CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

HERMAN C. MORSE (DEFENDANT)....APPELLANT; 1919 *Mar. 10, 11 *May 6

AND

AMOS D. KIZER (PLAINTIFF)........RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Registry laws—Registration of mortgage—Notice of judgment—Priority—Nova Scotia "Registry Act," R.S.N.S., [1900] c. 137.

The mortgagee of land in Nova Scotia who registers his mortgage with notice of a judgment against the mortgagor, afterwards registered, does not obtain priority over the judgment-creditor. Idington J. dissents.

Judgment of the Supreme Court of Nova Scotia (52 N.S. Rep. 112; 39 D.L.R. 640), affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the judgment.

One Blinn was convicted at Bridgetown, N.S., of having obtained money under false pretences. After the conviction the court made an order for compensation, having the effect of a judgment, under section 1048

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

(1) 52 N.S. Rep. 112; 39 D.L.R. 640.

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of the Criminal Code, which order was initiated by appellant who was counsel for the prisoner. Appellant on the next day took from the prisoner a mortgage on land in King's County, N.S., and had it registered before the judgment. The judgment creditor then brought action for an order declaring that his judgment had priority.

The trial judge granted such order and his judgment was upheld by the court *en banc.*

Morse, appellant in person.
O'Connor K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons for judgment of my brother Anglin and would dismiss this appeal with costs.

IDINGTON J. (dissenting)—Notwithstanding the elaborate history of the law submitted I am of the opinion that this case should be decided by the construction of the relevant sections in the "Registry Act," R.S.N.S., 1900, ch. 137.

As I read same the bare fact that a mortgagee has notice of outstanding unregistered judgments against him giving the mortgage in no way touches the rights acquired by the mortgagee taking and registering a mortgage.

To hold otherwise would lead to rather alarming consequences.

Followed out logically a judgment debtor who was notoriously insolvent never could give a valid mortgage, not even for an actual advance of cash paid him.

Section 16 of the Act in question only makes registration of a judgment effective "from the date of such registry."

And if a mortgagee cannot rely upon that I do not see how any man can safely take a mortgage if he has reason to believe there is a judgment anywhere against his mortgagor.

If the facts had been as Mr. Justice Drysdale through error states them, then an entirely different case would have been presented For I think it is at least fairly arguable that if a man by theft or fraud deprives another of specific money which can be clearly traced into an investment in the purchase of real estate, a mortgagee taking with full knowledge thereof a mortgage upon such real estate would have some difficulty in maintaining his security against the party so defrauded.

Here it is neither alleged in the pleading nor attempted to be proved that appellant knew that the money which was invested in the real estate in question was that which had been obtained by false pretences.

It is alleged in the pleading that the said money was that so obtained.

Why the plaintiff so carefully abstained from alleging that appellant knew that alleged fact I cannot understand on any other hypothesis than that plaintiff did not believe such a charge and hence properly refrained from making it.

The temptation to make the charge I should surmise must have been great.

I think the appeal should be allowed with costs.

ANGLIN J.—This appeal from the Supreme Court of Nova Scotia, involving merely a question of priority between a judgment for $71 and a mortgage for $80 upon land said to be of a value insufficient to satisfy both claims, illustrates the necessity for further restricting the right of appeal to this court.

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The defendant, a barrister and solicitor, acted as counsel for one Blinn, accused of obtaining $71 by false pretences from the plaintiff. After convicting Blinn the County Court Judge, on the 14th of March, 1917, made an order for compensation against him under section 1048 of the Criminal Code, which is by that section given the force and effect of a judgment for debt. The defendant initialled the order to evidence his approval of its form. With this actual notice of it but, so far as the record shews, without any intention of defeating the plaintiff's judgment or of embarrassing him in its recovery and without any knowledge of the fact that the $71 fraudulently obtained had been invested in the property covered by it, the defendant on the 15th of March obtained from Blinn a mortgage on some real estate for $80, the amount of his fees for Blinn's defence, and immediately caused it to be registered. The plaintiff's judgment was registered only on the following day. By this action the plaintiff seeks

an order * * * declaring that the compensation order * * * may have precedence and priority on the records of the registry of deeds at Kentville in the County of King's over the said mortgage obtained by the said defendant from the said James F. Blinn.

The trial judge granted this relief and his judgment was unanimously affirmed on appeal.

Much of the argument at bar was devoted to the question whether the plaintiff's judgment gave him a lien on Blinn's real property before its registration. A judgment in nowise affected the debtor's lands at common law. Until the Statute of Westminster 2nd (13 Ed. 1, ch. 18) provided the writ of *elegit* the debtor's lands were not liable in satisfaction. Black on Judgments (2 ed.), sec. 397 *et seq.* Whatever might have been the case under the earlier Nova Scotia "Docketing Acts" of 1758 and 1822, I think it is perfectly clear that under the registry legislation in force in March, 1917 (R.S.N.S., 1900, ch. 137) no lien arises until registration. But, in my opinion, the plaintiff's claim in this action does not depend on the existence of such a lien before registration.

Sections 2 (a), 15 and 16 of the "Registry Act" of 1900 are as follows:—

2. In this chapter unless the context otherwise requires:—

(a) The expression "instrument" means every conveyance or other document by which the title to land is changed or in any wise affected, and also a writ of attachment, a certificate of judgment, a lease for a term exceeding three years, and a vesting order; but does not include a grant from the Crown, a will, or a report of commissioners appointed to make partition.

15. Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to *the same land*, be ineffective unless such instrument is registered in the manner provided by this chapter before the registering of such subsequent instrument. R.S., ch. 84, sec. 18.

16. A judgment, a certificate of which is registered in the manner by this chapter provided in the registry of any district, shall from the date of such registry, bind and be a charge upon any land within the district of any person against whom such judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment. R.S., ch. 84, sec. 21.

Section 3 of ch. 170, "The Sale of Land Under Execution Act," is as follows:—

3. The land of every judgment-debtor may be sold under execution after the judgment has been registered for one year in the registry of deeds for the registration district in which the land is situated. R.S., ch. 124, sec. 1 (part).

The plaintiff's right after obtaining his order for compensation was to cause it at any time to attach to the judgment-debtor's lands in any particular registration district by registering a certificate of it in the Registry Office of that district under section 16. With actual notice of that right the defendant took his mortgage. His position is, I think, not distinguishable from that of an English mortgagee or purchaser taking his mortgage or deed with notice of the right of a

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judgment-creditor to attach the lands of the mortgagor or vendor by suing out a writ of *elegit*, or, if they were situated in a county having a registration system, by registering it in the Registry Office of such county.

The principle of equity on which such a mortgagee or purchaser is held to take subject to the rights of the judgment-creditor as against the mortgagor or vendor is perhaps most clearly stated by Vice-Chancellor Sir W. Page-Wood in *Benham* v. *Keane* (1). After reviewing the earlier cases (*Hine* v. *Dodd* (2); *Tunstall* v. *Trappes* (3); *Robinson* v. *Woodward* (4)), he says, at p. 704:—

> No person having notice of a judgment can by contract with the debtor put himself in a better position than the person with whom he contracts.

The same principle was acted on by Lord Elgin in *Davis* v. *Earl of Strathmore* (5), approved in *Greaves* v. *Tofield* (6).

As put by Lord Hatherly (formerly Page-Wood, V.-C.) in *Rolland* v. *Hart* (7), at p. 684:—

> Actual notice must be shewn, which amounts to fraud in the person who, having such actual notice, attempts through the medium of the "Registration Act" to get priority. * * * The authorities have been uniform in holding that the proof of notice must be very clear and distinct; but if actual notice is proved, then a man cannot take advantage of his registration to invalidate a previous unregistered security.

This doctrine is so firmly embodied in the English Equity system that nothing short of explicit legislation will suffice to render it inapplicable where that system is in force. We had to consider such legislation in the recent case of *Union Bank* v. *Boulter-Waugh* (8).

The language of the English "Registry Act" dealt with in the cases above cited was more explicit than section 16 of the Nova Scotia Act. The Registration

(1) 1 J. & H. 685.
(2) 2 Atk. 275.
(3) 3 Simons 286, 307.
(4) 4 De G. & S. 562.
(5) 16 Ves. Jr. 419, 429.
(6) 14 Ch.D. 563, 571, 573-6.
(7) 6 Ch. App. 678.
(8) 58 Can. S.C.R. 385

Act for the West Riding of Yorkshire (5 & 6 Anne, ch. 18) contained this provision as section 4:—

No judgment * * * shall affect or bind any manors, lands, tenements or hereditaments, situate, lying and being in the said West Riding but only from the time that a memorial of such judgment shall be entered at the Registry Office.

The "Middlesex Registry Act," 7 Anne, ch. 20, by sec. 18, provides that:—

No judgment * * * shall affect or bind any honours, manors, lands, tenements or hereditaments, situate, lying and being in the said county of Middlesex, but only from the time that a memorial of such judgment * * * shall be entered at the said Registry Office expressing, etc.

I read the affirmative provision of section 16 of the Nova Scotia Act as implying the negative expressed in both these English statutes and formerly found in the word "only" of the Nova Scotia statute of 1832, ch. 51, sec. 3; the R.S.N.S. 1851, ch. 113, sec. 20; the R.S.N.S. 1859, ch. 113, sec. 22; and the R.S.N.S. 1864 (Appendix), ch. 113, sec. 22, which was dropped in the revision of 1873, ch. 79, sec. 22.

I agree with Mr. O'Connor that it is the defendant and not the plaintiff who must seek the aid of section 15 of the Nova Scotia "Registry Act" to obtain a priority which equity denies him and that he is excluded from its operation because he is not "a person claiming * * * without notice," and possibly also because a judgment is not an "instrument" within the definition of that word in the statute. In any case, while unregistered, a judgment does not affect the title to land within the meaning of section 15.

Two cases were cited by the appellant as in conflict with the view which I have stated. In *Neate* v. *The Duke of Marlborough* (1), the judgment-creditor had not sued out a writ of *elegit* and it was accordingly held that having no legal right against his debtor's land he could not invoke the auxiliary jurisdiction of

(1) 3 My. & Cr. 407.

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a court of equity to reach his debtor's equitable interest. That decision has no bearing on the equitable doctrine as to the effect of actual notice. It might be in point if the plaintiff here were suing without having registered a certificate of his judgment.

The personal equity affecting the conscience, referred to by Lord Cranworth, in *Johnson* v. *Holdsworth* (1), which prevents a purchaser sheltering himself behind the "Registry Act" to the prejudice of a judgment-creditor of the vendor, with notice of whose judgment he paid his purchase-money, is equally applicable to a mortgagee. The true principle is that stated by Page-Wood V.-C., that no person can by contract made with notice gain a better position than that of the person with whom he contracts. Here, although the debt as security for which the defendant's mortgage was taken was incurred before the plaintiff's judgment had been obtained, the mortgagee had not and from the very nature of the case in the absence of legislation similar to 33 & 34 Vict., ch. 28, sec. 16 (Imp.), he could not have had before that time, any equitable lien or claim upon the land in question, such as might have arisen had the debt been incurred on a valid promise to secure it by mortgage—not dissimilar to the equitable interest of a purchaser who has paid over his purchase-money on the promise of a conveyance.

I would dismiss the appeal.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—I also concur.

Appeal dismissed with costs.

Solicitor for the appellant: *Harry Ruggles.*

Solicitor for the respondent: *John Irons.*

(1) (1850), 1 Sim. N.S. 106.