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GEORGE H. G. McVITY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

*June 5.
*June 26.

AND

RACHEL TRANOUTH AND WILLIAM TRANOUTH (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Limitation of actions — Unregistered deed — Subsequent registered mortgage—Possession—Right of entry.

R. T. in 1891, being about to marry W. T. and wishing to convey to him an interest in her land, executed a deed of the same to a solicitor who then conveyed it to her and W. T. in fee. The solicitor registered the deed to himself but not the other, forging on the same a certificate of registry, and he, in 1895, mortgaged the land and the mortgage was duly registered. R. T. and W. T. were in possession of the land all the time from 1891, and only discovered the fraud practised against them in 1902. In 1903 the mortgagee brought action to enforce his mortgage.

Held, affirming the judgment of the Court of Appeal (9 Ont. L.R. 105), Davies and Nesbitt JJ. dissenting, that the legal title being in the solicitor from the time of the execution of the deed to him the Statute of Limitations began to run against him then and the right of action against the parties in possession was barred in 1901.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment at the trial in favour of the plaintiffs.

On the 19th of June, 1891, the defendant Rachel Tranouth, then Rachel Maxfield, was the owner in fee simple and in possession of 100 acres of land in the Township of Cavan, and on that day, being about to

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Idington JJ.

(1) 9 Ont. L.R. 105.

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marry her co-defendant, desired to convey to him an undivided one-half share thereof, so that they might become tenants in common in fee.

She therefore requested one George Sootheran, a conveyancer, to prepare the necessary instruments for that purpose, which he undertook to do.

The instruments which he prepared, and which were duly executed in duplicate, were a conveyance from the lady to himself, Sootheran, and a re-conveyance to the two defendants as tenants in common in fee.

The deeds were left with Sootheran for registration and safe keeping, and on the 29th of September afterwards, he duly registered the conveyance to himself, but fraudulently omitted to register the re-conveyance, and indorsed upon one of the parts a certificate of registration, to which he forged the signature of the registrar.

Afterwards, on one or more occasions, Sootheran, without the knowledge of the defendants, fraudulently borrowed money for his own use, by mortgage of the land thus appearing to stand in his name in the registry office; and on the 30th day of August, 1895, he applied to Mr. Seth S. Smith, a solicitor, for another loan wherewith to pay off the mortgage or mortgages which he had previously made. Mr. Smith, acting for the plaintiffs, agreed to advance the money, $2,000, out of the funds of the plaintiffs in his hands upon receiving a certificate of the sufficiency of the security. For this purpose Sootheran forged a certificate purporting to be signed by the assessor of the township, expressing that the land was worth $4,000, and that the defendants were in possession thereof under a lease for seven years, of which only three years had expired. Upon the faith of this certificate the loan

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was completed upon a mortgage of the defendants' lands, dated the 30th day of August, 1895, executed by Sootheran to the plaintiffs, and which was duly registered on the following day.

Some time in the year 1902 the defendants learned accidentally of the registration against their land of the mortgage or mortgages thus made by Sootheran, and began to make inquiries, upon hearing of which Sootheran absconded.

The present action was commenced on the 12th of May, 1903, against the defendants, who had been in continuous possession and occupation of the land from and after the 19th of June, 1891, and is for possession and sale of the land, in default of payment of the mortgage made to them by Sootheran under the circumstances above related.

Two defences were set up to the action, first, notice of the fraud which had been committed by Sootheran, or such absence of inquiry as was equivalent to notice, and secondly, the Real Property Limitation Act.

The learned Chancellor held against the defendants on both grounds of defence, and granted a judgment for redemption and sale and for immediate possession which the Court of Appeal reversed.

H. J. Scott K.C. for the appellants cited *Murray* v. *East India Co.*(1).

Watson K.C. and *Ruddy* for the respondents referred to *Ross* v. *Hunter*(2); *Stephens* v. *Simpson*(3).

THE CHIEF JUSTICE.—This case has given me much trouble. The fact that the Court of Appeal reversed the judgment of the Chancellor and that my

(1) 5 B. & Ald. 204.
(2) 7 Can. S.C.R. 289.
(3) 12 Gr. 493.

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brothers Sedgewick and Idington are unhesitatingly of opinion that the Court of Appeal was clearly right, whilst my brothers Davies and Nesbitt, with no less hesitation, say that it was clearly wrong, is, by itself, cogent evidence that the point in controversy, though reduced to a narrow compass, is not of an easy solution.

After great hesitation I have come to the conclusion, with my brothers Sedgewick and Idington, that the appeal should be dismissed. In doing so, I am forced to confess that my best reason for it is that to doubt is to confirm.

SEDGEWICK J. concurred with Idington J.

DAVIES J. (dissenting).—I am of opinion that the true construction of the Registry Act of Ontario, 87th section of chapter 136, Revised Statutes, is simply to give a registered conveyance affecting lands priority over an unregistered conveyance of the same lands, although the latter was first executed. The section does not avoid previous unregistered instruments absolutely, but only as against subsequent purchasers or incumbrancees for value without actual notice, whose conveyances are registered. For all other intents and purposes the unregistered conveyance is good.

In this case the parties, plaintiffs and defendants, were the innocent victims of the wilful fraud of one Sootheran.

The plaintiffs claimed the land in question as the registered mortgagees of the same under a conveyance from Sootheran.

Sootheran had previously conveyed to the defendants. The deed was not registered, the defendants being deceived into the belief that it was by a certificate of registry forged upon it by Sootheran.

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The single question for us to determine is whether the defendants had acquired a title by possession under the Statute of Limitations. The Court of Appeal held that as the unregistered prior deed to the defendants from Sootheran was, by the Registry Act, made void, it could not be invoked by the subsequent registered mortgagees to shew that Sootheran, after its execution, had no right of entry to the lands in question. They held that the Statute of Limitations did, consequently, apply to him. Being void they held that it was void under the statute *ab initio,* and that the defendants being in possession the Statute of Limitations began to run the day after Sootheran got his deed and became owner in fee of the lands, and that their possession had ripened into a statutory title before this action was begun.

The fallacy underlying this reasoning lies in the ignoring of the words of the section making the unregistered prior conveyance void only as against the subsequent conveyance registered. The unregistered deed to the defendants conveyed to them all Sootheran's title and interest. Such title and interest still remains, but it is made by the statute to rank after the mortgage subsequently executed but first registered. Sootheran had, after the execution of the deed to the defendants, no right of entry which any possession under the Statute of Limitations could bar. In fact the statute did not, and under the construction I place upon the Registry Act could not, apply to him. It follows, therefore, that, as against the plaintiffs, the defendants have not acquired any statutory title, and the appeal should be allowed and the judgment of the Chancellor restored.

NESBITT J. (dissenting).—I concur. The authorities seem to me to clearly establish that the only effect

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of the Registry Act is to give priority to the registered over the unregistered instruments, leaving the interests of the parties otherwise unaffected. *New Brunswick Railway Co.* v. *Kelly*(1).

If, as suggested, no legal title ever passed from Sootheran to the mortgagee, as he had already conveyed the legal title to the defendants and, therefore, no right of entry ever accrued to the mortgagees, the Statute of Limitations never became applicable between the parties, and the Registry Act gives the mortgagees the priority they claim.

The result of the judgment of the Court of Appeal and the majority of this court is that a person who is the legal and equitable owner in possession of land, and as to whom the Statute of Limitations cannot have any application (who has, by his own act, in executing a conveyance which has been registered enabled an innocent party to bring into play the Registry Act), can defeat the plain language of that Act creating priority against him by invoking a statute which had admittedly no application prior to the registration, and add a term of years as running which, in fact, was not running. 0 plus 5 = 10 is an arithmetical calculation I fail to appreciate. I would restore the judgment of the Chancellor.

IDINGTON J.—It is asked by the appellants: When did the right of entry accrue? They set up the outstanding estate vested in the respondents by Sootheran's deed to them to shew that it stood in the way of making entry until the mortgage to the appellants was registered.

This deed is, by virtue of the Registry Act, made void as against the appellants. It is not made, it is

(1) 26 Can. S.C.R. 341.

said, absolutely void, but only as against the subsequent mortgage. I grant that. But how far is it necessary to make it void to enable the mortgagee to assert a good title to the legal estate?

It must make it void back far enough to enable the mortgagee to shew a good paper title—and that means beyond the time when the unregistered title began.

Then, when it runs to that point, there is presupposed an absence of any other legal estate. There cannot be two at the same time.

There seems, therefore, no escape from the result that, in this case, by the assertion of their title, the appellants, of necessity, obliterate, by force of the Act that they invoke for their protection, any title that the court can, in this case, consider. The appellants cannot claim at one and the same moment a legal estate vested in them and also in their adversaries.

This is, after all, only another way of saying and illustrating what the late Chief Justice Draper and others said in correct legal phraseology as to the unregistered deed being void *ab initio*.

I think the appeal should, for these and for the reasons assigned by the Court of Appeal, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Seth S. Smith.*
Solicitor for the respondents: *Robert Ruddy.*