore, that the purpose of this transaction was to deprive the plaintiff Company of the fruits of its possible success in the pending appeal, and that the refusal of the defendant Company to await the knowledge which it would have obtained from the decision of the appeal amounted to that wilful blindness which amounts to fraud.

In view, however, of the action of the Supreme Court in removing the *caveat* lodged by the plaintiff Company for its protection, it seems to me impossible to take this view of the matter. Two reasons were given by the Supreme Court for so removing the *caveat*. In the first place the learned Judge expressed himself as not satisfied that the plaintiff Company really and in good faith intended to prosecute the appeal. Subsequent events have proved that this suspicion of the Company's *bona fides* was unfounded. The Company not only forthwith prosecuted its appeal but succeeded in it. The fact remains,

however, that in the course of a judicial proceeding in which Howe and the plaintiff Company were parties this opinion was expressed by the Supreme Court. It is, I think, impossible to hold that Howe in thereafter acting upon that expression of opinion and selling his land without awaiting the hearing of the appeal was guilty of fraud. And if Howe honestly sold his land free from the plaintiff Company's rights, the defendant Company was entitled to buy it free from those rights, without being charged with want of good faith. Similar considerations apply to the second of the reasons given by the Supreme Court for the removal of the *caveat*. After pointing out that if the appeal went ultimately to the Privy Council the litigation might last for another three years, and that Howe might be involved in serious financial difficulties if he was further prevented by the *caveat* from selling his land, the learned Judge says: "It seems to me that to deny to Howe the fruits of the judgments he has obtained would be to inflict on him hardship amounting to injustice." It is to be observed, indeed, that the question was not whether the *caveat* was to stand for three years, but whether it was to stand for a few months at the most until the decision of the Court of Appeal. It is also to be observed that it was open to Howe, notwithstanding the *caveat*, to sell his land subject to the plaintiff Company's rights (if any) instead of selling it for the purpose of destroying those rights. The fact remains, however, that the Supreme Court evidently contemplated a sale of the unencumbered freehold and removed the *caveat* in order that such a sale might be effected. It is impossible to hold, therefore, that either Howe or the purchasing Company was guilty of bad faith in refusing to await the hearing of the appeal. The proper remedy of the plaintiff Company was to appeal from the judgment removing the *caveat*—not to wait until a transfer had taken place in consequence of such removal and then attack the title of the transferee.

It is, I think, a matter of regret that the long and expensive litigation over the plaintiff Company's timber rights has been thus burked by an alienation *pendente lite*, and that the Company has thus been deprived of the fruits of its victory, but I see no help for it.

I agree that judgment should be in the terms proposed by Mr. Justice Hosking.

ADAMS, J.—I have had the opportunity of considering the judgment written by Mr. Justice

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Hosking in this case, and agree with the whole of that judgment.

It is now finally settled that in order to deprive the registered proprietor of the protection given by s. 197 of the Land Transfer Act dishonesty must be shown, and this must always be a question of fact to be determined upon the evidence in each particular case. I find nothing in the history or the facts of this case which raises in my mind a suspicion of dishonesty in relation to the transaction impeached.

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