1920

*May 19.
*June 21.

PETER HEICHMAN (DEFENDANT)..APPELLANT;

AND

NATIONAL TRUST COMPANY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Marriage—Contract—Ante-nuptial representations—Administrators.

H., desiring to marry S.'s daughter, went with S. to H.'s father, who verbally told them he was giving to H. some land and certain chattels. S. then consented to the marriage, which took place afterwards. H. and his wife resided on the land and brought there some of the chattels but after H.'s death, his father removed them.

Held that H.'s administrators could enforce the transfer of the land and the recovery of the chattels against H.'s father.

Held also that H.'s father was bound to make good his representations on the faith of which the marriage took place. Mignault J. *dubitante.*

Per Mignault J.—The ante-nuptial promise by the father was a contract of gift and the subsequent marriage was a valuable consideration to support it.

Judgment of the Court of Appeal (13 Sask. L.R. 22; [1920] 1 W.W.R. 220) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) affirming the judgment of the trial judge and maintaining the respondent's action.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 13 Sask. L. R. 22; [1920] 1 W.W.R. 220.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Geo. A. Cruise for the appellant.

J. M. Stevenson for the respondent.

THE CHIEF JUSTICE.—I must say that, alike during the argument at bar and since then during my reading and examination of the case and factums, I entertained some misgivings as to the soundness of the judgment appealed from.

The question seems to me reduced to this: Had Stephen Heichman, the defendant's son, at the time of his death such a cause of action as entitled him to maintain an action against his father either for specific performance of his alleged agreement to give and convey to him the two-quarter sections of land in question or, in the alternative, for damages, as claimed in the statement of claim. If he had not, it goes without saying that the plaintiff company, as administrator of his estate, could not maintain the action.

I have reached the conclusion that the findings of fact by the learned trial judge are clearly such as the evidence justified. His rejection of the evidence of Paul Serak and his complete discrediting of him and his acceptance of the evidence of Solinak and Antonenko as to what took place between the father and the son when the written document signed by the defendant, the father, purporting to evidence that he had conveyed the half-section of land in question to his son was read and that this was done and intended to be done in consideration of his son marrying Mary, the daughter of the witness Solinak, coupled with the

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fact that such document satisfied the father of the intended bride who gave his consent to the marriage which shortly afterwards took place, satisfy me that the judgment of the Court of Appeal was right and the ground on which it was based of estoppel was sound.

The deceased son was induced to change his condition in life and enter into a marriage with Mary Solinak on the explicit statement made and the written document signed by defendant and read by the son in the father's presence to his future father-in-law that he, the son, was the owner of the half-section of land in controversy, as he, the father, had transferred the half-section to his son or was about doing so.

It does seem to me that the son having been thus induced to change his condition in life and assume the duties and responsibilities of married life could enforce that contract as against the father, the defendant herein, and that the latter would, in equity, be estopped from repudiating his representations of fact respecting the ownership of the half-section in question or "from setting up his own iniquity as a defence."

The representations of fact made by the defendant and which resulted in the marriage of his son related to, and covered as well, the personal property involved in the action. His representations were that he was giving the half-section of land to his son and the horses and machinery necessary to work the same.

I concur in the judgment of the Court of Appeal as stated in the reasons for judgment of Mr. Justice Newlands on the main and substantial question before us, which I think is sufficiently supported by the authorities to which he refers.

I cannot, however, agree with respect to the point of a partnership reference on which he thinks an amendment of the trial judge's judgment should be made. No such question was pleaded by the defendant, or in issue, or thrashed out at the trial and I would restore the trial judge's judgment unamended, excepting that the extension of the time given for the return to the plaintiff of his personal property should date from the day of this judgment.

I think this appeal should be dismissed with costs.

IDINGTON J.—I am of the opinion that the finding of facts by the learned trial judge was amply justified by the evidence assuming he was right, as a perusal of the relevant evidence assures me he was, in utterly discrediting the witness Serak as he did in a minor degree the appellant.

It might have been more satisfactory had the learned trial judge expressly said his finding was arrived at and intended to be applied in light of and in conformity with the statement of the law correctly stated by the learned judges in the Court of Appeal.

There is no doubt that they viewed the facts disclosed in the evidence as relevant to the principles of law upon which they proceeded.

It is very easy to confuse a representation of an existent fact with a promise to produce a condition of things in harmony therewith.

I see no reason to think that the Court of Appeal has done so and thereby erred in the application of the relevant law upon which they rely.

The mode of thought, and expression given thereto through interpreters, as in this case, is much more likely to have been correctly appreciated by the

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learned judges in appeal, by reason of their experience in dealing with the like incidents of a trial in the province of Saskatchewan, than we who have not had the same, though possibly something analogous, in our respective experience.

We should, therefore, be slow to reverse in such a case where we find the Court of Appeal has correctly apprehended the principle of law upon which they profess to act and apply thereto the evidence presented under such like difficulties.

Moreover, it is quite clear that what Solinak saw appellant about, was to be assured of the existent financial condition of his proposed son-in-law, in order to secure the future happiness of his daughter whose marriage he was being asked to consent to.

He left convinced by the appellant's actual representations and conduct that what had been done to satisfy him in that regard had in fact, by and in conformity with the representations or silence giving consent thereto as actual representations of fact, been accomplished.

I am, therefore, not disposed to act upon mere criticism of forms of expression of an interpreter suggesting another possible meaning than that which the court below has placed thereon, when clearly seized, as that court seems to have been, of the principle of law to which the evidence must be applied.

I therefore think the appeal fails.

But in regard to the cross-appeal I doubt if the facts in any way one can look upon them, give any title to the measure of relief which the court below has given.

If the parties are well advised they can reach a much more equitable result than anything based either upon the assumption of any partnership to be

implied from the facts or adjustment based thereon, or anything analogous thereto, and would suggest they attempt same before the cross-appeal is finally disposed of.

In the event of their failure we must dispose of same as best we can.

Meantime I would dismiss the appeal with costs and suspend the disposition of the cross-appeal for such brief period as the parties may intimate a desire for their attempting to consider same.

ANGLIN J.—Although I was at first somewhat in doubt, on further consideration of the evidence of Efram Solinak and George Antonenko, in the light of all the circumstances, I think it sufficiently supports the finding that a representation was made by the defendant that his son, Stephen, was the actual beneficial owner of, if not the legal holder of the title to, the half-section in question. I see no good reason why the plaintiff, as personal representative of Stephen Heichman and as trustee for Mary Heichman, whose intermarriage took place, as the defendant knew was intended, on the faith of that representation, cannot maintain this suit. It is not necessary to discuss the other grounds of action preferred by the plaintiff, viz., actual conveyance and contract to convey. For the reasons more fully stated by Mr. Justice Newlands I would dismiss the appeal with costs.

BRODEUR J.—This is an action instituted by the administrator of the deceased Peter Heichman for a transfer of a half-section of land in Saskatchewan and the return of certain chattels.

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Brodeur J.

The deceased was married to Mary Solinak under the following circumstances:

He went to see her at Battleford where she was living and she expressed then her willingness to marry him provided her father would be agreeable. The father of the bride, before giving his consent, wanted to know about the financial situation of the young man, met his father and there it was represented to him that the prospective son-in-law was the owner of the half-section in question in this case and of certain chattels. He was shewn a typewritten paper describing the son as the owner. The father of the young girl was satisfied with the representations made and the marriage took place a short time afterwards.

The young man and his wife resided with his father for a while and then went to settle on this half-section where he died a few months after.

After his death (the young wife being herself very sick) his father brought her to his house and removed all the chattels from the half section, and even the money which the young couple possessed.

Soon after the young wife was removed to some other place and the present action in recovery of the land and of the chattels is now instituted.

The defendant claims that his son was to give him a certain sum of money, viz., $3,000, and that credit was to be given on the purchase price of the half-section and that the contracts to that effect, though drafted, were never executed.

The evidence is somewhat conflicting as to what was said and done; but the trial judge and the Court of Appeal accepted the evidence of the plaintiff.

This evidence shows that the defendant represented to the father of the bride that his son was the owner of the property in question and that the payment of a sum of $3,000 was never mentioned.

What has become of the slip of paper which was read at the interview between the two fathers? The respondent denies its existence but the court has found that such a document was read. Has this document been taken by the appellant from the house of his son when he took away everything, even the money? Of course the appellant denies that but such a thing might have occurred.

There is no doubt that the evidence as accepted by the courts below is to the effect that the appellant represented that his son was the owner of the land and chattels in question. The law is that where upon proposals of marriage third persons represent anything material in a light different from the truth they shall be bound to make good the statement they make. *Montefiori* v. *Montefiori* (1), *Mills* v. *Fox* (2).

The appeal should be dismissed with costs.

There is a cross appeal.

The trial judge has charged the defendant with the value of the whole crop. The evidence shows, however, that this crop had been put in by the defendant himself and that he should not be charged with the whole value thereof and a reference was ordered to determine what amount should be properly charged to the defendant. The cross-appeal should be held over in order to give the parties an opportunity to settle.

(1) I Wm. Bl. 363. (2) 37 Ch. D. 153, at p. 162.

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MIGNAULT J.—In this case the evidence is very conflicting and the learned trial judge, on the vital fact as to the ownership by the appellant's son, Stephen Heichman, of the south half of section 30 of township 38, believed the testimony adduced by the respondent in preference to that of the appellant's witnesses. He did not, however, state specifically the facts found by him, being content with saying that he found that the facts were as alleged by the witnesses on behalf of the respondent. Reference must therefore be had to this testimony, which was taken through an interpreter, the witnesses being Russians.

The story is that Stephen Heichman desired to marry Mary Solinak and asked the latter's father, Efram Solinak, to allow the marriage, pretending that he owned two farms. Thereupon Solinak, to make sure of Stephen's prospects in life, went with Stephen and one George Antenenko to see the appellant. I quote from his testimony.

Q. What was said to Peter Heichman?

A. I told Peter Heichman, "Your son wants to marry my daughter."

Q. Yes?

A. Stephen told me that he had two farms, that you were giving him four horses and all the machinery.

Q. Yes?

A. Peter Heichman then said, "Yes, I am giving those."

Q. Did he say he was giving the land too, as well as the machinery?

A. Then I asked, "In whose name stands the land? Is the land standing?"

Q. Yes?

A. "The land is in my name but I am giving it to him. He is my son."

Antenenko swore:

Q. What took place?

A. We came over there to Peter Heichman's after 12.

Q. Yes?

A. Only John was home, and the children. Stephen then told John to go and get the father.

Q. Yes?
A. Then the father came and we got acquainted.
Q. Yes?
A. Solinak then started to ask questions.
Q. What about?
A. "Your son wants to marry my daughter."
Q. Yes?
A. 'He says he has two farms, four horses, and all the machinery."
Q. Solinak said that to Peter?
A. Yes.
Q. And what did Peter Heichman say?
A. Peter Heichman then said, "Yes, that is right." Peter Heichman (should be Solinak) then asked in whose name was the land.
Q. Peter Heichman asked?
A. Solinak asked Peter Heichman in whose name was the land.
Q. Yes?
A. And Heichman then said, "It is in my name."
Q. Yes?
A. "Are you going to make this transfer over to Stephen?" "Yes, all right."

That conversation took place late on Sunday night, the 10th February, 1918. On the Monday morning, the 11th, the appellant went with Stephen to see a Justice of the Peace, one Paul Serak, and the two afterwards returned with a typewritten paper, which Stephen read to Solinak and Antenenko in presence of the appellant. The former gives the contents of the paper as read as follows:

I, Peter Heichman, give the south half of section 30, township 38, range 11, to my son Stephen, to my son I am giving this land.

Antenenko's version is:—

I, Peter Heichman, turn over to Stephen Heichman the south of 30, half section 11-38; 38-11.

This satisfied Solinak and he consented to the marriage and returned home. The marriage took place on March 1st, Stephen brought his wife home, and afterwards the appellant built him a house on the south half of section 30, where he resided until his death in October of the same year.

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The difficulty of the respondent's case is no doubt increased by the fact that if such a paper ever existed it has disappeared, and this renders it imperative to carefully scrutinize the secondary evidence by which it is sought to prove its contents. The same critical scrutiny must be directed to the evidence by which the appellant attempted to contradict this secondary proof, for he afterwards called Paul Serak, the Justice of the Peace whom the father and son went to see on February 11th, and Serak stated that he had drawn up a paper purporting to be a receipt from the appellant to Stephen for the sum of $3,000, as a first payment on some land, and he is not sure whether the land was described in the receipt. Serak also said that he had subsequently prepared a formal agreement of sale of the land in question which was never signed, and one of the copies of which he files. The trial judge however did not credit Serak's testimony, and the alleged receipt is not produced, so I will not further consider Serak's story.

Apparently the learned trial judge considered the evidence sufficient to show that a gift had been made by the father to the son in consideration of the latter's marriage to Solinak's daughter. In the Court of Appeal, the learned Chief Justice of Saskatchewan, very reluctantly he said, acquiesced in the strong findings of the trial judge. Mr. Justice Newlands, with whom Mr. Justice Lamont concurred, based his judgment in favor of the respondent on a representation made by the appellant to Solinak, Antenenko and Stephen Heichman, that he had given this farm and the implements to Stephen, estopping the appellant from now denying the truth of this representation.

Mr. Cruise, who very ably argued the case on behalf of the appellant, contended that if the respondent relied on a contract of gift by the appellant to Spephen, no action could be taken on such a contract under the statute of frauds in the absence of a memorandum signed by the appellant. He further urges that no sufficient consideration has been shown for a gift of, or a promise to give, the land to Stephen. And as to the claim of estoppel founded on representation, Mr. Cruise argued that there was no representation of an existing fact, but at the most a representation, in the first interview, that the appellant would make over the land to Stephen. In regard to the document read in the second interview, Mr. Cruise urged that no existing fact was then represented but merely a statement made as to its contents. He further contended that if there was any representation, it was made to Solinak who is not a party to the action.

As to the contention based on the statute of frauds, I may say that the appellant did not plead the statute. Moreover this contention is fully answered by the evidence given by Solinak and Antenenko and believed by the learned trial judge of the contents of the writing read by Stephen in the appellant's presence, which writing was stated to have been signed by both the appellant and Stephen. This writing, it is true, has disappeared, but evidence was made without objection of its contents and I have no doubt that where a sufficient memorandum in writing under the statute of frauds is proved to have existed but to have been lost, secondary evidence of its contents can be made. As sworn to by both Solinak and Antonenko, the document read by Stephen satisfies all the requirements of the statute.

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Then as to consideration, marriage is a valuable consideration to support an ante-nuptial promise by a third person (Halsbury, Contract, No. 803). *Shadwell* v. *Shadwell* (1), is in point. There the plaintiff's uncle had promised an annuity to the plaintiff on hearing of the latter's intention to marry. It was held that the marriage was sufficient consideration to support the promise. Mr. Cruise attempted to distinguish the case of *Shadwell* v. *Shadwell* (1) by saying that here the promise was made to obtain the consent of the prospective father-in-law to the marriage and not to Stephen to induce him to marry. It must not be forgotten however that Stephen was the person chiefly interested in obtaining both the consent of Solinak, which would permit of his marriage, and the settlement on him of the land which would aid him in discharging the added pecuniary obligations resulting from his marriage. In the words of Erle C. J. Stephen

> may have made a most material change in his position, and induced the object of his affections to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be withheld. (*Shadwell* v. *Shadwell* (1) At page 174.

I must therefore think that the objection as to want of consideration is not well taken.

Thus far I have considered the respondent's claim in so far as it can rest on a contract. I think the trial judge and the Chief Justice of Saskatchewan so viewed it. As I have said, however, the two other judges of the Court of Appeal preferred to base their conclusions on a representation made by the appellant that he had given the land to Stephen, estopping him from now denying the gift. I cannot free myself from

(1) 9 C.B. N.S. 159.

doubt that this ground should be adopted. So far as there was representation, it would appear that it was solely made to Solinak, and Stephen, by reading the document signed by him and his father, was, in a way, a party to this representation. But so far as there was a contract, it was made with Stephen and my opinion is that it was sufficiently supported by the consideration of Stephen's marriage. On this ground I think the learned trial judge was right in giving judgment to the plaintiff.

I would dismiss the appellant's appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cruise, Tufts & Lindal.*

Solicitors for the respondent: *Bence, Stevenson & McLorg.*