G. M. ANNABLE (DEFENDANT) .....APPELLANT; 1912

AND *May 13. *June 4.

JAMES H. COVENTRY (PLAINTIFF) ..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Title to land—"Land Titles Act," R.S. Sask., 1909, *c.* 41—*Fraud—Cancellation of certificate of title—Appeal—Findings of fact—Review by appellate court.*

The appellant obtained a transfer of lands which had been executed by the registered owner to him through some mistake or inadvertence, and, although he was aware that these lands had been previously transferred by the beneficial owner to the respondent, he registered the transfer and thereby secured a certificate of title therefor in his own name as the owner.

Held, affirming the judgment appealed from (1 West. W.R. 148), that the certificate of title issued to the appellant should be cancelled, under the provisions of the "Land Titles Act' (R.S. Sask., 1909, ch. 41), as having been fraudulently obtained.

Per Anglin J.—Where error in the findings of the trial judge can be demonstrated wholly by argument it is the duty of an appellate court to review questions of fact even where those findings have been against fraud, and upon oral testimony. *Coghlan* v. *Cumberland* ([1898] 1 Ch. 704); *The "Gairloch"* ([1899] 2 Ir. R. 1); and *Khoo Sit Hoh* v. *Lim Thean Tong* ([1912] A.C. 323), followed.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), which varied the judgment of Newlands J., at the trial, and maintained the plaintiff's action with costs, but for reasons different from those given by the trial judge.

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

(1) 1 West. W.R. 148.

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

G. E. Taylor for the appellant.

W. B. Willoughby for the respondent.

THE CHIEF JUSTICE agreed that the appeal should be dismissed with costs.

DAVIES J.—I am not able to reach the charitable conclusion of the trial judge that there was no fraud on the part of Annable in taking from the vault of the solicitor Grayson and from that solicitor's clerk in his master's absence the transfer of the south-west quarter of section 36, township 15, range 24 west of the second meridian, and in causing the same to be registered and a certificate of title taken out to himself.

The learned trial judge, however, finds that under the circumstances the onus of proof lay upon him to prove that he paid value for the land and that he failed to discharge that onus.

I have gone carefully through the evidence and, while I fully agree in the finding that Annable did not prove that he gave any value for the land, I think also that he must have known when he obtained from the vault of the solicitor, Grayson, the transfer found by the latter's clerk in a private bundle of his employers from Kitty Ann White to Annable of this quarter section that it had been executed in mistake for the north-west quarter section of the same section which he had actually purchased from William J. White.

He must have known of the mistake when he registered the transfer and took out the certificate of title in his own name.

The positive evidence of William J. White that he never sold this south-west quarter section to Annable, but did sell him the north-west quarter section; the failure of Annable to remember how much he paid for this south-west quarter section, which he alleged he bought, or the amount of any of the instalments he paid, or when he paid any of them; the absence of any receipt, agreement or scrap of writing evidencing a sale to Annable by White or a payment of any part of the purchase-money to White; the absence of any entry in any book shewing any such payment, together with other facts proved, convince me that White never did sell and Annable never did buy this south-west quarter section.

William J. White was the beneficial owner of the land, it having been willed to him by his father. In April, 1902, he sold and transferred the quarter section to the respondent, Coventry, and was paid by him the purchase-price. Coventry went into possession at or immediately after his purchase and has remained in possession, farming the land and otherwise dealing with it as owner ever since, without any claim ever having been made by Annable that the land was his until after he found the assignment in Grayson's vault to himself and registered it in 1909.

Kitty White was the executrix of the will of her late husband, Charles B. White. The latter's son, William J. White, was the beneficial owner and devisee under his father's will. The consideration stated in the transfer found in the vault from Kitty White, executrix, to Annable was one dollar.

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Whatever may have been the belief or intention of Annable when he induced Grayson's clerk to give him this transfer we do not know, but, looking at all the facts proved, I fully agree with Chief Justice Wetmore that with full knowledge of the facts that W. J. White had sold this quarter section to Coventry, the respondent, and that he was the owner of the land the appellant fraudulently caused the transfer to himself from Kitty White to be registered and so obtained the certificate of title.

I think we are fully justified in reversing the inference of the absence of fraud drawn from the facts by the trial judge.

I would dismiss the appeal with costs.

IDINGTON J.—The father of William J. White homesteaded the south-west quarter of section 36, township 15, range 24, west of the second meridian and in the Province of Saskatchewan and had the right of pre-emption to the north-west quarter of said section.

He died on the 7th of March, 1891, at his original home in Ontario, after having by his will devised said lands to his son. By the same will he devised to his wife his homestead in Ontario and bequeathed to her his chattels there, during widowhood, and appointed her his executrix of the said will, which she proved.

William J. White lived on and completed the homestead duties in respect of said south-west quarter section and got a certificate recommending him to the grant thereof.

As there were no unpaid debts she was, in effect, a bare trustee for her son William J. White. He, being the actual beneficial owner of the said half-section,

resided on and farmed the said south-west quarter section for some years, if not till he sold it for a valuable consideration to the respondent, and, on the 26th of April, 1902, made an assignment to him pursuant to said sale. Unfortunately this could not by law be registered until the Crown patent issued, and even then was not tendered for registration, or the need for a transfer from the executrix would have been discovered and, no doubt, got.

In conformity with the "Land Titles Act" she was, on the 11th of May, 1903, granted said lands as personal representative, and this was registered on the 31st of March, 1904.

But it seems undisputed that respondent, who resided near it, had ever since his said purchase possessed and cultivated the land till these proceedings and, meantime, had made an abortive sale of it.

William J. White had, as appears from the abstract of registrations, previously mortgaged the property to local bankers for a small sum. And on the said 29th of April, 1902, that was discharged. A small seed-wheat-loan bond, as I take it, was made by William J. White in favour of the Minister of the Interior on the 12th of June, 1903. I see no explanation of why he should have signed for that after his sale to the respondent. As he stood in the Department of the Interior certified, as stated, for the patent, I infer he was merely carrying out his agreement of the previous year. Curiously enough the patent to his mother as personal representative and this bond bear the same number on the abstract. However, as no point is made of the execution of this bond save the unimportant one to shew that William J. White was not correct in saying he had left and never come back

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to Moose Jaw after January, 1903, it does not concern us much.

The appellant says he bought the north-west or pre-emption quarter-section and this south-west quarter-section from William J. White as one entire purchase, for the same consideration covering both. This single transaction becomes, as will presently appear, in carrying it out, if the story is true, strangely and in an unaccountable manner divided into two.

The said north-west quarter section was transferred to him by William J. White for the alleged consideration of $800 by a transfer, dated the 10th of March, 1903, drawn by one Fish, a local conveyancer.

There is produced and proved an assignment of this north-west quarter of said section from Kitty Ann White to William J. White, dated 14th September, 1904, for the consideration of one dollar.

Seeing the patent only got registered in the previous month of March this transaction just now referred to clearly is attributable to the completion of the title William J. White had bargained with the appellant to give him and pursuant to which he had made said transfer of the 10th of March, 1903, referred to.

The appellant had lived in Moose Jaw twenty-eight years before the trial and had been rancher, real estate agent and real estate speculator, and knew the district where the south-west quarter section now in question is situate, about twenty miles from Moose Jaw. On the 18th of March, 1909, he registered a transfer from Kitty Ann White, described as widow and personal representative of her late husband, purporting to transfer to him said south-west quarter section for the consideration of one dollar, and bearing date the

20th of July, 1903, and got, thereupon, a certificate of title which he contends is conclusive against the world.

At the foot of this certificate is noted, by the assistant deputy-registrar, the fact that the title of the owner is subject to the above-mentioned bond to the Minister of the Interior.

The attesting witness to said transfer was on said date serving as a clerk in the office of a solicitor where the respondent's above-mentioned transfer from White had been drawn, executed and still remained awaiting registration, which could not take place till registration of the patent. He made at the time the usual affidavit of execution from which it appears that this assignment was executed at Moose Jaw on the day it bears date. This witness was called but can give no information beyond verifying the fact of his being attesting witness and that the document seemed to have been written by a typewriting machine he had operated, but whether on this occasion he or some one else used it he could not say.

The solicitor's mind is equally a blank on the subject, save that he knew this south-west quarter section had been previously to that date conveyed by William J. White to the respondent and that he must have overlooked the misdescription.

It had remained in the solicitor's office, I imagine, evidently untouched, for nearly six years after this appellant had got Fysh to draw the transfer from William J. White to him of the north-west quarter section, and four or five years after he had carried it to the solicitor to get the said transfer by Mrs. White, of September following, to complete the business.

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The appellant, on the 25th of February, 1909, having sold the north-west quarter section to Wilson and Schrader, they retained said solicitor to pass the title. He (the appellant) accompanied the solicitor's clerk, who had then waited on him for his title papers, to the solicitor's office to search for them. Whilst engaged in such search the appellant, for the first time, saw the above-mentioned assignment of the south-west quarter section from Kitty Ann White to him and induced the clerk thoughtlessly to give it up to him. He took it away without asking the solicitor and registered it as already stated on the 18th of March, 1909.

If he had, as was his duty, asked the solicitor he never would have got it, for the solicitor tells us he knew Coventry, the respondent, had bought the south-west quarter section from William J. White.

Though he says he had bought both quarter sections at the time from William J. White as parts of the same transaction for one and the same consideration he cannot tell what that was. He pretends White owed him something, which the latter denies. He says the son directed the balance, which he cannot name except what had to be paid to the Government for the north-west quarter, to be paid to his mother, and it was paid accordingly by monthly instalments, but of which he can name no amount nor specify any of the times of payment.

She was dead before he ventured, without asking the solicitor, and hence improperly, to take possession of the document he founds his title upon, and was thereby led to invent this story he now tells. He cannot remember that he ever told any one till then that he owned or had bought the south-west quarter. It is shewn Mrs. White was well acquainted and on friendly

terms with Coventry, who on coming to town usually made a friendly call on her. She had bought a house in Moose Jaw after coming to town to live, and lived in it there with her son. There is not a shadow of foundation for supposing she was likely to be a party to a fraud on respondent, as she must have been if knowingly signing a transfer thereof to another and in monthly receipt of instalments on account of the price thereof.

The solicitor out of whose office the assignment was improperly taken acted for respondent and had, as he supposed, passed the title by procuring the discharge of the mortgage to the local bankers, but never saw the will and, I infer, waited the issue of the patent for which William J. White had a certificate apparently entitling him thereto. I infer that, as the transfer could not be registered before patent, whoever got it, the solicitor awaiting it lost sight of the transaction and the registration of the assignment to respondent was thus overlooked. The solicitor, I may repeat, has no doubt of the fact that respondent was the purchaser of the south-west quarter section and entitled to it.

And although the appellant swears the transaction between him and White was a single one embracing the purchase of a half section, he has utterly failed to suggest how or for what reason the assignments he got from William J. White, and his mother, and which he knew of all along, and had ultimately registered, one or both contained only the conveyance of a quarter section instead of the half section he was entitled to if his story is true. He listed the north-west quarter for sale, but refrained from listing the south-west quarter. He never paid taxes

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on the latter. He does not venture to say he omitted to do so as to the north-west quarter. He, I think, must have known in many ways that respondent was in possession of and claiming the south-west quarter section as the vendee of William J. White. The latter swears he had told him so. I see no reason to discredit him. Appellant undoubtedly knew it was a homestead quarter section, with such improvements as that implies, yet never concerned himself to know anything of the utility of these improvements with a view to benefiting therefrom as entitled on his story.

He seems to admit driving past it, yet never noticed or troubled to notice their state or other state of his acquisition which he never had seen except in this way.

He told respondent he had bought the north-west quarter from William J. White, but never set up any claim to the south-west quarter. The respondent also swears to the appellant telling him of having sold his quarter and having previously wanted one Smiley to put respondent's quarter along with his and sell both as a half section.

The appellant denies remembering. His explanation admits that he knew respondent had a quarter of that section, but imagined it was another. For a real estate speculator conversant with the district all this seems lame. And his story as to the alleged payments without receipts or other corroboration of any kind seems to me untrustworthy. The alleged loss of account books might, one would have supposed, be capable of corroboration, especially for one having a bookkeeper. It would have been interesting to have had the bookkeeper produce and verify the earliest cash-book and other books still on hand.

And when we find the bookkeeper writing a letter clearly disclosing knowledge of the respondent's claim and that man not called one is apt to become suspicious.

The question of notice may, in itself, be covered by the "Land Titles Act," but that does not dispense with its use as a valuable part of the evidence in a case of fraud. He swears he was to pay $800 to the Government for the north-west quarter. It is admitted the Government price actually was only $400 and, with interest, which from the date of the homesteading would be about $260, could not be the sum he names. There would be thus left a small balance. White swears he was to have got a hundred dollars, but never got it.

When we find $800 put in the assignment as the consideration, and that both almost agree, the one positive and the other suggesting that the bargain was made on the street, and it was found later that Mrs. White had to sign a transfer, I see nothing improbable in the surmise that I am tempted to make of something being said now forgotten by White relative to paying this balance to her.

It is not the version of either, yet they were speaking so long after the transaction was closed they may have forgotten such details. I need not dwell on, and do not rest on this surmise. If it comes to a question of veracity between them I have no hesitation in accepting White's statement as against that of appellant. The former coincides with honest dealing and a straight method of business. The latter is the converse and implies by its methods most improbable things.

No one has accepted the latter's story. Nor do I

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see how any one accustomed to such work can peruse his evidence and trust it.

The claims he sets up must rest on a bargain with William J. White, and the assignment put forward as executed by his mother must be taken if anything, as a mere mode of carrying that out.

When I come to the conclusion, as I do unhesitatingly, that there never was a bargain with him that embraced this south-west quarter, then his act of inducing a clerk, without authority and behind his master's back, to deliver over such a document under all the circumstances I have related and of having it taken to the registry and put on record there, constitutes such a gross fraud that there should, I respectfully submit, never have been any hesitation in so declaring.

If White ever thought of selling and defeating respondent's rights he clearly must have contemplated fraud, and it would require but little evidence to make the appellant a party who had participated therein with him under section 65 of the Act. If a personal representative, shewn to be such, on the face of the certificate and registry, as here, should for his or her own purposes, intending to apply the purchase money to his or her own use, so receive it for such purpose to the knowledge of the purchaser, how can he not be held participating or colluding ?

If White's story be accepted, how could the payments to the trustee be properly made ?

Clear as noonday, either White or appellant intended deliberately to cheat somebody out of their rights in the south-west quarter, for I am quite sure that the late Mrs. White never so intended. And there is nothing but appellant's word for it that White

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did. As between the two I have no doubt in concluding it was appellant who committed fraud, and all that has followed, placing him in the light of either knave or fool, as his own story does, is result thereof.

We have no explanation of how the transfer of the north-west quarter from White to appellant got from Fysh's office to that of the solicitor, or for what purpose. Possibly the appellant might have helped by searches most men would have made in an effort to discover this and other details of a story involving their honour, especially knowing or having means of knowing William J. White's version given in Moose Jaw six weeks before the trial. No one else seems to know the how or why of this and many other strange things his story suggests.

I think, however, a careful consideration of the evidence as he chooses to leave it as it stands almost demonstrates that the instrument he used was simply the product of a typewriter's mistake of "south-west" for "north-west," and its destruction was quite overlooked when about a year and three months later the late Mrs. White rectified the error by executing a new transfer.

Having reached such conclusions I need not enter at length, if at all, upon the questions raised by the learned trial judge's view of the Act, and the possibility of his judgment being maintained on the ground and in the way he dealt with the case. I do not dissent therefrom but express no definite opinion in that regard.

I may call attention to the following section of the "Land Titles Act":—

> Section 4.—Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of

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actual fraud or over contracts for the sale or other disposition of land for which a certificate of title has been granted.

This does not seem to me so clearly limited to the construction contended for by appellant's counsel as he seemed to urge. To restrict it to the cases of fraud only would eliminate part of the section. To apply that part of the section "or over contracts for the sale or other disposition of land" to such contracts as made after every certificate of title would be needless. Such a jurisdiction is nowhere in the Act taken away, and must, unless expressly taken away, be presumed to continue.

If, on the proper construction, it is applicable to a case such as this, for example, where the contract has not been fulfilled and yet the certificate of title which the parties might intend to become effective when once due fulfilment of contract for sale had taken place, had been improvidently issued, then the form of relief the learned trial judge gave might be appropriate so long as no right of third parties had intervened. There are many considerations relative thereto suggested by other sections of the Act.

The question was argued somewhat, but I have formed, I repeat, no final opinion in regard thereto.

The question is raised of the land not having been brought under the Act by registration of the Crown grant at the time when these competing transfers were made, but I doubt the point being well taken if nothing else had co-operated therewith. I need not form an opinion on it.

DUFF J. agreed that the appeal should be dismissed with costs.

ANGLIN J.—We are asked to reverse the finding of

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the Supreme Court of Saskatchewan, sitting en banc, that the defendant in taking and having registered a transfer from Mrs. K. A. White to himself of a quarter section of homestead land committed a fraud, and to restore that of Newlands J., that he merely made an innocent mistake, and that, in giving his testimony at the trial that he had bought and paid for this quarter section, he was also honestly mistaken—the fact being as found by the learned trial judge, that he had given no consideration for the transfer in question, but had bought an adjacent quarter section which had been conveyed to him and subsequently sold by him.

I agree with Wetmore C.J., who says:—

> Looking at the general character of Annable's testimony and his conduct * * * and the testimony of William J. White, I cannot bring my mind to look upon his action with the same degree of charity that the trial judge did.

I concur in the view of the evidence taken by Brown J. and in his conclusion that

> when the appellant got the transfer of this land from Mr. Grayson's office he had no right whatever to it, and he must have taken it and had it registered knowing that he had no right to it and in fraud of the plaintiff.

It is within the province of an appellate court and it is its duty,

> even where, as in this case, the appeal turns upon a question of fact * * * to re-hear the case * * * not shrinking from overruling it if, on full consideration, the court comes to the conclusion that the judgment is wrong. *Coghlan* v. *Cumberland* (1); *The "Gairloch"*(2).

This rule was acted upon by the Judicial Committee in the recent case of *Gordon* v. *Horne*(3), (29th July, 1910).

(1) (1898) 1 Ch. 704. (2) (1899) 2 Ir. R. 1.
(3) 43 Can. S.C.R. ix.; 42 Can. S.C.R. 240.

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It is, in my opinion, not possible to say that the full court erred in taking a view of the evidence different from that of the learned trial judge and in affirming his judgment on the ground of fraud which he had failed to find. His error was susceptible of demonstration wholly by argument. *Khoo Sit Hoh* v. *Lim Thean Tong*(1).

In dismissing the appeal, however, I do not wish to be understood as dissenting from the view of the law expressed by Newlands J. I find it unnecessary to consider that aspect of the case.

BRODEUR J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Chisholm & Regan.*
Solicitors for respondent: *Willoughby, Craig & McWilliams.*

(1) (1912) A.C. 323, at p. 325.