

Privy Council Appeal No. 184 of 1919.

The National Bank of Australasia, Limited - - - - *Appellants*

v.

Paul Hamilton Morris Joseph, since deceased, and others - - *Respondents*

FROM

THE SUPREME COURT OF SOUTH AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 26TH OCTOBER, 1920.

Present at the Hearing :

LORD BUCKMASTER.

LORD ATKINSON.

MR. JUSTICE DUFF.

[*Delivered by* LORD BUCKMASTER.]

The appellants in this case are the National Bank of Australasia, Limited, and the contesting respondents are the Hindmarsh Square Congregational Church, Incorporated. For simplicity these parties will hereafter be referred to as the Bank and the Church respectively.

The real question for decision relates to the existence and priority of certain equitable interests claimed by the Bank and the Church over a piece of land situate in Hindmarsh Square, in the city of Adelaide, being portion of the Town Acre No. 150, and comprised in Certificate of Title Register Book, Vol. 22, Folio 128. The circumstances that have given rise to the litigation are unusual, and, though there is no controversy as to facts, the obscurity of the chief document upon which the rights of the Church depend renders the dispute difficult of determination. The first respondent, Paul Hamilton Morris Joseph, who, being now dead, is represented by the last respondent, George McEwin, was a minister of the Congregational denomination; in the early part of 1916 he entered into negotiations with the Church, who then owned, subject to a mortgage for £1,200, the said piece of land in Hindmarsh Square, on which stood their chapel, schoolroom and other buildings, with the object of securing that a new site should be obtained for the erection of church premises and buildings, and that he should be appointed Pastor of the Church

for a period of ten years. It appears to have been contemplated that this scheme would be effected by raising money through the instrumentality of Joseph, who was to be aided in this purpose by the transfer of the Hindmarsh Square property. The actual details of the negotiations are not disclosed, nor are they indeed relevant, for the arrangement was reduced into writing, and is to be found in an agreement made between the Church and Mr. Joseph of the 15th February, 1916. Some of the terms of this agreement are sufficiently clear, but these unfortunately are not the ones that materially affect the present controversy. By Clause 1 Mr. Joseph was to be appointed to the office of minister for the period of ten years from the 1st October, 1916, and by Clause 2 liberty was to be given to him to buy a piece of land in the city of Adelaide to build a new church and other necessary buildings. Clauses 3 and 4 are in the following terms :—

“ 3. So soon as the Pastor shall have entered into an agreement for the purchase of such other land as a new site for a Church the Church shall transfer the said land at Hindmarsh Square aforesaid to the Pastor or his nominee subject to the said Memorandum of Mortgage.

— “ 4. Upon the registration of such transfer the Pastor shall stand possessed of the land and premises at Hindmarsh Square aforesaid subject to the terms of this agreement.”

Clauses 5 and 6 provide that the new site shall be purchased in the name of the Church who shall grant a lease thereof to the Pastor at a nominal rent of 5s. Clause 7 throws in plain terms upon the Pastor the obligation of advancing the monies to purchase the new site and to erect complete and furnish the buildings as will be seen from the following words taken from the clause :—

“ The Pastor shall advance the monies necessary to purchase the new site and to erect, complete and furnish the new buildings to be erected thereon.”

Clause 8 is the only remaining clause that deals with the property in the old site, and it is as follows :—

“ 8. The Pastor shall use his best endeavours to sell the present premises for cash or on terms at or near their market value, to be ascertained by such valuator or valuers as the Pastor shall appoint or employ. The net proceeds of any such sale shall as and when received by the Pastor be applied in or towards the cost of purchasing the new site and erecting and furnishing such buildings as aforesaid. The price agreed with any purchaser of the land and premises at Hindmarsh Square aforesaid shall be in the absolute discretion of the Pastor.

The rest of the agreement relates to the power of the Church to acquire the new site and the buildings ; this it provides by securing that the Pastor should grant the Church the option of buying the new site and the buildings at a price equal to one-half of the net cost. Clause 10 shows how the net cost is to be ascertained. It states that interest is to be charged on disbursements by the Pastor at the rate of 5 per cent., and from the total outlay the net proceeds of the sale of the old premises are to be deducted, and also the annual payments which are specified in the subsequent

clauses, but that no interest is to be charged until the new premises are fit for occupation, and if the Hindmarsh Square property be not sold its net value is to be set off in the place of the purchase price. It is also provided that the option to purchase is only to be exerciseable after the expiration of 10 years, or in the event of the death of the Pastor within twelve months of his death. It would appear that the benefit obtained by the Pastor from this agreement was a security of tenure of office for a period of ten years, and the retention for his own benefit of the balance of the contributions and offertories after providing for the expenses set out in the agreement. The only property with which he was fortified either for the purpose of raising money or securing himself against the total cost of the buildings, was the site of the old buildings in Hindmarsh Square. That it was contemplated between the Church that this property should be used for such purpose is made plain by the Memorandum of Transfer, which was signed on the same date as the agreement, by which the Church, who were then the registered proprietors of the property, transferred the whole of its estate and interest in the Hindmarsh Square property to Mr. Joseph, in order to vest the piece of land in him "for the purposes of sale and realisation by him, and as collateral security for advances up to the sum of £10,000, to be made to the said Church by the said Paul Joseph." This transfer was made subject to the existing mortgage for £1,200, and was registered on the 24th February, 1916. On the same day there was also registered a discharge of the mortgage for £1,200, which was paid off by Joseph out of monies drawn by him out of the Bank. Joseph had before the actual date of the agreement acquired the new site on which it was contemplated to build the Church, which had been transferred to him on the 2nd February, 1916, for the sum of £3,612 10s.

At the date of this transaction Joseph was a customer at the Bank with a private account, and before the execution of the agreement, he had opened a further account with the Bank, which was called the "Church Account." On this account and on his private account Joseph proceeded to draw monies, which, in part at least, were used for the purpose of paying for the new site, of redeeming the mortgage on the old site and executing such work as was in fact executed upon the new property. To secure these monies he deposited with the Bank the following securities: on the 25th February, 1916, a certificate of title of the new site; on the 20th March, 1916, the certificate of title of the Hindmarsh property; and on the 12th June, 1916, the certificate of title to Part Town Acre No. 748 was deposited and another account called No. 1 account was opened. All the above securities were deposited to secure any advances made and to be made to Joseph by the Bank on any account whatever. Part Town Acre No. 748 has been realised and its proceeds applied towards payment of the No. 1 Account, but a balance is still due on this account, together with considerable sums owing on the Church account and the private account.

On the 13th June, 1916, the Bank lodged a caveat against all the lands, and on the 17th June, 1916, the Church took the same step, but the rights of the parties are, on the evidence, wholly unaffected by either of these caveats. On the 19th June, Mr. Joseph resigned his office as Pastor, and in November of 1917, the Bank took proceedings against Joseph and the Church claiming the necessary mortgagee's relief in respect of their security. To these proceedings Joseph's representative has been added as defendant, he having died since the institution of the action. The Chief Justice of South Australia decided in favour of the Bank's claim so far as it affected the new site, but declared they were not entitled to any further interest in the old site, *i.e.* the Hindmarsh Square property, than as security for the monies that were applied in redemption of the mortgage of £1,200. So far as the new site was concerned the Church accepted the judgment, but the Bank appealed against the Order relating to the old site, and on the 18th March, 1919, the Full Court of the Supreme Court of South Australia delivered judgment supporting the judgment of the Chief Justice, Mr. Justice Buchanan alone dissenting. From that judgment this appeal has been brought.

In support of their claim, the Bank has contended first that Joseph was in the circumstances the actual owner of the property, or, if he were not, he was armed by the Church with the full certificates of title and with authority as shown by the transfer to use these certificates for the purpose of raising money up to £10,000, and they, having no notice whatever of the limitation of his powers, were entitled to deal with him as the true owner, and are not affected by any relations as between himself and the Church. The first of these contentions cannot in their Lordships opinion prevail and the latter leaves out of consideration one important and agreed fact which does not appear to have been prominently brought to the notice of the learned Judges of the Full Court. That fact is this, that as appears by the agreed statement, the Church remained throughout in occupation and enjoyment of the Hindmarsh Square property. The words of the statement of facts upon the point are as follows:—

“The said Hindmarsh Square Congregational Church Incorporated has never ceased to use occupy and enjoy and is still in possession of the said piece of land and the Church and schools and other buildings thereon.”

It is quite true that, in the same statement of facts, it appears that the Bank received the certificates of title without notice or knowledge of or enquiry as to the said agreement, or of any alleged claim or equity of the Church. But this statement must be taken as subject to whatever notice would be created by the fact of possession. There is nothing that will distinguish this case from the ordinary case of possession of real estate, and it has always been held that such possession is in itself notice of the title under which such possession is retained which anyone dealing with the property cannot, without risk, ignore. The cases of *Daniels v. Davison* (16 Ves. Jun. 249), and *Cavander v. Bulteel* (9 Ch. Appeals 79) are sufficient to show the permanence

of this doctrine, and the wide scope of its application. It must, therefore, be assumed that the Bank did, in fact, have the knowledge that enquiry as to the nature of the possession held by the Church would have made plain, that is knowledge of the agreement of 15th February, 1916, and the contemporaneous transfer; if, therefore, the effect of these documents is to establish or retain any outstanding equity in the Church, it must be subject to such equity that the Bank's title has arisen.

It is strongly argued on behalf of the appellants that the agreement does not reserve any such right in favour of the Church, and their Lordships are much impressed by this contention, for it is impossible to understand for what purpose the Hindmarsh Square site was to be transferred to Mr. Joseph, excepting to enable him to satisfy the obligations cast upon him to advance the money for buying the new site and building for the new Church, and the agreement appears to place no limitation on his powers of dealing with the property.

It is, however, unnecessary to discuss this question, for their Lordships think that the true effect of the agreement cannot be understood except by considering it in relation to the accompanying transfer. This makes plain that the site was not to be treated as conveyed to Joseph for his own absolute beneficial interest, but primarily for the purpose of sale and realisation; upon sale the monies were to be applied in the manner specified in clause 8, and the interest of the Church is preserved by the option to purchase at half the net cost; until sale Joseph's interest was limited to holding the property as security for advances up to £10,000 that he should make to the Church, a wholly unnecessary provision if the property were Joseph's own. This gave Joseph a limited right to deal with the property before sale and it was this right which was transferred to the Bank.

The notice which the Bank must be assumed to have had through the possession of the Church is notice of all, and not of a selected portion of the facts, and in this connection the transfer is just as important as the agreement which it accompanied, and by this their rights are limited and defined.

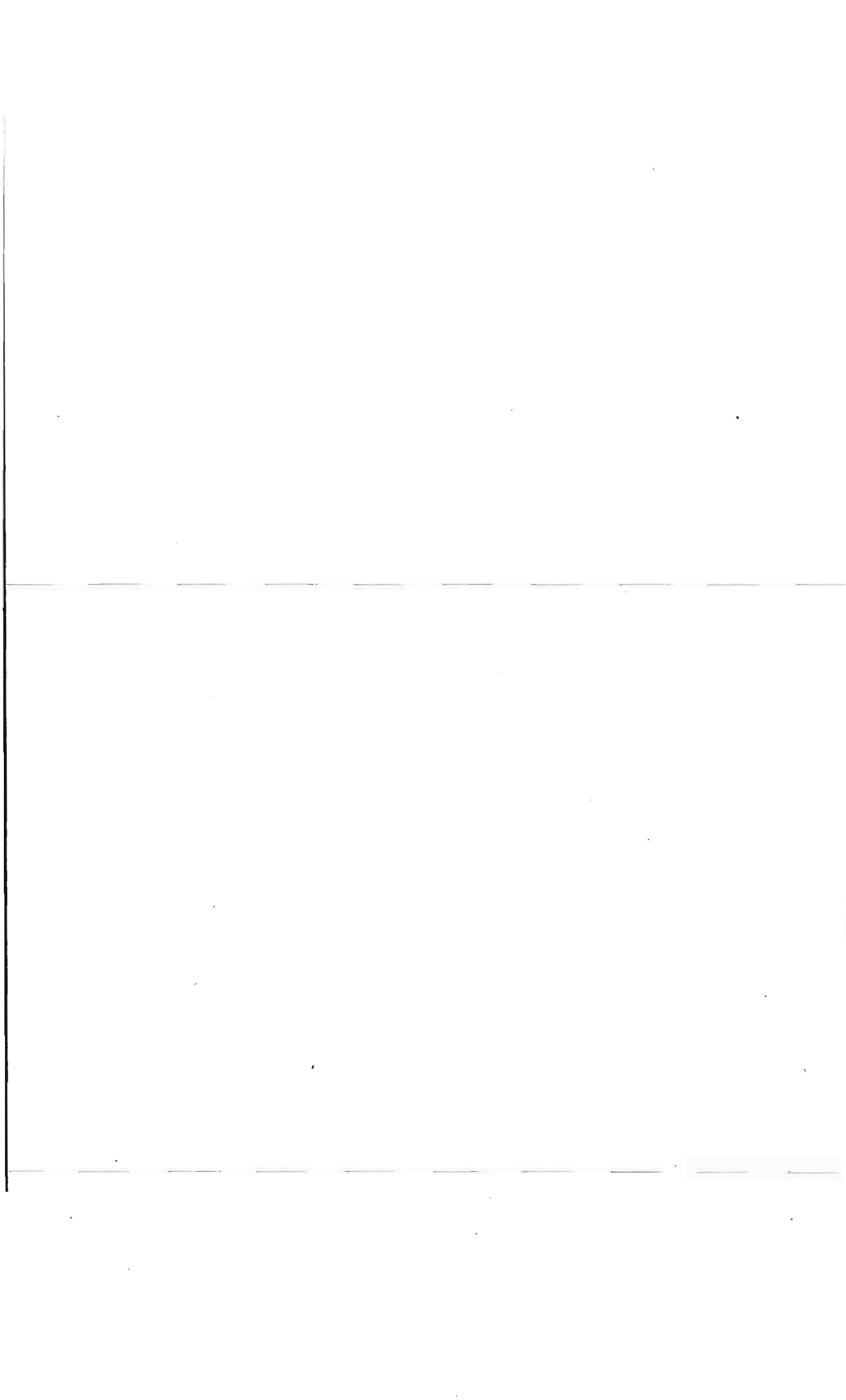
It is unfortunate that this view does not appear to have been presented in either of the Courts through which this case has passed. But it is in their Lordships' opinion conclusive of the controversy.

The scheme contemplated by the agreement has broken down, the property in Hindmarsh Square has not been realised, and their Lordships think that the rights of the several parties in it are as follows:—

First that Joseph had the right to hold it as security up to £10,000, to cover the advances that he made to the Church: that, subject thereto until sale, the Church were in equity the owners of the property, and that the Bank can only in the circumstances take from Joseph the title which he could give.

It will therefore be necessary to take an account to ascertain how much money Joseph did in fact advance to the Church, and

the Bank will be entitled to hold the Hindmarsh Square property as security for their advances to Joseph up to but not exceeding £10,000 of that amount. It will not be necessary for the Bank to show the application by Joseph of the particular monies advanced by them; to the extent to which Joseph made advances to the Church up to £10,000 he was entitled to pledge the property, and to that extent the Bank's security holds good. As by the judgment in favour of the Bank with regard to the new site, they have substantially succeeded on their appeal, they will accordingly be entitled to their costs here and in the Courts below, with power to add such costs to their security. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

THE NATIONAL BANK OF AUSTRALASIA,
LIMITED

vs.

PAUL HAMILTON MORRIS JOSEPH, SINCE
DECEASED, AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.
1920.