UNION BANK OF CANADA (DEFENDANT) ..... APPELLANT;

AND

FRANK C. PHILLIPS AND OTHERS—(DEFENDANTS) .....

AND

BOULTER WAUGH LIMITED (PLAINTIFF) ..... RESPONDENT.

1919
*Feb. 18,19.
*Mar. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Statute—Construction—Agreement for sale—Assignment—Assignor giving mortgage—Caveat by assignee—Lapse of—Knowledge by mortgagee—Priorities—"The Land Titles Act," Sask. S., 1917, 2nd sess., c. 18, s. 194. R.S. Sask., 1909, c. 41, s. 162.

In April, 1912, the owner made an agreement to sell a lot of land to P. for a price payable by instalments, and in May, 1913, P. assigned to B. his interest in this agreement. This assignment was not registered, but in June, 1913, B. filed a caveat. In September, 1914, P., having paid the purchase price, was registered as owner of the land subject to the caveat. Subsequently P. executed a mortgage of the land, and when it was registered the mortgagee was made aware of B.'s caveat. In June, 1915, the registrar, under section 136 of "The Land Titles Act" of Saskatchewan, notified B., at the request of the mortgagee, that his caveat would lapse at the expiration of a certain delay, unless continued by order of the court; and, by a subsequent order, B.'s caveat was continued for 35 days from the 8th of October, 1915. As no action had been taken by B. within that time, the caveat was vacated.

Held that, under section 194 of "The Land Titles Act" of Saskatchewan and in the absence of fraud, B., having allowed his caveat to be vacated, could not invoke the knowledge by the mortgagee of the existence of the caveat in order to maintain its priority of claim.

Judgment of the Court of Appeal (11 Sask. L.R. 297; 42 D.L.R. 548; (1918) 3 W.W.R. 27, 196), reversed.

---

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

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Brown C.J. at the trial and maintaining the plaintiff's action. 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.

S. B. Woods K.C. for the appellant.

P. E. Mackenzie K.C. for the respondent.

THE CHIEF JUSTICE.—The question for our decision in this appeal really turns upon the proper construction to be given section 194 of "The Land Titles Act, 1917," of Saskatchewan. Apart from that statute, and especially from section 194, there is little doubt that, under the authorities, the plaintiff respondent would have a right to maintain its action and the priority of its security over that of the bank and that, but for section 194, the failure on its part to maintain or renew its caveat which it had registered to protect its interest would not, with the knowledge possessed by the bank of the respondent's interest, operate to affect such right of priority. As Chief Justice Haultain puts it,

> The outstanding and important facts are that the plaintiff had an equitable interest in the land in question prior in time to the equitable interest of the defendant bank, and that the bank had full knowledge and notice of that interest at the time it took its security from Phillips. Apart from the provisions of "The Land Titles Act, 1917" (2nd sess.), ch. 18, these facts bring this case clearly within well established principles.

The section in question, 194, reads as follows:—

> 194. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into

(1) 11 Sask. L.R. 297; 42 D.L.R. 548; (1918), 3 W.W.R. 27, 196.

or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding.

2. Knowledge on the part of any such person that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The authorities relied upon in the argument at bar were to the effect that a purchaser or morgtagee for value of an equitable interest in lands with actual or constructive notice of other equitable unregistered interests prior to that which he acquired took subject to those interests.

But it seems to me that the object and purpose of this section, apart from cases of fraud, was to lay down a different rule which should govern in cases coming within its ambit, and, unless we are prepared to ignore the section altogether or fritter away its language and meaning, we must hold that, except in cases of fraud, these equitable rules established by the authorities, however just and equitable they may seem to be under ordinary circumstances, are not applicable to cases coming within section 194 of "The Land Titles Act."

I think the object and purpose of such statutes as the one here was very well stated by Edwards J. in delivering the judgment of the Court of Appeal in New Zealand in *Fels* v. *Knowles* (1):—

> The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law. * * * The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives,

(1) 26 N.Z. Rep. 604, at p. 620.

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

The Chief Justice.

in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.

In construing section 194 of "The Saskatchewan Land Titles Act," we must always bear in mind that cases of fraud are excepted from it, but that knowledge of an unregistered interest in lands "shall not of itself be imputed as fraud." The section provides that no person dealing with lands for which a certificate of title has been granted shall

> be affected by any notice direct implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

That seems to be sufficiently explicit and clear as making the register everything and outside notices or knowledge immaterial.

Now in this case a caveat had been filed on behalf of the plaintiff respondent against the lands in question and the registrar having given the plaintiff respondent notice to take action on the caveat the local master made an order under the statute directing the plaintiff within 35 days to bring an action to establish any claim it might have to the lands with an express provision that if such action was not brought the caveat should be vacated. No action having been brought the caveat was vacated.

The plaintiff then notified the appellant bank that it had not abandoned its claim and it brought the present action resting its claim to relief on the ground that the appellant bank, having had the knowledge of plaintiff's claim before taking its mortgage, cannot in equity acquire a title free from and prior to such claim.

This raises a clear cut issue whether the old rules of equity which section 194 was supposed to do away with still prevail and will be given effect to notwithstanding

the section or whether the plain words of the section itself, which practically makes the register everything, shall prevail.

I have no hesitation myself, apart from cases of fraud, in reaching the latter conclusion and that the plaintiff, whether by mistake or negligence, having allowed its caveat to be vacated, cannot invoke the old rule of notice and knowledge to maintain its priority of claim over that of the bank.

Such rule has, in my judgment, been expressly abrogated by this section 194, in all cases coming within its ambit and the register alone made the sole test always of course excepting, as the section does, cases of fraud.

I cannot find that the plaintiff has any one to blame but itself for the position it finds itself in. The bank did not try to take any unjust advantage of it. Perfectly within its right, the bank took proceedings under the Act which resulted in the plaintiff being ordered to bring an action to enforce that claim within a definite period, otherwise its caveat would lapse and be vacated.

The respondent allowed it, by its own neglect and inaction, to be vacated and so lost the right it otherwise would have had to enforce its claim of priority as against the defendant bank which in the meantime had acquired an interest in the land. I agree with Mr. Justice Newlands

that the vacating of the caveat cleared the registered title to the land of any claim the plaintiff might have against it in priority to any right that had attached to such land by such lapse.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Idington J.

IDINGTON J.—The question raised herein, I think, should be determined by the interpretation and construction of section 162 of "The Lands Titles Act," ch. 41 of the Revised Statutes of Saskatchewan, 1909, (Sask. s. 1917, 2nd session, c. 18, s. 194) so far as relevant to the facts in evidence.

162. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease, from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

2. The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

One Munson sold some land to one Phillips and gave him an agreement of purchase therefor on the 2nd of April, 1912, which he assigned, merely in the way of security, on the 2nd of May, 1913, to a company under whom, by virtue of several assignments, the respondent corporate company claims.

In the course of events attendant upon the said several assignments, one Scott Barlow, who had become one of the said several assignees, as trustee for respondent company, registered a caveat on the 5th of June, 1913.

In September, 1914, Phillips had paid the balance of the purchase money and obtained a conveyance from Munson who had never been notified by the assignees aforesaid, or any of them, of the fact of the said assignment by Phillips the vendor.

No one has pretended that Phillips, in doing so, had any fraudulent purpose in view or claimed that his action in doing so was fraudulent.

Thereafter, on the 23rd of March, 1915, the appel-

lant obtained from Phillips a mortgage upon the said lands and having had, when doing so, knowledge of the said caveat filed by Scott Barlow, the appellant is held by the court below to have committed a fraud and thereby is deprived of its rights as such mortgagee.

Not a word appears in the pleading herein charging such fraud.

And a very curious circumstance appears in evidence which seems quite inconsistent with the charge of fraud made by the court below. It is this: that the appellant, shortly after getting its mortgage from Phillips, instructed solicitors to call the attention of Scott Barlow, in whose name the caveat stood, that he must proceed to enforce his claim thereunder or it would lapse in thirty days, unless continued by order of the court.

The respondent, in consequence of this, applied accordingly and obtained an order continuing the caveat for thirty-five days on terms of the caveator taking proceedings within that time to establish his rights thereunder.

This he and the respondent failed to do and in the language used in the western provinces relative to such omissions, the caveat lapsed.

The respondent took ineffectual steps later to have it re-established.

The consequence of such failures is that on the registry record the appellant stands in priority to anything the respondent can now get registered against the same land. What has that in it in the nature of fraud?

The answer is furnished by the judgment in *Le Neve* v. *Le Neve* (1), upon which had been built, as it were, an enormous volume of law, which produces judicial

(1) 1 Ambler 436.

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Idington J.

expressions that might, if later legislation discarded, warrant one in saying any such advantage with knowledge, was equivalent to fraud and liable to have that declared and the priority of registration deprived of its usual effect.

I cannot, however, see how such doctrines can be maintained in such cases as this, in view of the express language of the legislature in the clause above quoted.

It seems impossible that the proper effect can be given to that section unless we try to appreciate what the legislature was about.

Clearly it was not satisfied with the results of the law as settled by judicial expressions and decisions, and had determined upon the adoption of a system of registration as a basis of ownership of land and a means of settling the order of priority of claims into or out of any such ownership when once registered under the Act in question.

In doing so it cast upon those acquiring any such ownership or claim to any interest therein burdens, perhaps previously unknown, in the way of diligence in order to protect the rights so acquired by observing the provisions of the Act in that regard under penalty of losing ownership or priority of claim save in the case of fraud on the part of those obtaining the priority, which the Act seems clearly to contemplate as possible even with notice or knowledge unless springing from that conveyed by means of registration of a caveat. Notice or knowledge resting upon the warning given by a permissible caveat would be available to him registering it, or those claiming under him by virtue thereof as a means of maintaining priority over any later registration.

But the steps necessary to secure such benefits

must be those contemplated by the Act and not something else.

The principle involved is not new. A privilege of any kind created by statute must be enforced in the way that statute provides.

It cannot be made available in any other way. The respondent seems to have recognized that by getting the renewal under the Act.

When it failed to proceed according to the law enacted for its benefit its rights ceased.

The notice or knowledge thus obtained by appellant was nothing more than all other kinds of notice or knowledge excluded by the section quoted from having any effect and, by the express language of the Act, "shall not of itself be imputed as fraud."

I am unable, therefore, to see how the language of the legislature can be properly defied and set at naught by reason of judicial conceptions of what might have been called fraud, before this express prohibition of their being given further recognition.

We have been referred to a number of New Zealand cases which, of course, do not bind us any more than the judgment appealed from. I have, however, looked at them and find in most, if not all, some element of fact which could well be interpreted as to constitute fraud, or might well be held as within such a compliance with the statute as to found a claim thereunder for the relief sought and got.

The New Zealand Act differs somewhat from that now in question and the corresponding section to that above quoted is capable of a less drastic meaning than it.

The Australian statutes, upon which cases were cited to us, are not in our library. And I may be permitted to think that the attempted construction of

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Idington J.

such like statutes as in question from a reading of a single section or extract therefrom is rather a hazardous sort of proceeding.

For this court to attempt to call that fraud on the part of the appellant which it appears to have done herein, would only tend to impair the regard attaching to any finding of fraud we might be able to find as understood by the exception in above quoted section.

Nor is this the only illustration furnished by the administration of justice wherein due diligence is recognized as entitled to acquire its reward and he wanting in the application thereof is doomed to disappointment.

So long as its application is not associated with a fraudulent purpose, he suffering has no legal right to complain.

It does not seem to me that the facts upon which the court above had to proceed in the case of *Loke Yew* v. *Port Swettenham Rubber Co.* (1), have much resemblance to those we have to deal with and the relevant law contained in the statute there in question has still less to that above quoted.

The appeal should be allowed with costs throughout and, I think, the respondent should be at liberty to redeem and judgment go for that as falling under its alternative prayer for relief.

ANGLIN J.—The facts in this case appear in the judgments delivered (2), in the Court of Appeal. They establish that the appellant bank took the mortgage for which it now claims priority over the respondent's unregistered equitable interest in, or claim upon, the lands in question with "direct" notice of such interest.

(1) [1913] A.C. 491.

(2) 11 Sask. L.R. 297; (1918) 3 W.W.R. 27, 196; 42 D.L.R. 548.

Were it not for the effect of section 194 of "The Land Titles Act" (statutes of Saskatchewan, 1917 (2nd sess.), ch. 18), I should unhesitatingly agree with the learned Chief Justice of Saskatchewan and Lamont J. that any attempt of the bank to give to its security "an effect inconsistent with or destructive of" the respondent's prior interest would, under these circumstances, be "looked upon by equity as a fraud which it (could) not countenance." Mr. Justice Lamont has, in my opinion very convincingly shewn that but for the effect of section 194 a caveat would not have been required to protect the respondent's interest against the bank and that the lapse of its caveat, therefore, did not leave it in any worse position than it would have occupied had it never lodged it.

But I find in section 194 an insuperable difficulty to giving effect to the principle of equity which would otherwise support the respondent in this position. The language of that section is so explicit that it leaves no room for doubt as to the intention of the legislature that that principle shall be abrogated in favour of a

person * * * taking * * * a transfer mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted, except in the case of fraud.

By sub-sec. 2:

Knowledge that any trust or unregistered instrument is in existence shall not of itself be imputed as fraud.

Here there was knowledge, but nothing more. Knowledge, of course, could not of itself constitute fraud. Fraud must always have consisted in the doing of something which that knowledge made it unjust or inequitable to do. The meaning of the statute must, therefore, be that the doing of that which mere knowledge of "any trust or unregistered interest" would make it inequitable to do shall nevertheless not be imputed as fraud, within the meaning of that term as used in

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Anglin J.

sub-sec. 1 of sec. 194. That which equity deems fraud, therefore, is by this enactment of a competent legislature declared not to be imputable as fraud.

A passage from my judgment in *Grace* v. *Kuebler* (1), is cited by the learned Chief Justice and by Lamont J. apparently as inconsistent with this view. All that that case decided was that the mere lodging of a caveat to protect an interest acquired subsequently to the making of an agreement for the sale of registered land does not affect the purchaser under such agreement, otherwise ignorant of them, with notice of the rights to protect which the caveat is lodged so as to render ineffectual as against the caveator payments on account of purchase money subsequently made by the purchaser to his vendor. Expressions of opinion in the judgment on any other point must, it is needless to say, be regarded as *obiter*. If anything I said in that case is really inconsistent with the views I have expressed above, I can only cry *peccavi* and plead that it was not so intended. I find in section 194 the "very explicit language" which I deem necessary to justify our regarding a statute as intended to render unenforceable such a wholesome doctrine as that of the effect of notice in equity. To give effect to a provision that a person is to be unaffected by notice, his rights and remedies must be the same as they would have been had he not had notice. However wholesome we may consider the equitable doctrine as to the effect of notice—however regrettable and even demoralizing in its tendency we may deem legislation rendering it inoperative—it is not in our power to disregard it. The legislative purpose being clear we have no right to decline to carry it out. Were we to do so consequences still more deplorable must

(1) 56 Can. S.C.R. 1, at p. 14; 39 D.L.R. 39, at pp. 47-8.

ensue. The court would occupy a wholly indefensible position, one of usurpation of an authority, sovereign within its ambit, which it is its imperative duty to uphold.

MIGNAULT J.—In my opinion the decision of the question submitted is entirely governed by the provisions of "The Land Titles Act" of Saskatchewan (ch. 41 of the Revised Statutes of Saskatchewan (1909)). (Sask. S., 1917, 2nd session, c. 18).

As briefly as they can be stated, the pertinent facts are as follows:—

In April, 1912, one J. H. Munson made an agreement to sell to Frank C. Phillips lot 10, block 6, plan E.M., town of Humboldt, Saskatchewan, for $1,750 payable by instalments.

In May, 1913, Phillips, being indebted to Boulter Waugh and Company, Limited (now represented by the respondent), assigned his interest in the agreement for sale to the said company, which immediately transferred its interest to its credit manager, Mr. Scott Barlow, in trust for the company. These assignments were not registered, but on the 5th June, 1913, Mr. Barlow filed a caveat in the district land titles office to protect the interest thus assigned by Phillips.

In September, 1914, Phillips, having paid to Munson the purchase price, received a transfer and was registered as owner of the land, subject to a mechanic's lien and to the Barlow caveat.

Subsequently Phillips became indebted to the appellant and executed a mortgage of the land in its favour, which mortgage was registered on the 24th March, 1915. When the appellant acquired this mortgage from Phillips, it was aware of the Barlow caveat, which was entered on the certificate of title, and of the rights represented by this caveat.

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Mignault J.

On the 29th June, 1915, the deputy registrar, under section 130 of "The Land Titles Act," (R.S. Sask. 1909, c. 41) notified Mr. Barlow at the request of the appellant that his caveat would lapse at the end of 30 days unless continued by order of the court. An order was made on the 28th July, 1915, and registered, continuing the caveat until further order. By a subsequent order of the court, the Barlow caveat was continued for 35 days from the 8th October, 1915, and it was ordered that in default of the caveator taking proceedings within that time, the caveat should be vacated. On the 13th November, 1915, a certificate of the clerk of the court was registered stating that no action had been taken during the 35 days continuing the caveat, and that this time having expired the caveat was vacated.

Legal proceedings were subsequently taken to reinstate the Barlow caveat resulting in a judgment of the Supreme Court of Saskatchewan *en banc* of the 14th July, 1916, setting aside an order of the local master at Humboldt reinstating the Barlow caveat, without prejudice, the judgment stated, to the right of the respondent to make application to file a new caveat.

The question to be decided is whether the appellant is entitled to priority over the respondent in respect of their respective rights in and to the lands in question, and this question, as I have said, must be determined according to the rules enacted by "The Saskatchewan Land Titles Act."

The material provisions of this statute (R.S. Sask. 1909, c. 41) are as follows:—

125. Any person claiming to be interested in any land under any will, settlement or trust deed or under any instrument of transfer or transmission or under any unregistered instrument or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is

registered in the name of some other person or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed as hereinafter provided unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat;

Provided that no caveat which has heretofore been or that may hereafter be lodged shall be deemed to be insufficient for the purposes of the lodgment thereof merely upon the ground that the interest claimed therein is not shewn to be derived from the registered owner of the land affected.

129. The owner or other person claiming any interest in such land may by summons call upon the caveator to attend before a judge to shew cause why the caveat should not be withdrawn; and the said judge may upon proof that such last mentioned person has been summoned and upon such evidence as the judge requires make such order in the premises as to the said judge seems fit.

130. Subject to the provisions of the preceding section such caveat shall continue unless and until it is removed as hereinafter set forth, namely: The owner or other person claiming any interest in such land may require the registrar by notice in writing which shall be in form Y in the schedule to this Act to notify the caveator at his address for service as set forth in the caveat that such caveat shall lapse at the expiration of thirty days from the mailing of such notice by the registrar unless within said thirty days, the caveator shall file with the registrar an order made by the judge providing for the continuing beyond the said thirty days of said caveat, and in the event of such order not being filed with the registrar within the said thirty days, such caveat shall lapse and shall be treated as lapsed by the registrar; the notice hereinbefore provided to be given by the registrar shall be by registered letter.

Provided, however, that whenever the registrar is satisfied that any interest in such land other than the interest therein of the caveator is protected by such caveat he may refuse to notify the caveator as required by this section, and in such case the removal of such caveat shall be subject only to the provisions of sec. 129 hereof.

131. The caveator may by notice in writing to the registrar withdraw his caveat at any time; but notwithstanding such withdrawal the court or judge may order the payment by the caveator of the costs of the caveatee incurred prior to such withdrawal.

132. A memorandum shall be made by the registrar upon the certificate of title and upon the duplicate certificate of the withdrawal, lapse or removal of any caveat or of any order made by the court or a judge in connection therewith.

2. After such withdrawal, lapse or removal it shall not be lawful for the same person or for any one on his behalf to lodge a further caveat in relation to the same matter unless by leave of the judge.

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Mignault J.

133. Any person lodging or continuing any caveat wrongfully, and without any reasonable cause, shall be liable to make compensation to any person who has sustained damage thereby.

2. Such compensation with costs may be recovered by proceedings at law if the caveator has withdrawn such caveat and no proceedings have been taken by the caveatee as herein provided.

3. If proceedings have been taken by the caveatee then the compensation and costs shall be determined by the court or judge acting in the same proceedings.

The rules laid down here can give rise to no difficulty. Under section 129, the owner or other person interested in a lot of land may by summons call upon the caveator to attend before a judge to shew cause why the caveat should not be withdrawn, or he may, under section 130, require the registrar to notify the caveator that such caveat shall lapse at the expiration of 30 days from the mailing of the notice by the registrar, unless, within 30 days, the caveator shall file with the registrar an order made by the judge providing for the continuing of the caveat beyond the 30 days, and if such order is not filed, the caveat shall lapse and shall be treated as lapsed by the registrar.

The notice in question was given under section 130. The caveator first obtained an order of the court continuing the caveat until further order, but a subsequent order continued the caveat for 35 days from the 8th of October, 1915, and ordered that in default of the caveator taking proceedings during this term, the caveat should be vacated. No proceedings having been taken by the caveator during the 35 days I am of the opinion that his caveat fully lapsed. The permission subsequently granted him by the Supreme Court *en banc* to file a new caveat—permission which was required under section 132—and the filing of the caveat could only operate from the date of the new caveat and could not affect the prior registered mortgage of the appellant.

But the respondent relies on the knowledge acquired by the appellant at the time it took its mortgage from Phillips of the rights represented by the Barlow caveat as first filed, and the respondent contends that it would be "against conscience" or equivalent to fraud to thus acquire a right in land with knowledge of the existing unregistered rights of the respondent. Many cases are cited in this connection, but I cannot but think that they are without application in view of sec. 162 of "The Saskatchewan Land Titles Act," (R.S. Sask. 1909, c. 41) which section is, in my opinion, a complete answer to the respondent's contention.

This section reads as follows:—

162. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

2. The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

In this connection, but of course not an authority, but merely as shewing that the registration laws of the different provinces are not so far apart, I might refer to art. 2085 of the Quebec Civil Code, the application of which has never given rise to any difficulty, and which reads as follows:—

2085. The notice or knowledge acquired of an unregistered right belonging to a third party and subject to registration cannot prejudice the rights of a subsequent purchaser for valuable consideration whose title is duly registered, except when such title is derived from an insolvent trader.

I, however, base entirely my opinion on section 162 of "The Land Titles Act," and I take it that the knowledge acquired by the appellant of the unregistered interest of the respondent cannot, of itself, be imputed

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Mignault J.

as fraud. The registration by the appellant of the mortgage acquired by it from Phillips was certainly not a fraudulent act, for if the Barlow caveat had been maintained by the court the appellant's mortgage would have been subject to the rights represented by this caveat. And it certainly cannot be contended that the appellant committed a fraudulent act by availing itself of the right granted by sec. 130 of "The Land Titles Act" to any person claiming an interest in a lot of land to test the validity of a caveat lodged in the land titles office. If Barlow or the respondent allowed the caveat to lapse, no fault or fraud can be imputed to the appellant, but the respondent suffers by reason of its own negligence.

The learned judges of the Court of Appeal who have found in favour of the respondent observe that if the opinion I feel constrained to adopt is to be followed, Barlow would be in a worse position by filing a caveat than if he had relied on the equitable doctrine that the knowledge of his right by the appellant prevented the latter from acquiring priority as against his interest in the land in question.

I am not at all sure in view of sec. 162 that Barlow would have been in a better position had he not filed the caveat, a point on which it is unnecessary to express any opinion. He has, however, filed a caveat to protect his rights and he, therefore, has put himself entirely under "The Land Titles Act." The respondent has, moreover, since the first caveat lapsed and it was refused reinstalment, filed a new caveat which is subsequent in date to the registration of the appellant's mortgage. I think, therefore, that the statute entirely governs the parties in this case, and it is clear to my mind that the appellant is entitled to preference.

The learned Chief Justice of Saskatchewan cites

certain maxims coming, I think, originally from the Roman Law with which, as a civilian, I am familiar, such as *nemo dat qui non habet*, or *qui prior est tempore potior est jure* But I may say with deference that these maxims are not of universal application, and when third parties are concerned they cannot be applied without some qualification. It might, moreover, be possible to offset axiom by axiom and to refer to the one so often mentioned by the old jurists, *vigilantibus non dormientibus scripta est lex.* I prefer, however, to rest on the clear text of the statute, and I take it as being eminently desirable, in the interest of the security of land transactions in a system where registration of titles to land is provided for, that the entries in the public register, in the absence of fraud, be taken as conclusive. Here the respondent failed to register its assignment and even to protect its caveat when it was called upon in the manner prescribed for by "The Land Titles Act" to do so. I cannot, under the circumstances of this case, come to its assistance.

I am, therefore, of the opinion that the appeal should be allowed and the judgment of the learned trial judge restored with costs throughout.

CASSELS J.—I concur in the reasons and result arrived at by Mr. Justice Mignault.

Appeal allowed with costs.

Solicitor for the appellant: *F. H. Bence.*
Solicitors for the respondent: *McCraney, Mackenzie & Hutchinson.*