[HIGH COURT OF AUSTRALIA.]

CURREY (REGISTRAR OF TITLES) . . . APPELLANT;

AND

THE FEDERAL BUILDING SOCIETY . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 4, 28.

Knox C.J., Isaacs, Rich and Dixon JJ.

Transfer of Land—Mortgage by absolute transfer and deed of defeasance—Building society—Transfer by mortgagee as registered proprietor to sub-purchaser from mortgagor—Whether all intermediate parties must join as directing parties or all intermediate dealings must be registered—Whether provisions of Stamps Act complied with—Transfer of Land Act 1915 (*Vict.*) (*No.* 2740), *sec.* 248—*Transfer of Land Act* 1916 (*Vict.*) (*No.* 2849), *sec.* 22—*Stamps Act* 1915 (*Vict.*) (*No.* 2728), *sec.* 68 (6)—*Stamps Act* 1918 (*Vict.*) (*No.* 2982), *sec.* 3.

D., the registered proprietor of certain land, transferred all her estate and interest therein to a Building Society, the Registrar of Titles having notice at the time that the transfer was by way of security only. D. then sold her interest in the land to C. subject to a mortgage to the Society, and C. in turn sold his interest in the land to V. subject to a similar mortgage. These transactions were effected by two unregistered transfers, the former purporting to be by the Society to itself by the direction of D. and C., and the latter from the Society to itself by the direction of C. and V. V. having paid off the mortgage to the Society, the Society lodged for registration a transfer from itself to V. direct, and the two intermediate transfers were not lodged. It thus appeared that the Society, having taken a transfer from one person by way of security, was retransferring the land to another, and the Registrar accordingly made a requisition "that the vendors of the equitable interest in the land must be made parties to direct transfer" to V. The two unregistered transfers were then produced to the Registrar, who required that they should be lodged for registration prior to the transfer to V. if his former requisition was not complied with.

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Held, by *Knox* C.J., *Rich* and *Dixon* JJ. (*Isaacs* J. dissenting), (1) that the transfer to V., being a transfer of an unencumbered estate in fee simple by the person registered as proprietor thereof, ought to be registered as no reason appeared, whether upon the face of the certificate of title or upon the face of the transfer or otherwise, for interposing further instruments upon the register or requiring other persons to execute the transfer; and (2) that the transfer presented for registration did not violate the provisions of sec. 68 (6) of the *Stamps Act* 1915 (Vict.) as amended by the *Stamps Act* 1918 (Vict.).

Effect of sec. 22 of the *Transfer of Land Act* 1916 (Vict.) considered.

Per Isaacs J. The transaction infringed the provisions of sec. 68, sub-secs. 3 and 6, of the *Stamps Act* 1915 as amended by the *Stamps Act* 1918, and accordingly should not be registered.

Decision of the Supreme Court of Victoria (Full Court): *Federal Building Society* v. *Currey, Registrar of Titles*, (1929) V.L.R. 269, affirmed.

APPEAL from the Supreme Court of Victoria.

A summons under sec. 248 of the *Transfer of Land Act* 1915 (Vict.) was issued in the Supreme Court by the Federal Building Society calling upon Norman Richard Currey, the Registrar of Titles, to substantiate and uphold the grounds of his refusal to register an instrument of transfer by the Federal Building Society to Marianne Vale which was executed in the following circumstances:— On 31st January 1918 Bessie Duggan was registered as the proprietor of an estate in fee simple in the land described in the certificate of title, vol. 3609, fol. 721744. By a transfer dated 24th January 1918 and registered on 31st January 1918 Bessie Duggan, in consideration of the sum of £200 paid to her by the Federal Building Society, transferred the said land to the Society. This transfer was made by way of security only, and accompanying it was a certificate signed by the solicitor for the Building Society certifying that the transfer from Bessie Duggan to the Society was not a transfer upon a sale from the said Bessie Duggan to the Society but was by way of security to it. This certificate was not lodged with the Registrar under sec. 55 of the *Transfer of Land Act* 1915 as a declaration of trust, but it was in fact forwarded to the Registrar with the transfer when lodged for registration. On 13th December 1928 there was lodged for registration an instrument of transfer which was dated 4th December 1928 and which was relodged for registration on 19th February 1929, whereby it was expressed that the

Federal Building Society as registered proprietor of the said land, in consideration of the sum of £200 paid to it by Marianne Vale did thereby transfer to the said Marianne Vale all its estate and interest in the said land. This transfer was stamped by the Collector of Imposts "This instrument is not chargeable with any stamp duty," indicating that the transfer was not by way of sale and thus suggesting that it was by way of redemption. In view of the fact that the transfer to Marianne Vale so lodged for registration appeared to be a transfer by way of redemption on the part of a person other than Bessie Duggan, the Registrar made a requisition that the vendors of the equitable interest in the land should be made parties to and direct the transfer to Marianne Vale. The solicitor for the Society thereupon produced for the inspection of the Registrar two instruments of transfer, the first of which, dated 19th April 1918, recited that "The Federal Building Society . . . being registered as the proprietor of an estate in fee simple in the land . . . in consideration of the sum of two hundred pounds paid to it by Bessie Duggan . . . and in consideration of the sum of three hundred and thirty-five pounds paid to the said Bessie Duggan by Thomas Percival Clark . . . and Violet Clark his wife . . . and in consideration of the sum of three hundred pounds paid to the said Thomas Percival Clark and Violet Clark by the Federal Building Society aforesaid doth hereby transfer to the said the Federal Building Society (by direction of the said Bessie Duggan, Thomas Percival Clark and Violet Clark) all its estate and interest" in the said land. The other of the two instruments of transfer so produced to the Registrar and dated 8th August 1922 recited that "The Federal Building Society . . . being registered as the proprietor of an estate in fee simple in the land . . . in consideration of the sum of three hundred pounds paid to it by Thomas Percival Clark . . . and Violet Clark his wife . . . and in consideration of the sum of four hundred pounds paid to the said Thomas Percival Clark and Violet Clark by Marianne Vale . . . and in consideration of the sum of two hundred pounds paid to the said Marianne Vale by the Federal Building Society . . . doth hereby transfer to the said the Federal Building Society (at the request and by the direction of the said Thomas Percival

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Clark, Violet Clark and Marianne Vale testified by their execution hereof) all its estate and interest " in the said land. The Registrar then required that the two transfers so produced to him for his inspection should be lodged for registration prior to the transfer to Marianne Vale which was already lodged. The Building Society by its solicitor refused either to make the vendors of the land registered in the name of the Society parties to the transfer to Marianne Vale and as such to direct the transfer or in the alternative to lodge for registration before such transfer the two transfers so produced to the Registrar, and withdrew the transfer. The Society's solicitor afterwards relodged it, and thereupon the Registrar repeated his requisition and refused to register the transfer to Marianne Vale. The grounds of his refusal were as follows :—" (1) Unless the intermediate dealing with the land disclosed by the transfers produced to the Registrar (and in particular the sale of the land by Bessie Duggan to the said Thomas Percival Clark and Violet Clark and the sale by the said Thomas Percival Clark and Violet Clark to the said Marianne Vale) are completed by registration the Registrar cannot certify to the title of the said Marianne Vale. (2) The transfer by the said Society to the said Marianne Vale expressed to be in consideration of the sum of £200 is not, as the Society admits and as appears on the face of the transfer, a transfer on a sale of the land to her but is a transfer by the Society to her on repayment of the amount advanced by the Society to her on the security of the said land. (3) The transfer by the Society to the said Marianne Vale being by way of redemption only is not of itself a proper and sufficient authority to the Registrar to certify to the title of the said Marianne Vale as the proprietor of the land within the meaning of the *Transfer of Land Act*. (4) Unless the intermediate sales are completed by registration the title of the said Marianne Vale to be registered as proprietor and to redeem the land by paying off the money secured thereon and taking a transfer from the said Society will not appear on the register. (5) Production of unregistered transfers cannot be accepted by the Registrar as sufficient proof of the title of the said Marianne Vale to take a transfer by way of redemption from the said Society. A sale of land under the Act must be completed by registration of a transfer to the purchaser or,

in the alternative, of a transfer by his direction to another person. (6) The fact that in the case of a transfer by direction the result of the registration of the transfer will be that the same person will become again the registered proprietor does not justify the omission to register the transfer. (7) Although the statutory power to transfer registered land is by the Act confined to registered proprietors of the land it has for many years been the practice of this office to accept for registration transfers expressed to be made by the direction of an intermediate purchaser to a purchaser from him and not to insist upon each sale of registered land being completed by a separate transfer. A transfer by direction of an intermediate purchaser to a sub-purchaser has been regarded as two transfers and the registration of such a transfer as equivalent to the registration of two transfers. By regulation of the Governor in Council a fee for direction in a transfer has recently been provided." The solicitor for the Building Society thereupon took out the above-mentioned summons calling upon the Registrar to substantiate and uphold the grounds of his refusal. This summons was, by consent, referred for hearing to the Full Court of the Supreme Court, and was heard by *Irvine* C.J. and *Cussen* and *Lowe* JJ., who ordered the Registrar to register the transfer: *Federal Building Society* v. *Currey, Registrar of Titles* (1). *Irvine* C.J., who delivered the judgment of the Court, after stating the facts above set out said (2):—" I should say that there is no dispute as to the correctness of any of the facts recited or set out in any of the documents referred to, the objection of the Registrar being, so far as the present facts are concerned, that until these instruments are registered there is no transfer of the equitable interest which originally existed in Bessie Duggan to the transferee under the transfer now presented for registration. No question is raised as to the correctness of the recitals in those various documents. The Registrar's objection is that he cannot take those facts into consideration. He says he cannot be satisfied that there is not some interest outstanding in Bessie Duggan, inasmuch as none of those documents has been registered. We think, without any examination of the numerous and difficult questions as to the construction of the statute that have been raised, that it sufficiently

(1) (1929) V.L.R. 269. (2) (1929) V.L.R., at p. 275.

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appears on the facts presented and brought to the mind of the Registrar that by these documents such equity no longer exists in Bessie Duggan or in the Clarks, but that if there exist any such equity it is in the transferee under the transfer now presented for registration."

From this decision the Registrar now, by special leave, appealed to the High Court.

Walker, for the appellant. The Registrar is bound to protect equitable owners, and he had knowledge that the transfer by Mrs. Duggan to the Society was by way of security only. The transfer was marked "not dutiable," and a certificate by the Society's solicitor was attached. The terms of the security did not appear on the transfer, and the Registrar had no knowledge of the terms of the collateral agreement. The transfer to Mrs. Vale purported to be a transfer on sale, but the real consideration was the repayment of the loan. The Registrar had a duty to protect Mrs. Duggan, and was justified in making the requisition that the vendors of the equitable interest in the land should be made directing parties to the transfer, or that the intermediate dealings should be registered. If the Registrar, with knowledge that Mrs. Duggan was the equitable owner of the land, registered a transfer by the registered proprietor to someone else and thereby deprived her of her interest in the land, he would be liable to a claim under sec. 246 of the *Transfer of Land Act* 1915 (*Williams* v. *Papworth* (1)). This case shows that an equitable interest comes within that section. It is also his duty to protect outstanding equities by preventing any fraud or improper dealings (*Transfer of Land Act* 1915, secs. 55 and 233 (III.) ; *Templeton* v. *Leviathan Pty. Ltd.* (2)).

[KNOX C.J. The question is whether the Registrar should require registration of intermediate transfers by the Society to itself. Transfers by direction are not recognized by the Act.

[*Gregory*. Those transfers were mere records and could not have been registered.]

Each of those instruments had the effect of three transfers, each of which the Titles Office could and should have registered. It is

(1) (1900) A.C. 563, at p. 568.

(2) (1921) 30 C.L.R. 34, at pp. 53, 54, 63.

immaterial that the effect of those three transfers is to leave the title still in the Society.

[KNOX C.J. Conceding that the Registrar's duty is to protect such an equitable owner, if he satisfies himself that the proposed dealing was not improper and does not infringe the rights of any person, are the parties not entitled to have the transfer registered ?]

The intermediate transfers until registered were ineffectual to pass the equitable interests of the directing parties—sec. 61. That section applies to transfers of equitable interests (*Johnson* v. *McKell* (1)). The words " interest in land," in sec. 61, are unqualified and include equitable interests (*Williams* v. *Papworth* (2)). In making his requisition for the protection of the equitable owners, the Registrar acted reasonably in requiring the applicant to register the intermediate transfers and his discretion should not be interfered with (*Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (3)).

[KNOX C.J. Mrs. Duggan had no interest which she could pass under this Act. The scheme of the Act is to avoid difficulties and not to make them. Any direction is opposed to the whole scheme of the Act, and the names of those intermediate parties should not appear on the register.

[ISAACS J. referred to *Stamps Act* 1918 (No. 2982).

[DIXON J. referred to *Roberts* v. *Collector of Imposts* (4).

[*Gregory.* The Registrar has admitted that all proper duties have been paid.]

Counsel referred to *Haji Abdul Rahman* v. *Mahomed Hassan* (5).

[KNOX C.J. Mrs. Duggan did not retain an equity in the land : a defeasance does not create an estate in the land. There may be an equity against a person, but only while such person remains the registered proprietor.

[ISAACS J. The only equity is a right to have the agreement specifically performed. That right could be lost or postponed.

[KNOX C.J. She has no interest which should appear upon the register. The register must not be fouled, otherwise the simplicity of the system will be destroyed. Could the Registrar require

(1) (1893) 19 V.L.R. 62 ; 14 A.L.T. 177.
(2) (1900) A.C. 563.
(3) (1912) 14 C.L.R. 286, at p. 295.
(4) (1919) V.L.R. 638 ; 41 A.L.T. 85.
(5) (1917) A.C. 209.

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consents to be put upon the register ? The intermediate transfers are merely consents.

[RICH J. referred to sec. 123 of the *Transfer of Land Act* 1915 allowing a registered proprietor to transfer to himself and another.]

[Reference was also made by counsel to sec. 22 of the *Transfer of Land Act* 1916.]

Gregory (with him *D. Claude Robertson*), for the respondent. The transfer in this case was in proper form as provided by sec. 121 of the *Transfer of Land Act* 1915. If the Registrar knows that such transfer is improper or wrongful for any reason, he may refuse to register it, but it has not been argued that the Registrar considers that this transfer was either improper or wrongful. The provisions of sec. 22 of the *Transfer of Land Act* 1916 were not relied on by the Registrar in his reasons, or before the Full Court of Victoria, and in any event cannot be so construed as to cut away the right to make an application to the Court under sec. 248 of the *Transfer of Land Act* 1915. The *Stamps Act* 1918 did not warrant the Registrar in refusing registration of the transfer.

Cur. adv. vult.

Oct. 28. The following written judgments were delivered :—

KNOX C.J., RICH AND DIXON JJ. This is an appeal by special leave from an order made by the Full Court of the Supreme Court of Victoria upon a summons under sec. 248 of the *Transfer of Land Act* 1915 calling upon the appellant, the Registrar of Titles, to substantiate and uphold the grounds of his refusal to register a transfer in which the respondent Building Society was transferor. The Full Court ordered the appellant to register the transfer. This instrument, which was dated 4th December 1928, stated that the respondent Society, being registered as the proprietor of an estate in fee simple in a certain piece of land subject to no encumbrances, in consideration of the sum of £200 paid to it by one Marianne Vale did thereby transfer to her all its estate and interest in the said piece of land. When it was presented for registration the transfer bore the particular stamp of the Collector of Imposts denoting that

it was not chargeable with any duty. (See *Stamps Act* 1915, sec. 32 and sec. 36.) Thus it was admissible in evidence and available for all purposes notwithstanding any objection as to duty. (See sec. 32 (4).)

The respondent Society had become registered proprietor on 31st January 1918 pursuant to an instrument of transfer by which one Bessie Duggan in consideration of the sum of £200 paid to her by the Society transferred to it all her estate and interest in the land. This instrument, of course, remained in the Office of Titles. Annexed to it was a document by which the Society's solicitor certified (doubtless for the purpose of ascertaining its liability to stamp duty) that it was not a transfer upon a sale from Bessie Duggan to the Society, but was by way of security only. From this material it appeared to the Registrar that the Society, having taken a transfer from one person by way of security, was retransferring the land to another. He made a requisition that " the vendors of the equitable interest in the land must be made parties to direct transfer " to Marianne Vale. As a result of this requisition the Society produced to him two further instruments. The Registrar required that these should be registered if his requisition was not complied with, and the Society then withdrew the transfer presented for registration. This transfer was, however, again lodged for registration, and on this occasion the Registrar repeated his requisition and again refused to register the transfer unless either his requisition was complied with or the two further instruments were lodged for registration. Each of these documents was in form an instrument of transfer. But each expressed a transfer of an estate in fee simple in the land from the Society, as transferor, to the Society, as transferee. The first, which was dated 19th April 1918, stated that in consideration of the sum of £200 paid to the Society by Bessie Duggan and in consideration of the sum of £335 paid to Bessie Duggan by some persons named Clark and in consideration of the sum of £300 paid to the Clarks by the Society, the Society did thereby transfer to the Society, by the direction of Bessie Duggan and the Clarks, all its estate and interest in the land. This instrument was executed first by the Society, then by Bessie Duggan, then by the Clarks, and then again by the Society. The second of the two documents was dated 8th August 1922, and

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stated that in consideration of the sum of £300 paid to the Society by the Clarks and in consideration of the sum of £400 paid to the Clarks by Marianne Vale and in consideration of the sum of £200 paid to Marianne Vale by the Society, the Society did thereby transfer to the Society at the request and by the direction of the Clarks and Marianne Vale, testified by their execution thereof, all its estate and interest in the land. This instrument was executed first by the Society, then by the Clarks, then by Marianne Vale, and then again by the Society. Each instrument was stamped with the amount of duty appropriate to a transfer on sale for the consideration expressed to have been paid by one directing party to the other.

The Registrar's requirement that these documents should be presented for registration, as a condition precedent to the registration of the transfer in question, implies that he is satisfied in substance that this transfer has not been made in fraud or derogation of any beneficial interest or equitable rights of Bessie Duggan or any other person. If the intermediate instruments were registered he would feel at liberty to give effect to the evidence which they contain that neither Bessie Duggan nor the Clarks retain any interest in the land; but until they are registered he considers himself unable to do so. The case, therefore, is not one in which the proposed dealing appears to the Registrar to involve some breach of equitable duty, or otherwise to be improper, or in which he considers the instrument lodged for registration ought not in law or in fact to be placed upon the register. (See *Templeton* v. *Leviathan Pty. Ltd.* (1).) In the first of the grounds which the Registrar assigned for his refusal to register the transfer, he says that unless the intermediate dealings with the land disclosed by the transfers produced to him (and in particular the sale of the land by Bessie Duggan to the Clarks and the sale by the Clarks to Marianne Vale) are completed by registration, he cannot certify to the title of Marianne Vale.

We do not think the Registrar can lawfully require that the intermediate " dealings " should be registered or that the parties to them should execute, as directing parties, the instrument of which

(1) (1921) 30 C.L.R., at pp. 53-54, 64, 72-73.

registration is sought. This instrument is a transfer of an unencumbered estate in fee simple by the person registered as the proprietor of that estate. It is sufficient in form to transfer the estate. Neither upon the face of the certificate of title, nor upon the face of the instrument presented for registration, does any reason appear for interposing further instruments upon the register, or requiring other persons to execute the instrument. All that appears is that the owner of a legal estate is transferring it by the appropriate means in consideration of a money payment. The fact that the Registrar happens to know, or is able to infer from a previous dealing with the land and a paper produced to and retained by him in connection with it, that a third person at one time had a contractual or equitable right in relation to the land may, or may not, be a sufficient reason for delaying registration until he has ascertained that the dealing will not unlawfully defeat that right. But once it is found that no such violation of right is attempted, nothing remains but to give effect to the registered proprietor's dealing. The Registrar nevertheless says in the fourth of his reasons that " unless the intermediate sales are completed by registration the title of the said Marianne Vale to be registered as the proprietor and to redeem the land by paying off the money secured thereon and taking a transfer from the said Society will not appear on the register." One might have supposed that inasmuch as Marianne Vale's right to redeem the land by paying off the money secured upon it was either an equitable interest or a contractual or other personal right, the last thing which the Registrar would desire would be that it should appear upon the register. Moreover, Marianne Vale's right to be registered as proprietor arises from the fact that she is the transferee of the registered proprietor under a proper instrument, and it depends upon nothing else. This right might be intercepted by extrinsic facts if they showed that the transfer was an impropriety, but it is nothing but a confusion to treat facts which negative impropriety as part of the transferee's title to registration.

In the grounds which the Registrar gave under sec. 248 for his refusal to register, he relied rather upon the fact that the intermediate dealings were not registered, than upon the failure to comply with

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his original requisition. But, for the reasons stated, the Registrar was not entitled to require that the "intermediate dealings" should be lodged for registration or that other parties should execute the transfer. Indeed, the nature of the intermediate instruments was such that, even if they were so lodged, he ought not to register them. They are, or profess to be, transfers by a proprietor to itself of the very estate in respect of which it is registered. The transferee is expressed to take the same estate or interest in the same capacity as it holds it. It is hard to see how such an instrument can be a registrable transfer. The fact that the parties are added as directing this operation gives no further efficacy to the operation itself. The equitable interests or the personal rights of the directing parties *inter se* doubtless are affected by their execution of the document, but, as an instrument of transfer of the registered proprietor's estate, it accomplishes nothing. The estate is left precisely where it was.

The Registrar, however, before this Court endeavoured to justify his refusal to register by relying upon sec. 22 of the *Transfer of Land Act* 1916. It is not an unreasonable interpretation of the legislation to treat the discretion given to the Registrar by this provision as liable to review under sec. 248. However this may be, it is difficult to suppose that the provision empowers the Registrar to require that the transferee shall do such an act as presenting for registration instruments which ought not to be registered. But sec. 22 of the Act of 1916 was not relied upon by the Registrar in his notice of appeal, and it appeared from the statements of counsel, aided by the report of the case in the *Argus Law Reports* (1), that, in the Supreme Court, the Registrar disclaimed reliance upon its provisions. The point, therefore, ought not to be entertained.

During the argument another question was suggested which, also, was not included in the grounds taken in the notice of appeal or in those argued in the Supreme Court, and was outside the reasons given by the Registrar under sec. 248. This question is whether the transfer presented for registration violated sec. 68 (6) of the *Stamps Act* 1915, as amended by the *Stamps Act* 1918, which requires

(1) (1929) 35 A.L.R. 226, at p. 227.

such an instrument to set forth "the consideration moving from the original purchaser and also the consideration moving from any sub-purchaser or sub-purchasers who are or who at any time have been interested in the real property the subject matter of" the instrument. The Registrar did not suggest this point when he applied for special leave, and, although it was then considered to some extent by members of the Court, it is not likely that leave would have been granted for the purpose of raising it. The question has, however, been discussed and considered, and to refrain from answering it might be thought to imply an opinion that the transfer presented for registration does contravene the provisions of sec. 68 (6). In fact an examination of the provisions of the section and an analysis of the transactions appear to require the contrary conclusion. The word "conveyance," in this sub-section refers to a "conveyance on sale" or a conveyance described in sub-sec. 3 as one "which seeks to give effect whether directly or indirectly to" a sale of real property. This much appears clearly enough from a consideration of sec. 68 with sec. 17, Div. VI. of the Third Schedule and sec. 62; provisions a full discussion of which will be found in the judgments of *Cussen* J. and of *Schutt* J. in *Roberts* v. *Collector of Imposts* (1).

The transfer from the Society to Marianne Vale is not a transfer on sale, because the consideration is the payment, not of purchase-money, but of a mortgage debt; the transferor is not a vendor, but a mortgagee, and the transferee takes as mortgagor and not as purchaser. Does it then seek to give effect directly or indirectly to the sale by Bessie Duggan to the Clarks, or the sale by the Clarks to Marianne Vale? The answer appears to depend upon correctly determining the operation and effect of the transactions entered into on the occasion of each sale. On each occasion there were three separate transactions contemplated. One was a sale of an unencumbered estate by a vendor who in fact was entitled only to an equity or right of redemption. Another was the discharge of the mortgage debt by this vendor. The third was a borrowing by the purchaser from the same mortgagee upon the same security, but of a different sum of money. If each of these transactions had

(1) (1919) V.L.R. 638; 41 A.L.T. 85.

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been independently carried out, three transfers would have been required: first, a transfer from the Society, the registered proprietor who was in fact the mortgagee, to the vendor; next, a transfer from the vendor to the purchaser; and, third, a transfer from the purchaser, as a borrower, to the Society again to become a registered proprietor who was in fact a mortgagee. The second transfer would give full and final effect to the sale. But the result would simply be that the Society would retain the same estate, subject, however, to a new right to redeem in a new mortgagor, a right which was original and not derivative. It seems evident that if this exact result could be produced without the circuity involved in three independent transfers, the sale would necessarily be carried out, and given as full, complete and ample an effect as if the circuity had been employed.

Under the general law, including in that expression the doctrines of equity, there is nothing to prevent the parties carrying into effect, by an informal instrument, any dealing in relation to land which involves no grant or alteration of the legal estate provided there is a sufficient indication of intention. Inartistic and anomalous as the two instruments are which dealt respectively with these transactions, they sufficed to carry them into final effect in the manner intended by the parties, they avoided circuity, and effectually put them in the situation described. The first resulted in the Society ceasing to hold the land as security for the debt incurred by Bessie Duggan which she repaid, and continuing to hold it as a security for a new debt incurred by the Clarks, and subject to a new right to redeem vested in them alone. The second resulted in the Society ceasing to hold the land as security for this debt of the Clarks which they repaid, and continuing to hold it as security for a new debt incurred by Marianne Vale and subject to a new right vested in her alone. At this stage the whole purpose of these two transactions was accomplished, and it was not possible to give further effect to either sale. In other words, the transfer now under consideration gave effect only to Marianne Vale's right to redeem and correctly stated the consideration.

It follows from these reasons that the objection based upon sec. 68 (6) is not well founded. In this view it is unnecessary to

consider whether a transfer stamped under sec. 32 with the particular stamp denoting that it is not chargeable with any duty can be lawfully refused registration upon the ground that the statement of the consideration does not comply with sec. 68 (6). Sec. 32 (4) renders such an instrument available for all purposes notwithstanding any objection relating to duty, and it may be that a transfer so stamped remains available although sec. 68 (6) has not in fact been obeyed and although the parties are punishable under sec. 68 (8).

For these reasons the appeal should be dismissed with costs.

ISAACS J. This is a case of considerable importance with respect to the administration of the *Transfer of Land Act* and the protection of the revenue of the State of Victoria, and even the law as to trusts. It is very desirable, therefore, in order to prevent misapprehension on the part of the office and the profession as to what is decided, that the situation should be stated with precision. The point made against the Registrar is that he insisted on the registration of two specific intermediate transfers as a condition of registering a transfer by the registered proprietor to Marianne Vale. That is a fundamental misconception. If it were true, it would not in the circumstances support the full order made. For, the Vale transfer not being in conformity with the requirements of the *Stamps Act* as amended, the Court being itself aware of the defect should not direct what would be a contravention of the law, and by a statutory mandamus compel the Registrar to do an act operating contrary to the express direction of a statute. (See per *Haldane* L.C. in *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1).) But it is not true in any relevant sense. It would, indeed, be singular that an officer of the Registrar's experience with the practice of the office to guide him, as expressly stated in his reasons, should stipulate as suggested. What he really insisted on was: (1) that a transfer from the registered proprietor to Vale should itself contain the intermediate directions required by law; or (2) that, if the specific instrument of transfer to Vale was persisted in, then there should be intermediate transfers lodged for registration, those produced being obviously regarded and treated by the applicant as in every way regular. It has been pointed out during the argument that the intermediate

(1) (1914) A.C. 461, at p. 469.

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so-called transfers actually executed were unwarranted, because they were from the Society to the Society itself. That defect is not attributable to the Registrar. Those instruments were produced to him as proper transfers on which as transfers the duty was paid, and were regarded as registrable if the Society so desired. It does not come well from the Society now to take advantage of the fact that they were not valid transfers. If the Court can find invalidity in those transfers, much more should it acknowledge invalidity in the Vale transfer. The Registrar's insistence, in reality, was not on those specific documents, but on transfers carrying out the intermediate transactions. We have now to see how the question arose.

The Facts.—On 13th December 1928 there was lodged for registration an instrument of transfer from the Federal Building Society as registered proprietor to Marianne Vale, expressed to be in consideration of £200 paid by her. The transfer, when lodged, was on its face stamped by the Collector of Imposts "This instrument is not chargeable with any stamp duty." That at once called the attention of the Registrar to the fact that the transaction was not one of ordinary sale, but was probably, as is common, a redemption transfer. On examination it was found that the Society became registered proprietor upon a transfer from one Bessie Duggan, dated 24th January 1918, in consideration of £200 paid to her by the Society. By reason of the duty stamp on that transfer being only 2d. and of an accompanying certificate by the solicitor that the transfer was not a transfer by way of sale but by way of security, the Registrar saw that Vale was apparently attempting to exercise what were prima facie Duggan's proprietary rights. The Registrar on 21st December 1928 made the usual requisition that the vendors of her equitable interest should be made parties to and direct the transfer to Vale. The next step was that the solicitor for the Society produced two documents purporting to be duly executed instruments of transfer. The first was dated 10th April 1918. It recited a consideration of £200 paid by Duggan to the Society, £335 paid to Duggan by one Clark and his wife, and £300 paid by the Society to the Clarks; and proceeded: "The Federal Building Society . . . doth hereby transfer to the said the Federal Building Society" (by

direction of Duggan and the Clarks) " all its estate and interest in " the land. That transfer bore a duty stamp of £3, which at that time was the proper duty on a conveyance or transfer of the land by way of sale where the consideration was £335. And it bore no other duty. The second document was a transfer dated 8th August 1922. It also was by the Society to the Society. The consideration was £300 paid to the Society by the Clarks, £400 paid to the Clarks by Marianne Vale and £200 paid to Vale by the Society. It was by direction of the Clarks and Vale. The transfer bore duty £3 10s. attributable to the £400.

It is necessary to see at this point what those documents disclosed. Their genuineness is not doubted, there is no question of unpaid duty in this case. What the first shows is that on 19th April 1918 Duggan paid off her mortgage and became, so far as the Society was concerned, entitled to the full legal and equitable estate in the land, and to a transfer of the land from the Society ; that she agreed to sell, not a mere equity of redemption, if such a thing is possible in land under the Act, but the full legal and equitable estate—the full fee—to the Clarks, who thereby became entitled thereto, but that being so entitled they with Duggan directed a transfer to the Society (which, when registered, was apparently to be as in Clarks' right) of the land in question. Henceforth, by reason of the agreement, the Society in equity, as I infer, held that land free from Duggan and only as Clarks' nominee and mortgagee, that is, as between the parties. The whole frame of the transaction as recorded, and particularly the attempted transfer from the Society to the Society, shows that the Duggan mortgage was satisfied. But the all-important point to bear in mind is that there was an " original " sale of *the land* by Duggan to the Clarks for £335. She did not sell a mere equity. She did not retain the right to the legal estate—if that be a proper expression in the case. She *sold* the land and, as part of her obligation to transfer it, directed the Society, as a paid-off mortgagee, to transfer to the nominee of the purchasers. The parties regarded it as a sale of the land outright, to be accomplished by a statutory transfer of the land *to a nominee of the purchasers*, and the duty was paid on that footing. Then the Clarks made their own

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arrangements with the Society as to a mortgage to them. But these were after, and independent of, the "original" sale of the land by Duggan to them. The second document shows a similar transaction by way of sub-purchase between the Clarks, Vale and the Society. The Clarks, by paying off the mortgage, became fully entitled to the land as against the Society; they sold that to Vale, who in turn mortgaged it to the Society, which henceforth held as her mortgagee, the Clark mortgages being satisfied. The important point here to notice is the sub-sale by Clark to Vale of *the land* for £400, *to be carried into effect by a statutory transfer.* That was the view of all parties, as shown by payment of the duty on the transfers. The Clarks, by reason of their agreement, ceased to be interested in the land, and Vale became a party interested.

Now, these were the circumstances that were made apparent to the Registrar. The Registrar in his "grounds of refusal" expressly states the intermediate transfers disclosed that the respective vendors had "*sold the land*" to the respective purchasers. Those instruments do not anywhere refer to an "equitable estate," or to anything less than "the land." Such a reference would, indeed, be foreign to their statutory character. But further, nowhere is it denied by the applicant that it was "the land" that was sold. If such an allegation had been made and were material, the Court might have directed an issue under the section. But the Supreme Court, in the judgment appealed from, recites but does not question the accuracy of the Registrar's conclusion that in each case it was "the land" that was sold. Nor do I think on the materials before us that that conclusion can be seriously questioned, for whatever was sold was transferred—that is, subject to registration.

Having accepted the position as disclosed by the intermediate documents, the Registrar wrote the following letter:—"Requisition of 21/12/28 has not been complied with. Transfers referred to do not appear to have been lodged. Two transfers produced should be lodged for registration *prior to this transfer.*" (Italics are mine.) In effect, the Registrar said: "As you will insist on the Vale transfer in its present form, intermediate transfers are necessary." Thereupon the dealing was withdrawn.

On 19th February 1929 the Vale transfer was relodged for registration with a letter stating "*the transfer is in due form* and on behalf of all the parties thereto I must request that its registration be completed." (Italics are mine.) On 7th March the Registrar replied:—"The first requisition on the transfer, made on 21st December 1928, was for its direction, in accordance with the usual practice, by the intermediate purchasers of the land. The requisition of 6th February 1929 that the transfers produced should be lodged for registration was made with a view to saving you the trouble of obtaining execution by the intermediate purchasers of the transfer. *The first requisition is again made on relodgment.*" (Italics are mine.) That, as is plain, primarily again required the Vale transfer to be put into proper form, and only secondarily, if at all, required registration of the intermediate transfers, the formality of which no one then questioned—least of all the Society. The Society's solicitors replied on 8th April that it was desired to test the requirement as to intermediate dealings, and stating: "In this case *the transfer is in statutory form*, and the whole of the equitable dealings have been properly disclosed to the assessor of duty under the *Stamps Act*, and all the necessary duties paid, and the present transfer itself bears the assessor's certificate to that effect." I may interpose the observation of fact (law being later dealt with) that the transfer there referred to did not bear the assessor's certificate that "all the necessary duties" were paid, if that transfer had to comply with sec. 68 (sub-sec. 6) of the *Stamps Act*. That letter having been simply acknowledged, the Society's solicitor pressed for registration of the Vale transfer, and thereupon proceedings were instituted under sec. 248 of the *Transfer of Land Act*, resulting in an order by the Supreme Court of Victoria that the Registrar (a) had failed to substantiate his reasons, and (b) should be directed to register the Vale transfer as lodged. The ground of the decision was that it sufficiently appeared, on the facts presented and brought to the mind of the Registrar, that Duggan and the Clarks had no equity, and that all equities were in Vale. So far as it is a matter of fact, I agree that Vale has in her all the necessary equities to support a proper transfer of the land to her by the Society.

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I also agree that so far as it is a matter of fact the Registrar must be taken to have been personally satisfied of that. But his position is that that is not sufficient to satisfy the law. It is rather the strongest reason for his insistence on carrying it out. Officially, he says, that is not the lawful method of satisfying his requisition, and that he cannot, in compliance with the law, be officially satisfied unless either the Vale transfer sets out the directions, or else the intermediate transfers be registered. That has not been dealt with by the Supreme Court. But it is to me a matter for regret that the attention of that Court was not drawn to the statutory provision presently referred to and on which this case, in my opinion, turns. Having regard to that circumstance, I do not consider I am really differing in my view of the law from their Honors of the Supreme Court. Nevertheless, the law is clear, and, in my opinion, the Registrar was right in refusing to register the transfer in its present condition.

The Law.—It was established at an early period—1880—by *Stawell* C.J., in *In re Transfer of Land Statute; Ex parte Bond* (1), that the judicial duty of examining into the validity of instruments presented to the Registrar of Titles for registration is imposed upon him by the Act. That case, with others, was cited with approval by my late brother *Higgins* in *Templeton* v. *Leviathan Pty. Ltd.* (2). I entirely agree with that view. In this case the Registrar has regarded the Vale transfer in its present form as infringing the law unless and until intermediate transfers in respect of the intermediate sales be lodged for registration. And the precise point raised by this case as presented is whether that contention is correct.

I may, by anticipation, summarize the relevant requirements of the law as it now stands in relation to such a case as the present. The law requires: (1) that duty shall be paid on the consideration for every *sale* of real property; (2) that the duty shall be paid on the *conveyance* (or transfer) which seeks to give effect, directly or indirectly, to every such sale; (3) that every such sale of land under the *Transfer of Land Act* given effect to, directly or indirectly, by a registered transfer, shall be recorded in that transfer, either separately by virtue of the *Transfer of Land Act* or jointly by virtue of sec. 68

(1) (1880) 6 V.L.R. (L.) 458; 2 A.L.T. 94. (2) (1921) 30 C.L.R., at p 64.

(6) of the *Stamps Act*; (4) only in that form is the failure penalized by sub-sec. 8.

I need scarcely add that the separate recording is by the ordinary transfer as provided by the *Transfer of Land Act*, by A to B on the sale of land, by A as vendor to B as purchaser. At one time before Act No. 2982, which came into existence on 1st January 1919, if A sold to B for £500 and B sold to C for £600, a conveyance or transfer direct from A to C carried a duty in respect of the £600 only. That was because sub-sec. 3 of sec. 68 of the *Stamps Act* as it then stood provided, in terms which I arrange: "Where a person" (a) "having contracted for the purchase of any property but" (b) "not having obtained a conveyance thereof contracts to sell the same to any other person, and" (c) "the property is in consequence conveyed *immediately* to the sub-purchaser," (d) "the conveyance is to be charged with *ad valorem* duty in respect of the consideration for the sale by the original purchaser to the sub-purchaser." As that law stood, (a) would represent the purchase by the Clarks from Duggan, (b) would represent the sale by the Clarks to Vale, (c) would represent the Vale transfer, and (d) would represent the duty payable on that transfer, and for the consideration given by Vale only. The word "immediately" is important, because it is replaced in the amending legislation.

In Act No. 2982 by the new sub-sec. 3 of sec. 68 of the *Stamps Act*, duty is required on both the £500 and the £600. It enacts that (a) "Every sale of real property shall be chargeable with *ad valorem* duty upon the consideration therefor, and" (b) "such duty shall be paid on the conveyance which seeks to give effect whether *directly or indirectly* to *every* such sale." If there is only an "original" sale, a conveyance by the vendor or by his direction to the purchaser or his nominee gives effect "directly" to that sale within the meaning of the sub-section. If there are several sub-sales, a conveyance from the original vendor or by his direction to the ultimate purchaser or his nominee, seeks to give effect "directly" to the last sale, and "indirectly" to every intermediate sale. So long as there are successive sales, each of them other than the first is dependent for its validity and effect on the preceding sale or sales, and the final consummation by transfer from the registered proprietor gives effect

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to every sale preceding the transfer. It matters not what devices are resorted to for the convenience of the parties in the interim, they may have trust deeds or other mutual arrangements, the *sales* are dutiable, because they are sales of "real property," and the duty is payable on any "*conveyance*" within the meaning of the Act which directly or indirectly gives effect to them, that is to say, by transferring the proprietary title to the real property sold to some other person. But so far, no statutory obligation was enacted to disclose the various sales, except the obligation to pay the duty, and though a fraud would be committed if the duty were intentionally not paid, no machinery was provided for requiring the disclosure of the various sales to the Registrar or the Registrar-General. To meet the situation and to guard the revenue, it is enacted by sub-sec. 6 that every party to a conveyance, and every person concerned in the preparation of any conveyance or transfer, shall fully and truly set forth in precise terms the consideration money from any sub-purchaser or sub-purchasers *who are or who at any time have been interested in the real property, the subject of the conveyance or transfer.* My impression during the argument that this provision is fatal to the respondent's contention is confirmed by later consideration. It is, of course, of little use to consider what would be sufficient if the provision did not exist. The sub-section is a distinct statutory requirement of the Legislature in a Finance Act. To me its language is unusually plain and simple, and clearly applicable to the Vale transfers in this case. Until that transfer was executed there had never been any conveyance to Vale of the land she had purchased. Even if for the moment it be conceded that in equity she had an equitable estate in the strictest sense, she nevertheless had never had conveyed to her or her nominee the legal property she had bought and paid for, and agreed to be conveyed to her nominees. The transfer seeks to give effect directly to the sale Clarks to Vale as made. But for that sale, and but for the prior sale Duggan to Clarks, the Society, as registered proprietor from Duggan, would have no right whatever to transfer to Vale. It is, in my opinion, quite irrelevant in this connection to introduce the Vale mortgage or the Clark mortgage. Those mortgages, constituted by defeasances, evidencing the real nature of the relations between the purchasers and vendors, after

the vendors had sold, are immaterial to the Crown. Had Vale, for instance, not required a loan and had she demanded an instant transfer after buying from Clarks, the transfer would, of course, have been a transfer giving direct effect to the sale. The mere fact that a transfer is postponed until a loan is obtained and paid off cannot alter its character when ultimately executed. And so with Clarks' transaction. In each case there was a purchase and but one effective transfer of the property purchased, supposing Vale's transfer registered. And so, unless sub-sec. 6 is complied with, the transfer would be in contravention of the statute. It is not complied with, because the consideration moneys from the Clarks to Duggan and from Vale to the Clarks are not set forth. The Registrar, from the information given by the Society itself, which he accepts, can see that the Act is not complied with. Sub-sec. 8 penalizes every person who with intent to defraud executes or prepares such a transfer as the Vale transfer. No fraud is, of course, here suggested, but if there were fraud, surely the sub-section would apply.

For myself, I would need to go no further than sub-sec. 6. As, however, my opinion is not shared as to this, I have to examine the position further, as to whether the two intermediate transfers, as I may conveniently call them, were " conveyances " within the meaning of sec. 68 of the *Stamps Act*. They purport to be statutory transfers by direction under the *Transfer of Land Act*. They contain no word of trust. At the time the direction by Duggan was given, the Society was a bare trustee for the directing vendor and was bound to obey the directions given. But those directions were not to hold the vendor's land in trust for the purchasers, but expressly to transfer the land—that is, the united legal and equitable estates, which in law meant by merger the unqualified legal estate—to the purchasers or nominee in accordance with the provisions of the *Transfer of Land Act*. No fragment of legal ownership was by the agreement to be retained by Duggan or the Society as representing her, and therefore no present trust, so far as she was concerned, was created or intended by her or even possible. (See *Lewin* on *Trusts*, 13th ed., p. 63 ; and *Hardoon* v. *Belilios* (1).) Nor was

(1) (1901) A.C. 118, at p. 123.

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any trust intended by the purchasers until *after* transfer—that is, after the registration of the transfer in the name of the proposed transferee. If the transferee had been some person other than the Society, the matter would be beyond question. But it is immaterial here, because the transfer intended was to the Society as nominee of the purchaser, whoever it might be. Even if intended as a trust, it was not completely constituted: "the transaction was not complete" (*Edwards* v. *Jones* (1)); and, as "there can be no conveyance by a person to himself" (per Lord *Buckmaster* for the Judicial Committee in *O'Meara* v. *Bennett* (2)), the intended trust never could be completely constituted, but must remain enforceable, if at all, as "a contract to create a trust" (*Lister* v. *Hodgson* (3)). A case greatly in point is *Chesterfield Brewery Co.* v. *Commissioners of Inland Revenue* (4). There an express declaration by vendors in an agreement that shares should be held in trust for purchasers, was held to be a "conveyance on sale" on the ground that "the real intention of the parties was that this agreement should be the new company's only document of title, and that it should not be followed by a legal transfer of the shares in the old company" (*Wills* J. (5)). *Bruce* J. was of the same opinion.

In the present case it is beyond question that it was part of the bargain that the purchasers should be entitled to the legal estate, to be dealt with by them as they pleased. Even if they had chosen to take a declaration of trust to suit their own convenience, with the ultimate object of registering at some time or other a transfer of the legal title, the contract was one for a legal interest, and not merely for an equitable interest, and would be met by *West London Syndicate Ltd.* v. *Commissioners of Inland Revenue* (6) and *Commissioners of Stamps* v. *Queensland Meat Export Co.* (7). It is, therefore, in my view, impossible to imply a trust independently of fulfilment of the expressed prior directions given. The purchasers of the land had, of course, an equity to have the legal estate united with the equitable estate, so far as equity would decree specific performance (*Howard* v. *Miller* (8)). Equity would decree specific

(1) (1836) 1 My. & Cr. 226, at p. 240.
(2) (1922) 1 A.C. 80, at p. 86.
(3) (1867) L.R. 4 Eq. 30, at p. 34.
(4) (1899) 2 Q.B. 7.
(5) (1899) 2 Q.B., at p. 13.
(6) (1898) 2 Q.B. 507.
(7) (1917) A.C. 624.
(8) (1915) A.C. 318, at pp. 326-327.

performance of the contracts of sale, so far as appears, but not of an agreement that the registered proprietor should transfer to himself alone. That, unless expressly provided by statute, is, as already stated, an impossibility. Therefore there cannot be said to have been an equitable conveyance of an equitable estate, even supposing that possible of separate conveyance by acts of the parties under the *Transfer of Land Act*. A "conveyance or transfer" by sec. 62 of the *Stamps Act*, includes "every instrument . . . whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction." The subject matter of the sales being *the land* itself, it is on high authority clear that the unregistered intermediate instruments of transfer were not "conveyances" or "transfers" on sale of the real property within the meaning of sec. 68 of the *Stamps Act*. Practitioners would not regard them as such, apart from registration.

In one sense, Duggan, on paying off the mortgage, had, as I have said, an equity—that is, an equitable right—against the Society entitling her to have the land transferred to her. And the Clarks had a similar right. But that this is not sufficient to constitute a conveyance is definitely settled by an interpretation given to the identical definition by a very powerful Court of Appeal in *Commissioners of Inland Revenue* v. *Angus and Lewis* (1). There Lord *Esher* M.R. (2) emphasized the fact that it is not the transaction of purchase or sale that is struck at, but the *instrument* "whereby any property upon the sale thereof is legally or equitably transferred." Then said Lord *Esher*:—"When you are contrasting 'legally' and 'equitably,' 'legal' must be understood to refer to common law as distinguished from equity. Therefore 'legally' transferred means transferred at common law, and 'equitably transferred' means transferred according to equity. Can there be a common law transfer of an equitable interest? It seems to me that there cannot. Common law knows nothing about equity, and does not deal with equitable interests. There cannot, therefore, be a common law conveyance of an equity or an equitable interest. . . . I take the real meaning of the section to be this:—When the property to be

(1) (1889) 23 Q.B.D. 579.

(2) (1889) 23 Q.B.D., at p. 589.

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conveyed is a property known to the common law, then the conveyance, if there be one, will be a legal conveyance; and when the property to be conveyed is an equitable property or interest, then the conveyance, if there be one, will be an equitable conveyance. *It does not mean an equitable conveyance of a common law property*, or a legal conveyance of an equitable property, but the two kinds of conveyances are distributed each to that kind of property which it has to convey." Further on, the Master of the Rolls says, in a passage of great importance (1): "Then the question is, whether the instrument which we have now to consider is an instrument 'whereby' (that is, *by the instrument* itself alone) the property . . . is conveyed." Then he says (2):—"It has been argued that it is an agreement of which a Court of equity in the event of the vendors not immediately fulfilling their agreement, would at once grant specific performance. And it is said that, when an agreement is such that equity will grant specific performance of it, it is to be considered as a conveyance in equity, or an 'equitable conveyance.' *If that were true, it would be an equitable conveyance of a legal property or a legal right.*" I may interrupt for a moment to observe that that is precisely what the learned Lord has just said the section does not mean. His Lordship continued that the very fact that the instrument required the interposition of equity to vest the property in the purchaser, showed that the instrument *itself* did not do so. In that case it was specific performance that was suggested, but that is only one instance of equitable interposition. Injunction is another. And to this judgment, in which Lord *Halsbury* L.C. concurred, I may add some words of the Lord Chancellor himself (3). He said, in order that sec. 70 (almost identical with sec. 62 of the *Stamps Act*) "may apply, the property must be actually transferred by the instrument itself, *not merely by virtue of an equitable doctrine*." I would refer *passim* to the powerful reasoning of *Lindley* L.J. in the case just referred to, and, adapting one passage in his judgment (4), I would say that the distinction between an implied trust and a "conveyance" of land is a distinction which is perfectly well known to every lawyer. That case was cited

(1) (1889) 23 Q.B.D., at p. 590.
(2) (1889) 23 Q.B.D., at p. 591.
(3) (1889) 23 Q.B.D., at p. 588.
(4) (1889) 23 Q.B.D., at p. 597.

to *Holroyd* J. in *Johnson* v. *McKell* (1). That very learned Judge, in a clear judgment, applied it to the *Transfer of Land Act*. There a purchaser of land, having resold, purported expressly to transfer all his right, title and interest under his contract of purchase, and the purchaser purported to accept the transfer : *Held*, no conveyance. The question arose in *Commissioners of Stamps* v. *Queensland Meat Export Co.* (2) whether on a sale of chattels included in a general entire sale of land and other property for one indivisible consideration, the agreement contemplating a formal transfer, there was an equitable interest transferred as to the chattels. The Judicial Committee (Viscount *Haldane*, Lord *Dunedin* and Lord *Sumner*) held in the negative. Lord *Sumner* delivered the judgment. His Lordship, on the question of whether the priority vested in the purchaser and whether the contract was one for the sale of an equitable interest in the property, said (3) :—" The answer depends upon the intention of the parties to be collected from the terms of the instrument under the circumstances of its execution. It is plain that the instrument is not a contract for the sale of an equitable interest. All the subject matters dealt with are meant to be sold out and out. The doubt is whether that sale is, as to any of them, a sale *in præsenti*. Furthermore, it is plain that, as regards the real property at any rate, no estate or interest therein was vested in the purchasers or was intended to be vested in them on the execution of the deed. The agreement gave them a right to equitable relief in case the old company failed to convey but in respect of the hereditaments it was a contract to sell only. . . . The distinction between an agreement to sell and a sale, between an agreement to convey and a conveyance, is fundamental and familiar. It is also a familiar transaction to include in one agreement a bargain relating to hereditaments, choses in action, and chattels. Here all these subject matters formed parts of one going concern, and it was the chief object of the transaction that the new company should continue the going concern, which the old company had carried on. The contract was entire. The considerations were not severed or appropriated. Their Lordships infer that the intention was to vest the different subject matters,

(1) (1893) 19 V.L.R. 62 ; 14 A.L.T. 177.
(2) (1917) A.C. 624.
(3) (1917) A.C., at p. 627-628.

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by the appropriate forms and assurances according to their nature, when, but not until, they could all be transferred together and the entire considerations could be exchanged against the collective transfers. So the contract is framed, but the inference does not depend simply on the frame of the contract. The consideration could not be severed or apportioned without some further agreement, which neither party could be required to make. Any other construction would impute to the one side or the other an intention to divest itself of something belonging to it, as an act of confidence and upon credit. It may well be that entire mutual confidence existed, but there is no discoverable convenience or business object in vesting the properties *seriatim*."

The circumstance that the land is under the Act adds to the respondent's difficulty. There is no doubt that in equity "the right to call for a conveyance of the land is an equitable interest or equitable estate" (per *Jessel* M.R. in *London and South-Western Railway Co.* v. *Gomm* (1)). But as that, which may arise under a contract of purchase of land and is assignable in equity, connotes that there is still to be a conveyance of the land, the doctrine so stated reinforces the distinction made in *Angus's Case* (2) and the *Queensland Case* (3). And the doctrine so stated was enforced in *Barry* v. *Heider* (4) and *Great West Permanent Loan Co.* v. *Friesen* (5). For my own view of its application to land under the Act I refer to pp. 216 and 217 of *Barry's Case*. If, and so long as the right is enforceable by specific performance, or protectable by injunction, it has in equity the attributes of property. But so long as it needs those equitable remedies for its effectuation, it is obvious that the so-called equitable estate is not "conveyed" or "transferred" to the beneficiary in a strictly proprietary sense. The distinction is exemplified in *McEllister* v. *Biggs* (6), a case under the *Torrens Act* of South Australia, where Sir *Barnes Peacock* says with reference to a section corresponding to sec. 61 of the Victorian Act: "Although the deeds did not pass an interest in the land, still they passed to the plaintiffs the equitable right which Guthrie had to set aside the

(1) (1882) 20 Ch. D. 562, at p. 581.
(2) (1889) 23 Q.B.D. 579.
(3) (1917) A.C. 624.
(4) (1914) 19 C.L.R. 197.
(5) (1925) A.C. 208.
(6) (1883) 8 App. Cas. 314, at p. 316.

certificate of title." In *Orr* v. *Smith* (1) *Hosking* J. says :—" The position of an unregistered instrument is that until registration it does not bind the land, although it binds the parties contractually. In equity the general rule is that a contract for the sale of land capable of being specifically performed will, while it remains so capable, be treated as binding the land and as creating an equitable interest in the land itself commensurate with the relief obtainable by way of specific performance. This, I think, states the result of *Howard* v. *Miller* (2), *Central Trust and Safe Deposit Co.* v. *Snider* (3) and *Cornwall* v. *Henson* (4). In face, however, of sec. 38 " (the Victorian sec. 61) " of the *Land Transfer Act* 1915 and of the New Zealand decisions thereon, the contractual rights which an unregistered instrument relating to land under that Act creates cannot in strictness be termed equitable estates or interests, although such a designation may be conveniently used so long as the effect of sec. 38 is not lost sight of." In *Gibbs* v. *Messer* (5) Lord *Watson*, speaking for the Privy Council, distinguished between " proprietary rights " and " mere interests in land." In *Assets Co.* v. *Mere Roihi* (6) Lord *Lindley* referred to those equities which included " the *right* . . . to have the transfers . . . carried out and completed." In *Macindoe* v. *Wehrle* (7) *Pring* J., as to land under the *Real Property Act*, said that it was only in cases where the statutory form was followed " that any estate in the land should pass." In *Farmer & Co.* v. *Commissioners of Inland Revenue* (8), where there was a sale of the equity of redemption in New South Wales land subject to the *Trust Property Act* 1862, *Phillimore* J. said (9) it was the sale of " an equitable interest only."

As in my view, as already mentioned, this branch of the inquiry is not essential to the decision, I do not pursue it further, except to note that the opinion I have expressed with regard to it is apparently shared by text-writers who have collated the numerous relevant authorities. I may instance *Hogg* on *Registration of Title to Land throughout the Empire* (1920), at pp. 164 *et seqq.* ; *Wiseman* on

(1) (1919) N.Z.L.R. 818, at p. 827.
(2) (1915) A.C. 318.
(3) (1916) 1 A.C. 266.
(4) (1899) 2 Ch. 710.
(5) (1891) A.C. 248, at p. 254.
(6) (1905) A.C. 176, at pp. 209-210.
(7) (1913) 13 S.R. (N.S.W.) 500, at p. 502.
(8) (1898) 2 Q.B. 141.
(9) (1898) 2 Q.B., at p. 147.

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the *Transfer of Land Acts* (1925), at pp. 62-63; and *Kerr* on the *Australian Lands Titles* (*Torrens*) *System* (1927), at pp. 132-148, and particularly at p. 136, in par. 259. It is true that *ad valorem* duty was paid on the unregistered transfers. But that was in the belief that they were registrable and in the expectation that events might make their registration desirable. With those considerations in view, duty, in compliance with sec. 28 of the *Stamps Act*, had to be paid, if at all, within a month after execution. It was apparently not desired to register them, and so give effect to the sales. But when we come to the Vale transfer we reach the point when all the links in the chain of changing ownership are sought to be given effect to. Had it been registered in proper form, then the record required by sub-sec. 6 would have been made of all the sales and purchases by persons who "are or . . . at any time have been interested in the real property," that is, since the transferor became registered proprietor. The only escape from the requirement of sub-sec. 6 in the present case—which was the first requisition made and repeated—would be the registration of proper intermediate transfers—which was the second and concessive requirement of the Registrar. The Society, however, choosing to adhere to the comprehensive Vale transfer, cannot, as I conceive, validly claim to register it as it stands. That duty has been paid is nothing to the point. It would not have been paid again. To hold that the Vale transfer must be registered as matters stand is to repeal by judicial decision sub-sec. 6 of sec. 68 of the Act. It would also repeal sub-sec. 3 in part, for if this case does not fall within sub-sec. 6 it does not fall within sub-sec. 3, and no duty needs to be paid in such a case, except such as was payable before the amending legislation.

Take an even stronger instance under the general law:—A, the owner of land, conveys to B, taking a declaration of trust for A. Then by a series of sales and sub-sales of the land, A to C, C to D, and D to E, each purchaser in turn receiving a declaration of trust from B, the right to call for a conveyance rests in E, to whom B conveys. On the authorities cited, the only "conveyances" within the meaning of the *Stamps Act* are A to B and B to E. Does sub-sec. 6 of sec. 68 require a statement of the consideration moneys C to A, D to C, and E to D? If language means anything, the statement

is required. The Court of Appeal in *Angus's Case* (1) and *Holroyd* J. in *Johnston* v. *McKell* (2) are not, as I think, mistaken. If they are, the consequences are serious. And equally serious are the consequences if it be held that within sub-sec. 6 the Vale transfer is not a "conveyance" or that the Clarks and Vale are not "purchasers or sub-purchasers who are or who at any time have been interested in the real property" in question.

Unless sub-sec. 6 is given effect to in a case like this, the legislative security provided by it against fraudulent evasion of duty as to all sales of real property, both at common law and under the *Transfer of Land Act*, is practically gone.

In my opinion the appeal should be allowed.

I decide nothing about sec. 22 of Act No. 2849, because it appeared during the argument that in the Supreme Court counsel, in answer to *Lowe* J., expressly stated that no reliance was placed on it. But had it been relied on, a very serious question would have arisen. By the *Transfer of Land Act* the State undertakes under certain circumstances to certify to the ownership of land. It prescribes its own conditions, and authorizes and requires the Registrar, on behalf of the State, to perform the necessary duty, on stated conditions. Sec. 248 is a procedure section, whereby the Court may direct the Registrar to carry out the duties required of him. But the Court under sec. 248 cannot alter or increase those duties, or deprive the Registrar of any discretion to refuse to register with which the State has armed him. His discretion to refuse is the State's discretion to refuse. And therefore, when the solicitor for the Society placed before the Registrar two transfers, supposedly regular, supposedly instruments capable of registration, and on which duty was paid as such, and when these were put forward as effective documents and never challenged as invalid, I should hesitate to put aside altogether the later legislative direction in sec. 22 and override a discretion which had never been directed to the flaw of the Society's own creation.

Appeal dismissed with costs.

Solicitor for the appellant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the respondent, *William J. Robb.*

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(1) (1889) 23 Q.B.D. 579.

(2) (1893) 19 V.L.R. 62; 14 A.L.T. 177.