

the impression that Lye was in a position to re-sell, but that impression was not due to anything said or communicated to them by or on behalf of plaintiff. And they had full notice and knowledge of his rights, whatever they were.

That being the state of the case, their only defence to this action is, that at the time of the agreement with them plaintiff's rights were at an end, and that Lye was legally in a position to re-sell the property.

But that was not the position. Lye's action to enforce the agreement with plaintiff was pending, and, although plaintiff had entered an appearance . . . he had done nothing to prevent his afterwards doing as he did, i.e., elect to perform the contract and pay the purchase money into Court. As between him and Lye, the agreement was still subsisting and in a position to be carried into effect. It was prior in point of date to the agreement made by Ruttan, and the registration of the latter gave no advantage to defendants in view of their knowledge of the facts.

It appears from Ruttan's testimony that the receipt he gave to Jones for the \$500 paid at the time contained words similar to the stipulation in the agreement to the effect that "the vendor reserves the right, if he should be unable to make title to the lands herein described, to return the amount paid to the purchaser;" and that these words were inserted because of the uncertainty as to plaintiff's position under his agreement. It is obvious that all parties understood that if Lye was not off plaintiff's agreement, or could not free himself from it, the other agreement was not to be treated as a subsisting contract. And, in the circumstances, the appellants are not in a position to claim the benefit of the registry laws, or to set up the agreement as a shield against plaintiff's claim.

The appeal should be dismissed with costs, except those of and incidental to the examination of Ruttan, which plaintiff should pay to appellants.

OSLER, J.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., also concurred.