THE AMERICAN-ABELL ENGINE AND THRESHER COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

JOHN McMILLAN AND WILLIAM JAMES DOIG (DEFENDANTS) ..... RESPONDENTS.

1909
*Oct. 14.
*Oct. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Title to lands — Homestead and pre-emption rights — Unpatented Dominion lands—"Transfer"—Incumbrance—Charge to secure debts—Sanction of minister—Absolute nullity—Construction of statute—60 & 61 *Vict. c.* 29, *s.* 5; *R.S.C.* (1906) *c.* 55, *s.* 142.

On 6th August, 1904, the holder of rights of homestead and pre-emption in Dominion lands, in Manitoba, which had not then been patented or recommended for patent, assumed to "incumber, charge and create a lien" upon the lands as security for the payment of a debt by an instrument executed without the sanction of the Minister of the Interior.

Held, affirming the judgment appealed from (11 West. L.R. 185) that the instrument was in effect a "transfer" and was absolutely null and void under the provisions of the "Dominion Lands Act."

APPEAL from the judgment of the Court of Appeal for Manitoba (1), Howell C.J. dissenting, affirming the judgment of Mathers J., at the trial, by which the action was dismissed with costs as against the defendant Doig.

The defendant McMillan, in August, 1904, ordered from the plaintiffs through his co-defendant, Doig,

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

27 (1) 11 West. L.R. 185.

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who was then the agent of the plaintiffs, certain machinery for which he agreed to pay $2,840 in cash, or in lieu thereof to give five promissory notes for a like amount provided that the plaintiffs were willing to give credit. The form of order signed by McMillan required the agent to fill out accurately and have signed by purchaser a property statement indorsed thereon. This statement was filled out and signed by McMillan and alleged that he owned in his own name and right and unincumbered the land in question. This order was sent by Doig to the plaintiffs and, relying in part upon the statements made in the order, the plaintiffs accepted it, sent McMillan the machinery and granted him the credit, taking from him, as security, an instrument in the following form:—

"I, John McMillan, * * * , being registered as owner of an estate in fee simple in possession subject, however, to such incumbrances, liens and interests as are notified by memorandum underwritten or indorsed hereon, in the land described as follows: (description), and desiring to render the said land available for the purpose of securing to and for the benefit of American-Abell Engine and Thresher Company, Limited, * * * the sum of money hereinafter mentioned, do hereby incumber, charge and create a lien upon the said land for the benefit of the said American-Abell Engine & Thresher Company, Limited, with the sum of $2,850, to be raised and paid at the times and in the manner following, that is to say: (dates of payments set out).

"If notes should be given by me to the said company for all or any of the above payments, the said notes shall not be a satisfaction of the said incumbrance, charge and lien, but the same shall continue

until the payment in full of the said notes and any renewals thereof.

"In witness whereof I have hereunto signed my name this 6th day of August, A.D. 1904.

"JOHN MCMILLAN" (Seal).

"Signed in the presence of

"Jas. W. Currie."

The lands described were the homestead of the defendant McMillan and his rights in the land were those of a homesteader who had not received a recommendation for patent, under the "Dominion Lands Act." The sanction of the Minister of the Interior had not then been given to the transaction, and these facts were known to the defendant Doig. Subsequently McMillan secured a recommendation for patent, dated 3rd August, 1905, and the patent was issued to him, dated 23rd September, 1905.

After the issue of the recommendation for patent Doig, who had then ceased to be the plaintiffs' agent, obtained from his co-defendant a conveyance of the quarter-section of land in question in payment of indebtedness from McMillan to himself. The Secretary of the Department of the Interior, by letter dated 2nd June, 1908, waived the forfeiture of the McMillan's homestead under section 142 of the "Dominion Lands Act."

The action was brought to have it declared (*inter alia*) that the plaintiffs had a charge upon the lands in question as against the defendants. McMillan did not defend the action and judgment has been obtained against him. The plaintiffs' charge was duly registered and the defence set up by Doig was that such charge was void under section 142 of the "Dominion Lands Act," R.S.C. (1906) ch. 55, which is the

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consolidation of the statute 60 & 61 Vict. ch. 29, sec. 5, amending section 42 of chapter 54, R.S.C. (1886).

At the trial Mr. Justice Mathers held that the instrument in question was void under the provisions of section 142 of the "Dominion Lands Act," but did not decide whether or not the instrument was an "assignment" or "transfer" within the meaning of the Act. He also held that the defendant Doig was not estopped from setting up the invalidity of the instrument. An appeal to the Court of Appeal for Manitoba was dismissed, the majority of the judges holding that the instrument was an "assignment" or "transfer" and was void under the Act. Howell C.J. dissented, taking the view that the instrument was not one of those prohibited by the statute.

Chrysler K.C. for the appellants. The judgment appealed from is erroneous in holding (1) that the charge in question is an "assignment" or "transfer" of a homestead right; (2) that it is an assignment or transfer and thereby void under section 142, and (3) that the defendant, Doig, is not, by reason of his conduct, estopped from setting up, as against the plaintiffs, his conveyance from the defendant McMillan.

Section 142 of the "Dominion Lands Act"(1), is in terms identical with that in force during the whole of the transactions in question. The charge in question, being merely equitable, is not an "assignment" or "transfer" within the meaning of that section. The nearest analogy is found in cases arising out of forfeiture provisions in leases and insurance policies. The giving of an equitable mortgage is not a breach of a covenant by the lessor not to assign or sublet

(1) R.S.C. (1906) ch. 55.

without leave. *Doe d. Pitt* v. *Hogg*(1); *Gentle* v. *Faulkner*(2). Where an insurance policy prohibits a transfer of the property insured an equitable mortgage has been held not to be such a transfer. *Sands* v. *Standard Ins. Co.*(3); *Bull* v. *North British Ins. Co.* (4); *Sovereign Fire Ins. Co. of Canada* v. *Peters*(5).

A strict construction is given to such statutes as the present. In *Meek* v. *Parsons*(6), Armour C.J. held that the word "alienate" in the "Free Grant and Homestead Act of Ontario" did not include an agreement to alienate. In the United States it has been held that a mortgage of a homestead (which did not convey the legal estate) was not an alienation of the land. *Stark* v. *Morgan*(7); 9 Am. & Eng. Ann. Cases, at page 930, where the matter is fully discussed and reference made to all the American cases. A pledge of stock-in-trade bought on credit is not a "transfer." *In re Hall*(8).

The mortgage under the "Land Titles Act"(9) was on account of its form considered not to be an assignment or transfer under section 142 of the "Dominion Lands Act." Consequently Parliament passed section 96 of the "Land Titles Act," declaring that a mortgage executed by a settler should be deemed to be an assignment or transfer prohibited by section 142. The plaintiffs' claim is under a charge and not under a mortgage. It is not an instrument under which the court could foreclose the defendant's interest, but is one in which they could only order sale. The intention of section 142 is that the homesteader should not

(1) 4 D. & Ry. 226; 1 Car. & P. 160.
(2) (1900) 2 Q.B. 267.
(3) 26 Gr. 113; 27 Gr. 167.
(4) 15 Ont. App. R. 421.
(5) 12 Can. S.C.R. 33.
(6) 31 O.R. 529.
(7) 73 Kan. 453.
(8) 14 Q.B.D. 386.
(9) R.S.C. (1906) ch. 110.

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be permitted to alienate or transfer the absolute title in the property. The charge given is not an assignment or a transfer, nor was it so intended by McMillan, nor was it accepted by the company as such. It really is an undertaking to pay the price of machinery as the same becomes due; he did not assign the land but gave a document under which the court might order the sale of the land and, out of the proceeds, payment of the claim. At the time of the recommendation for patent only a small part of the plaintiffs' claim was due; the remainder of the price became due after the recommendation for patent.

The defendant, Doig, is estopped from setting up that the lien is void by reason of the fact that he was the plaintiffs' agent at the time the lien was taken, and he himself took it. The company acted on the representation in selling the machinery, and this being so, it is not open to Doig now to set up that the instrument was void. Doig is not in a position to set up that the instrument is void under the statute.

The instrument did not assign or transfer the whole or part of a homestead right. It takes away no such rights. It is not a mortgage conveying the fee. The plaintiffs under this charge could never get in the fee. All such rights are exempted from execution until patent issues, yet the statute does not prohibit the homesteader going into debt and a judgment recovered binds automatically the land as soon as the same is recommended for patent. *Harris* v. *Rankin* (1). As pointed out in this case, at page 132, the object of the Act was and is to obtain *bonâ fide* settlers on the public lands and to retain them there. This charge does not defeat that object.

(1) 4 Man. R. 115.

We also refer to *Edwards* v. *Dick*(1); *Doe d. Bryan* v. *Bancks*(2); *Roberts* v. *Davey*(3); *Davenport* v. *The Queen*(4); *Malins* v. *Freeman*(5).

Bergman for the respondent Doig. The instrument under which the plaintiffs claim is an "assignment" or "transfer" of homestead right or of a part thereof within the meaning of section 142 of the "Dominion Lands Act," and absolutely null and void by virtue of the provisions thereof, and the defendant Doig is not estopped from thus setting up that the lien in question is void. The object of all homestead laws is to secure actual settlers and to prevent the public lands from falling into the hands of speculators, or from being homesteaded for the benefit of any person other than the entrant and his family. See *Harris* v. *Rankin*(6), *per* Killam J., at page 132; *United States* v. *Richards* (7), *per* Munger J., at page 450. That section of the Act must be construed so as to carry out this object and prevent its evasion. See Maxwell on Statutes (4 ed.), p. 171; *Philpott* v. *St. George's Hospital*(8), at page 349; *Fox* v. *Bishop of Chester*(9).

The principle on which conditions against assignment in policies of insurance and leases have been decided can have no application in the construction of the statutory provisions now in question. From the language of Killam J., in *Harris* v. *Rankin*(6), at page 128, it is clear that the learned judge considered that the creation of a mere charge upon the land came within the prohibition of the statute. See also, *per* Taylor J., at page 362, in *Manitoba Investment Association* v.

(1) 4 B. & Ald. 212.
(2) 4 B. & Ald. 401.
(3) 4 B. & Ad. 665.
(4) 3 App. Cas. 115, at p. 128.
(5) 4 Bing. N.C. 395.
(6) 4 Man. R. 115.
(7) 149 Fed. Rep. 443.
(8) 6 H.L. Cas. 338.
(9) 2 B. & C. 635.

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Watkins(1), in respect to a mortgage, and *per* Tenterdon L.C.J., in *Wetherell* v. *Jones*(2), when speaking of a contract forbidden expressly or by implication either by a statute or at common law. The question was also decided in *Gathercole* v. *Smith,* in 1881(3), at page 7, by James L.J., and, at pages 9 and 10, by Lush L.J. This view was taken at the passing of the Dominion "Land Titles Act"(4), in which the 96th section treats a mere security or charge as an assignment or transfer prohibited by the "Dominion Lands Act." This enactment must be taken as declaratory of the law respecting all Dominion lands. See also *Bass* v. *Buker*(5), at page 923; and *Edinburgh Water Company* v. *Hay*(6), in 1854, at pages 682 to 687, *per* Cranworth L.C.

The plaintiffs themselves considered their lien within the prohibition and, consequently, applied to the Minister of the Interior for a declaration that the forfeiture of the homestead was waived and that the lien was validated. The reply from the Department, however, had not the effect of validating the lien. In fact, the whole policy of the statute would have been defeated if the lien had been validated; it would have been equivalent to a donation by the Government of the lands affected. In the cases where charges may be permitted under the Act with the sanction of the Minister, his powers are strictly limited; and, in this case the provisions of sections 145 to 148 can have no application.

Estoppel cannot work against Doig; no reliance

(1) 4 Man. R. 357.
(2) 3 B. & Ad. 221.
(3) 17 Ch. D. 1.
(4) R.S.C. (1906) ch. 110.
(5) 12 Pac. Rep. 922.
(6) 1 Macq. 682.

was placed upon any act or representation made by him. See 16 Cyc., pp. 734-738, and the cases there cited. No equitable estoppel can arise except from actual contract: 16 Cyc. 741, and cases there cited; rules as to good faith and loyalty do not apply after an agency has been fully terminated: 31 Cyc. 1449, and cases there cited; *Nichol* v. *Martyn*(1); *Robertson* v. *Chapman*(2).

Section 142 of the "Dominion Lands Act" renders assignments and transfers of homestead rights before recommendation for patent void not only as against the Crown, but as against the homesteader and his assigns. *Harris* v. *Rankin*(3); *Cumming* v. *Cumming* (4); *Flannaghan* v. *Healey*(5); *In re Webster and Canadian Pacific Railway Co.*(6); *In re Sawyer-Massey Co. and Dennis*(7); *Park* v. *Long*(8); *Waterous Engine Works Co.* v. *Weaver*(9). We also refer to *Re Hughes*(10), at page 601, which should be read in connection with *Gentle* v. *Faulkner*(11), and to the reference made by Gwynne J. to *Sovereign Ins. Co.* v. *Peters*(12), at pages 162-163 of the report of *The Citizens' Ins. Co.* v. *Salterio*(13).

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

DAVIES J.—This appeal from the Court of Appeal for Manitoba raises the question of the proper construction to be given the 142nd section of the "Domin-

(1) 2 Esp. 732.
(2) 152 U.S.R. 673.
(3) 4 Man. R. 115.
(4) 15 Man. R. 640.
(5) 4 Terr. L.R. 391.
(6) 6 West. L.R. 384.
(7) 7 West. L.R. 272.
(8) 7 West. L.R. 309.
(9) 8 West. L.R. 432.
(10) (1893) 1 Q.B. 595.
(11) [1900] 2 Q.B. 267.
(12) 12 Can. S.C.R. 33.
(13) 23 Can. S.C.R. 155.

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ion Lands Act"(1), and specially whether the words of that section are large and broad enough to cover and prohibit the placing of a lien or charge upon his homestead by the homesteader before he has obtained the recommendation of the local agent for his patent.

The section in question reads as follows:

> Except as herein provided unless the Minister otherwise declares every assignment or transfer of homestead or pre-emption right or any part thereof and every agreement to assign or transfer any homestead or pre-emption right or any part thereof after patent obtained, made or entered into before the issue of the patent shall be null and void; and unless the Minister otherwise declares, the person so assigning or transferring or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right.

The judgment of the Court of Appeal, Chief Justice Howell dissenting, upheld that of the trial judge and held that the instrument attempting to create a lien or charge upon the homestead came within the prohibitive language of the section and was, therefore, void.

The document or instrument creating the charge or lien was given to the appellants by the defendant McMillan as security for the price of a threshing outfit sold him and professed "to incumber, charge and create a lien upon the said land," which land, at the time, was McMillan's homestead, for which he had not then obtained the recommendation of the land agent for a patent.

The contentions of Mr. Chrysler were, first, that the words of the section were not broad and ample enough to cover the case of such a lien or charge as the one in question here; and, secondly, that, if they were, the language of the section did not make the transfer absolutely void, but voidable at the option of

(1) R.S.C. (1906) ch. 55.

the Crown and only suspended it until the will or decision of the Minister was obtained.

With regard to the latter construction, I cannot for a moment accept it. The language used by Parliament seems to me clear beyond any reasonable doubt. Unless the Minister declared that a transfer by the homesteader might or could be made of his homestead within a specified time the transfer should be null and void. All transfers of homestead rights made without the sanction of the Minister before recommendation for patent were, in my opinion, by this section declared null and void, not only as against the Crown, but as against the homesteader. The section was intended as much for the protection of the homesteader and his assigns as for the Crown, and to carry out the policy of settling with *bonâ fide* settlers the unoccupied lands of the Crown. Looking to the known character and financial condition of many of those settlers it was thought desirable, for a time at least, during the early days of their settlement and occupation, to protect them, even from themselves and their own acts as well as from the speculators and others to whom they would become an easy prey. Provision is made in a subsequent part of the statute, under "Charges upon Homesteads for Advances," from sections 145 to 158, enabling persons

> desirous of assisting by advances in money intending settlers to place themselves on homestead lands,

and of securing such advances, to do so legally and properly. The provisions embrace expenditures for passages and freight, medical attendance, subsistence of the settler and his family, materials for erecting buildings on the homestead, breaking land, providing

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horses, cattle, house furniture, farm implements and seed grain, etc., etc. They cover everything which Parliament, no doubt properly advised, thought essential for a settler in aid of his establishment upon the homestead and carefully provide for the submission to the settler and to the local agent or homestead inspector appointed by the Minister of a statement of all such expenditure or advances with vouchers in support thereof, before the settler is authorized to make or give a charge or lien for the amount upon his homestead. A further general provision enabling persons to make advances to settlers and take charges or liens therefor upon the homestead is given in sub-section 3 of section 146 of the statute. But in each and all of these cases there are special conditions and provisions limiting and defining the circumstances under which and the amount for which advances may be made and charges taken upon the homestead. The sanction of the Minister must be had in advance. The amount advanced and charged in all must not exceed $600; the rate of interest is limited, the times for re-payment specified and the active supervision and approval of the Minister's agent or inspector assured.

In fact, the statute treats the intending settler as a ward of the Minister, who is to protect him from himself and prevent him from incumbering his homestead until he is, at least, entitled to obtain his patent. It is not, of course, pretended that the charge sought to be enforced in this case is one of those contemplated and provided for in the sections of the statute to which I have called attention, and I am of the opinion that the clear unambiguous words of section 142, as well as their clear and manifest object, exclude the limited

construction which Mr. Chrysler sought to place upon them.

In my judgment the only charge or lien which the settler could place upon his homestead before it was recommended for a patent was one of those specifically provided for under sections 145 to 158, of which the one in question here is not contended to be, and all other attempted charges, included in the prohibitive words of the section against transfers or assignments, are absolutely null and void, unless otherwise declared by the Minister.

I have not been able, after reading carefully the judgment of the Judicial Committee in the case of *Davenport* v. *The Queen*(1), to see its application to the construction of the clause of the statute in question here. That case is, no doubt, an authority for the general proposition that the courts have construed and will construe clauses of forfeiture in leases declaring, in terms however strong and clear, that they should be void on breach of conditions by the lessees to mean that they are voidable only at the option of the lessors, and the same rule has, no doubt, been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract, as in *Doe d. Bryan* v. *Bancks*(2), and *Roberts* v. *Davey*(3). But, in the case before the Judicial Committee, their lordships simply held the construction of the statute on which they relied because the intention of the legislature to the contrary did not, in their view, so clearly appear as to exclude the usual and equitable rule of construction from applying to the leases there in question. In

(1) 3 App. Cas. 115. (2) 4 B. & Ald. 401.
(3) 4 B. & Ad. 665.

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the case before us there is no lease and no question of its forfeiture, while the intention of Parliament is, to my mind, plain and clearly expressed.

Then, on the question upon which Mr. Chrysler seemed chiefly to rely, I cannot doubt that what the statute intended to prevent was, as expressed, any transfer or assignment or agreement to transfer or assign as well as anything which would or could have the legal effect of transferring away from the homesteader and giving to another his rights as such or of having the same done by process of law. In other words, the language used was large enough, in the connection in which it was used, to cover indirect as well as direct transfers and so to cover a charge such as this under which a sale of the homesteader's rights could be decreed and transferred from him by a sale of the lands under the decree. The same word which is here used came under the consideration of the Court of Appeal, in England, in the case of *Gathercole* v. *Smith* (1881) (1). At page 7, James L.J. says:

> Now "transfer" is one of the widest words that can be used. It appears to me that very word was used by the legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred.

At pages 9 and 10, Lush L.J. says:

> The word "transferable," I agree with Lord Justice James, is a word of the widest import, and includes every means by which the property may be passed from one person to another. * * * Clearly the words "shall not be transferable at law or in equity" do say that he shall not be at liberty to encumber it either directly by assignment or indirectly by suffering a judgment.

(1) 17 Ch. D. 1.

Applying this language and reasoning to the present case, and I have no difficulty in doing so, the language of section 142 of the Act is sufficiently broad to cover the plaintiff's lien.

Looking at the subject-matter with which Parliament was dealing, namely, the inchoate right of a homestead settler which right might afterwards ripen into a vested right or interest in the lands, and the object it obviously had in view in limiting the power of the homesteader for a time to incumber his homestead, I have no difficulty in ascribing to the words used "transfer or assign" a meaning sufficiently wide to include such a charge as we have now before us.

Our attention was called to some language used by the learned Chief Justice of the Court of Appeal in his dissenting opinion in which he argued that the section 96 of the "Land Titles Act"(1), shewed that Parliament had felt called upon to give a meaning to the prohibitive words "transfer or assign" as used in the 142nd section of the "Dominion Lands Act," and, as he says, "it seems to me to widen their meaning."

I am not able to agree with the Chief Justice in this. The intention of Parliament, it seems to me, in passing that section 96 of the "Land Titles Act'" was to make it clear beyond any doubt that in legislating as it did in the 98th section of the Act and declaring that

> a mortgage or encumbrance *under this Act* shall have effect as security, but shall not operate as a transfer of the land thereby charged,

there was no intention of interfering with the provisions of the "Dominion Lands Act" prohibiting transfers and that, notwithstanding a mortgage was de-

(1) R.S.C. (1906) ch. 110.

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clared not to be a transfer under the "Land Titles Act," it should, nevertheless, remain and be within the prohibitory words of the section 142 of the "Dominion Lands Act," and deemed and held a transfer working a forfeiture.

These sections of the "Land Titles Act rather, in my opinion, support the view I have expressed of the meaning of section 142 of the "Dominion Lands Act."

I am, therefore, of opinion that this appeal should be dismissed with costs.

IDINGTON J.—If as contended such an instrument as that in question herein can constitute a valid charge or lien it would be a good foundation for a suit to have the land sold wherein judgment might go for sale even before recommendation for patent and the conveyance thereby be completed by virtue of estoppel. Why not?

If so, then the statute is easily defeated. Any explanation shewing this impossible must disclose the frailty of the instrument by reason of its being tainted.

The mind turns back to the days when fines and recoveries were a common kind of assurance, and estopped in that relation a power in the old land.

I fear this attempted, perhaps hoped for, restoration of that good old time must fail because it merely promises to bring us an estoppel which is tainted because its work falls within the mischief against which the statute is clearly aimed.

I need not elaborate further, for my brother judges bring forward that reasoning in which, speaking generally, I agree.

The appeal must be dismissed with costs.

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DUFF J.—This appeal raises two questions concerning the construction of section 142 of the "Dominion Lands Act"(1). The opinion of the majority of the Court of Appeal for Manitoba upon both questions accords with the uniform current of decision in that province as well as in the North-West Territories; and, after a careful consideration of the dissenting judgment in the court below and the argument of Mr. Chrysler, I do not think there are sufficient grounds for rejecting the views which have hitherto prevailed.

The first question is whether, in the absence of action by the Minister of the Interior, the effect of section 142 is to invalidate for all purposes the instrument by which a homesteader professes to "encumber, charge and create a lien upon" his homestead as security for the payment of a debt. The words of the section are as follows:

Except as herein provided unless the Minister otherwise declares every assignment or transfer of homestead or pre-emption right or any part thereof and every agreement to assign or transfer any homestead or pre-emption right or any part thereof after patent obtained, made or entered into before the issue of the patent shall be null and void; and unless the Minister otherwise declares the person so assigning or transferring, or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right, and shall not be permitted to make another homestead entry: Provided that a person whose homestead or homestead and pre-emption have been recommended for patent by the local agent, and who has received from such agent a certificate to that effect, in Form R., countersigned by the Commissioner of Dominion Lands, or, in his absence, by a member of the Dominion Lands Board, may legally dispose of and convey, assign or transfer his right and title therein; and such person shall be considered to have received his certificate upon the date upon which it was so countersigned.

The question is: Does an instrument such as that now in question fall within the description

every assignment or transfer of homestead or pre-emption right or any part thereof.

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in the sense in which it is used in this section? These words are, of course, broad enough to extend to such an instrument. The scope of them is sufficiently illustrated in the following passage from the judgment of that great lawyer and master of language, James L.J., in *Gathercole* v. *Smith* (1):

> Now "transfer" is one of the widest terms that can be used. It appears to me that very word was used by the legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order, by an execution creditor, or otherwise transferred.

And by this observation from the judgment of Lush L.J., in the same case:

> Clearly the words "shall not be transferable at law or in equity" do say that he shall not be at liberty to encumber it either directly by assignment or indirectly by suffering a judgment.

What we really have to determine is whether there is any good reason for restricting the *primâ facie* meaning of the words to such an extent as to exclude the instrument in question from the operation of the provision in which they occur.

The argument put forward by the appellants proceeds upon the hypothesis that the sole aim of the enactment is to secure permanency of occupation by real settlers through the prevention, on the one hand, of a succession of transfers during the performance of the settlement duties required by the Act, and, on the other, by minimizing (through the prohibition of agreements entered into by settlers before the granting of their patents for the conveyance of their lands afterwards), the possibility of the machinery of the

(1) 17 Ch. D. 1.

Act being made an instrument for speculation in the public lands. This, there can be no doubt, was one consideration of great importance which influenced the legislature in enacting the legislation. But it was, I think, only one of the objects of the legislature. The cognate legislation to be found in sections 145 to 158 of the "Dominion Lands Act" and in the "Land Titles Act"(1), affords, I think, demonstrative evidence that the policy of Parliament was to invalidate every kind of assurance by which, save under sanction of the Minister, a homesteader should attempt to encumber his homestead by charging it as security for a debt. By the provisions of the land Act referred to, the Minister is given authority to sanction, antecedently, the creation of such a charge for securing the re-payment of advances to a limited amount for carefully specified purposes. If notwithstanding the provisions of section 142 the homesteader is to be held invested with the general power to constitute such charges upon his homestead, one does not readily see why Parliament should have deemed it necessary to confer upon him the special and carefully limited power which is the subject dealt with in the sections mentioned. Again, in section 96 of the "Dominion Land Titles Act," it is declared that

> notwithstanding anything contained in this Act, any such mortgage (a mortgage by a settler affecting his homestead), shall be deemed an assignment or transfer prohibited by the "Dominion Lands Act."

The word "mortgage" here means "any charge on land created merely for securing a debt or loan," (section 2, sub-sec. 5); and the form of mortgage prescribed by the Act does not in any material respect

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(1) R.S.C. (1906) ch. 110.

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differ from that of the instrument in question on this appeal.

These enactments then, the first by implication, the second, by express declaration, disclose a view of the effect of section 142 by the legislature itself and a trend of legislative policy with which the narrower construction proposed by the appellant cannot be reconciled.

The other question is: Whether, in the absence of any action by the Minister, the effect of this section is to nullify absolutely and for all purposes instruments embraced within its purview or only to make such instruments voidable at the instance of the Crown.

The enactment, by its express terms, excludes from its operation those cases in which the Minister may and does by his declaration permit the instrument to go into legal effect; but the words of the section, in their more obvious and natural meaning seem to signify that, in the absence of ministerial action, all instruments avoided by the enactments are to be and remain legally inoperative, that is to say, they are to be wholly without legal effect for any purpose whatever. It is true that the word "void" is often used in the sense more correctly expressed by the word "voidable"; but the last mentioned word does not necessarily mean "valid until rescinded." It is sometimes used to mean "invalid until validated"; and this latter is, I think, the only sense in which it can be said that an instrument coming within the sweep of section 142 and unauthorized by the Minister can properly be described as "voidable."

The course of legislation upon the subject, indeed, appears to shew conclusively that it is only by thus

reading the section we can carry into effect the real intention of Parliament in enacting it. The parent enactment (which with an immaterial modification is found in section 42, ch. 54, R.S.C. (1886)) contained an unqualified declaration that any assignment or transfer of a homestead (not having been recommended for a patent) should be null and void. In 1895, by section 5 of chapter 34 of 58 & 59 Vict. (which now appears as section 143 of the consolidation of 1906), it was provided in respect of such instruments executed before the passing of that Act, that they should not be null and void, *ipso facto,* but the Minister of the Interior was given power to declare any such instrument a nullity, and it was provided that any such declaration should take effect as if enacted in the Act itself, unless the patent should have issued before the date of the declaration. In 1897 (by section 5 of chapter 29 of 60 & 61 Vict.), section 42 of the "Dominion Lands Act" (1886), was repealed and a new section (now section 142 of the consolidation above quoted) was substituted for it. The difference in form between these two enactments, the one (section 143) dealing with instruments executed prior to the passing of the Act of 1895, and the other (section 142) relating to instruments of a subsequent date, cannot, I think, properly be disregarded. The legislature has manifestly drawn a sharp distinction between the two classes of documents. Those executed before the passing of the Act of 1895 are to be deemed to have gone into effect unless avoided by the action of the Minister; the latter were never to come into legal operation except as a result of a declaration by the Minister to that effect.

The appeal should be dismissed with costs.

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ANGLIN J.—The defendant McMillan while holder of a homestead section for which he had not yet obtained a patent or "been recommended for patent by the local agent," purported to "incumber, charge and create a lien upon" his homestead in favour of the plaintiffs by instrument, dated the 6th of August, 1904, and registered at Neepawa, on the 6th of December, 1904. The certificate of recommendation for patent to McMillan was issued and countersigned on the 3rd of August, 1905, and a patent was issued in his favour on the 23rd of September, 1905. On the 19th of September, 1905, McMillan conveyed his homestead property to his co-defendant Doig by instrument of transfer registered at Neepawa on the 25th of September, 1905. Doig had actual notice of the instrument of charge or lien given by McMillan to the plaintiffs. The question for determination is the validity of this charge or lien as against him.

By section 2(5) of the Revised Statutes of Canada, ch. 110, a mortgage is defined as "any charge on land created merely for securing a debt or loan"; by section 98 of the same Act it is declared that a mortgage "shall have effect as security, but shall not operate as a transfer of the land thereby charged." And, by section 96, any mortgage made by a settler before patent or recommendation for patent is declared to be "an assignment or transfer prohibited by the 'Dominion Lands Act'"(1), which, by section 142, provides that

> unless the Minister otherwise declares, every assignment or transfer of homestead or pre-emption right or any part thereof * * * shall be null and void.

(1) R.S.C. (1906) ch. 55.

It was argued that, notwithstanding this explicit provision of the statute, the instrument upon which the plaintiffs claim was not void, but merely voidable, and that it could be avoided only by or at the instance of the Crown. But the policy of the statute appears to be entirely to prevent the settler, during the period of performance of settlement duties, alienating his homestead or any part thereof or interest therein or in his inchoate right thereto, or doing any act which might tend to or be a step towards the bringing about of any such alienation. To hold that the words "null and void," when used in such a statute, should be construed as merely "voidable" would, in my opinion, be contrary to the clear policy and intent of the legislation and would tend to defeat—certainly not to advance—its object.

The language of section 143 which declares that, notwithstanding any provision to the contrary contained in any Act relating to Dominion lands, an assignment which would be in contravention of the terms of section 142 shall, if made before the 22nd of July, 1895, be not *ipso facto* void, but only voidable if the Minister so declares it, makes the construction of section 142, in my opinion, incontrovertibly that which I have stated, when applied to cases not within section 143.

It was strongly urged that the provision enabling the Minister to declare valid an assignment which would, otherwise, be null and void, in effect makes every such instrument merely voidable. It does not follow that because the Minister may declare the instrument valid it is prior to such declaration merely voidable; the statute says that it is null and void.

There has been, in fact, no declaration by the

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Minister with regard to the validity or efficacy of the plaintiffs' charge or lien. Section 142 provides for two things; first, that the prohibited assignment shall be null and void; and secondly, that its execution shall work a forfeiture of the homestead and pre-emption right. As to each, the operation of the statute is dependent upon the Minister not otherwise declaring In the present instance the issue of the patent to McMillan subsequently to his attempted creation of a charge in favour of the plaintiffs and a letter from the Secretary of the Department of the Interior, dated the 2nd of June, 1908, which states that any forfeiture of his homestead by reason of the execution of a lien to the plaintiffs has been waived, are relied upon as implying a declaration by the Minister of the validity of the instrument under which the plaintiffs claim. It is plain that the waiver of the forfeiture of the homestead and the validating of the plaintiffs' alleged lien are things essentially different, and that the one by no means involves the other. In the statute these two matters are kept entirely distinct. In my opinion, the contention that the issue of the patent and the writing of the letter above referred to amounted to more than a waiver of the forfeiture of homestead rights incurred by McMillan is not sustainable. There is no evidence of any declaration by the Minister of the validity of the instrument under which the plaintiffs claim, nor is there anything in evidence from which it can be inferred that the Minister ever made such a declaration or intended to do so.

In view of the explicit language which I have quoted from the several sections of the "Land Titles Act"(1), I think it is quite unnecessary to deal with

(1) R.S.C. (1906) ch. 110.

the somewhat elaborate arguments addressed to us upon the question whether, apart from this legislation, the instrument executed by McMillan in favour of the plaintiffs would be a "transfer or assignment" within the meaning of section 142 of the "Dominion Lands Act."

The appeal, in my opinion, fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Hudson, Howell, Ormond & Marlatt.*

Solicitors for the respondents: *Rothwell, Johnson & Bergman.*