

# CASES

DETERMINED BY THE

## SUPREME COURT OF CANADA

### ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

CHARLES E. YOCKNEY (DEFEND- ANT) .....	}	APPELLANT;	}	1914 *May 11, 12. *May 18.
AND				
JOHN ANDREW THOMPSON (PLAINTIFF) .....	}	RESPONDENT.		

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

*Registry laws—Manitoba “Real Property Act,” ss. 100, 130—Agreement for mortgage—Caveat—“Interest in land”—Registration subject to incumbrance—Indorsement on instrument registered.*

A mortgagee or incumbrancee of lands in Manitoba, subject to the “new system” of registration of titles, has such an interest in the lands as entitles him to file a caveat under section 130 of the “Real Property Act,” R.S.M. ch. 148; consequently, where the owner of such lands, for valuable consideration, agrees to execute a mortgage thereon in favour of another person, the right thus obtained constitutes an interest in the lands, within the meaning of section 130, which may be protected by caveat in the manner therein provided; this right is not affected by the terms of section 100 of the “Real Property Act” limiting the effect of mortgages and incumbrances. The judgment appealed from (25 West. L.R. 602, 14 D.L.R. 332) was affirmed.

\*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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*Per* Fitzpatrick C.J. and Idington and Anglin JJ.—Where a mortgage has been registered, under the “new system,” indorsed by the registrar as being subject to the caveat of a person claiming the right to have a mortgage in his favour executed affecting the same lands, the mortgagee who has been so registered cannot afterwards claim priority over the right of the caveator.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers C.J. at the trial(2), maintaining the plaintiff’s action with costs.

The circumstances of the case are stated in the judgments now reported.

*H. F. Tench* for the appellant.

*Ewart K.C.* for the respondent.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J.—The appellant had obtained a mortgage from his son upon some land which the son had agreed to mortgage to the respondent. To protect this agreement the respondent filed a caveat under the “Real Property Act” of Manitoba. The appellant then registered his mortgage and, as in duty bound, the registrar indorsed the following certificate thereon:—

At the request of the mortgagee this mortgage is registered subject to caveat 62347.

The issue raised is whether or not the appellant is under such circumstances entitled to have it declared that his mortgage has priority over the right of the respondent.

(1) 25 West. L.R. 602; 14  
 D.L.R. 332.

(2) 22 West. L.R. 863; 8  
 D.L.R. 776.

For the reasons assigned by the learned trial judge I think respondent was entitled to register his caveat and that the appellant cannot claim to have the same vacated and to have his mortgage prevail over the rights of the respondent in the premises.

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Idington J.

The appeal should be dismissed with costs.

DUFF J.—The question on this appeal is whether a contract made by an owner of land in Manitoba, registered under the “new system,” by which, for valuable consideration, he agrees to execute a mortgage on the land in favour of another will support a valid caveat under section 130 of the Manitoba “Real Property Act.” That section is as follows:—

130. Any person claiming an estate or interest in land, mortgage or incumbrance, under the new system, may file or cause to be filed on his behalf with the district registrar a caveat, in the form in schedule “H” to this Act, forbidding the registration of any person as transferee or owner of, or of any instrument affecting such real estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator.

The appellant contends that the beneficiary of such a contract, claiming to enforce his right to have a mortgage executed in accordance with it, is not a person claiming “an estate or interest in land” within this section. He puts his argument in this way:—The mortgage when executed would not, he says, operate as a transfer of “any estate or interest” in the land and, consequently, a claim to compel the execution of a mortgage is not a claim to any such “estate or interest.” This argument is based upon section 100 of the Act, which reads as follows:—

100. A mortgage or an incumbrance under the new system shall have effect as security, but shall not operate as a transfer of land thereby charged, or of any estate or interest therein.

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I think the contention should be rejected. The effect of section 100 was fully considered in *Smith v. The National Trust Co.*(1). It was there pointed out that, as regards land registered under the new system, title is consummated by registration and that the effect of section 100 is that the holder of a "mortgage or incumbrance" registered under the Act has not vested in him, in whole or in part, the registered title. The execution and registration of the mortgage, in a word, does not immediately effect any dismemberment of the mortgagor's registered title. In that sense the mortgagee has no estate or interest in the land.

I entirely agree, however, with the learned trial judge, that it is something very much like a contradiction in terms to say that a mortgagee, having the powers of sale and foreclosure vested in him by the statute together with other rights as to the possession of the land which the statute gives him, has not, in the broader sense of the words, an interest in the mortgaged land. I do not think section 130 can properly be limited to those cases in which the claim is a claim to be registered as possessor in whole or in part of the registered title. In other words, I do not think it can be properly limited to those cases in which an "interest" is claimed in the restricted sense in which "interest" is used in section 100.

I think the respondent is within the section.

ANGLIN J.—For the reasons which he assigns, I respectfully concur in the conclusion of Mathers C.J., affirmed by the Court of Appeal, that the plaintiff had, under his agreement, an interest in lot 38 within

(1) 45 Can. S.C.R. 618.

the purview of section 130 of the Manitoba "Real Property Act."

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Though not as clear or precise in its designation of the nature and extent of the plaintiff's interest as might be desired, the caveat lodged by him states the date of the agreement under which he claims and the parties to it. It also gives the name and address of a firm of solicitors representing him for the service of notices, etc. Its sufficiency for the purposes of the "Real Property Act" was presumably passed upon by the registrar before it was accepted and filed. The registration of the defendant's mortgage is expressly made subject to the caveat. Having regard to all these facts, I am not prepared to reverse the concurrent judgment of the two provincial courts which held it to be sufficient.

I would dismiss the appeal with costs.

BRODEUR J.—I agree that this appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *H. F. Tench.*

Solicitor for the respondent: *J. E. Adamson.*

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