

SECOND DIVISIONAL COURT.

OCTOBER 3RD, 1919.

CANADIAN FREEHOLD SECURITIES CO. LIMITED
v. McDONALD.

Evidence—Assignment to Plaintiffs of Contract of Defendant to Purchase Land in Saskatchewan—Action for Specific Performance—Defence Based on Misrepresentation—Proof of—Conflict of Oral Testimony—Inferences from Documentary Evidence—Finding of Trial Judge—Reversal on Appeal—Equities Available against Assignees.

Appeal by the defendant from the judgment of ROSE, J., 16 O.W.N. 139.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

T. G. Meredith, K.C., for the appellant.

W. T. McMullen, for the plaintiffs, respondents.

LATCHFORD, J., reading the judgment of the Court, said that the learned trial Judge accepted Mr. Hegler's denial of the defendant's statement that Mr. Hegler represented that any defence based upon misrepresentation made by Marsden or Mountain would be open to the defendant as against the plaintiffs, if the defendant entered—as he did—into a covenant with the plaintiffs to pay them the amount payable under the original agreement with Mountain. Upon that covenant the plaintiffs' right of action depended.

The result arrived at was, no doubt, open to the Court below, notwithstanding the fact that Mr. Hegler was the solicitor on the record for the plaintiffs, and therefore materially interested in the outcome of the action, and that he testified to the good repute of the defendant.

But the case did not turn wholly upon the credibility of these witnesses. Regard must be had to documentary evidence of the utmost significance, from which the proper inference had not been drawn—the letter addressed to the defendant by Mr. Hegler himself, on the 1st May, 1916, when he had no interest in the present litigation. Properly regarded, it directly contradicted Mr. Hegler's evidence at the trial, and confirmed the testimony of the defendant. "I told you," Mr. Hegler states, "that your acknowledgment would in no way affect your original contract with Mr. Mountain, and that, notwithstanding your executing that acknowledgment, any defence you might have as between you and Mountain would not be prejudiced by you signing the agreement in any way, because the Canadian Freehold, in taking