GERALD HENRY HELLER (*Petitioner*) ..APPELLANT;

1963

*Feb. 18, 19
Mar. 7

AND

THE REGISTRAR, VANCOUVER LAND REGISTRATION DISTRICT } RESPONDENT;

AND

MARY ELIZABETH HELLER .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Real property—Conveyance registered and new certificate of title issued—Registrar erroneously acting under impression he had duplicate certificate of title in his possession—Whether registrar must automatically, on discovering error, cancel new certificate of title—Land Registry Act, R.S.B.C. 1960, c. 208, s. 256.

The respondent presented to the Vancouver Land Registry Office a conveyance, from her husband, the appellant, to herself, of title to certain property. The conveyance was registered and title to the lands in question was issued in her name under a new certificate of title. The conveyance was registered under the erroneous impression that the appellant's duplicate certificate of title was lodged at the registry office. The appellant's solicitor later wrote to the registrar requesting that the certificate of title issued to the respondent be cancelled and that the cancellation stamp on the appellant's certificate of title be removed. The registrar refused to comply with this request and the husband then filed a petition, by way of appeal, in the Supreme Court of British Columbia, which petition was granted. An appeal to the Court of Appeal, argued on an agreed statement of facts substantially different from what had been alleged in the petition, was allowed and the petition was dismissed.

Held: The appeal should be dismissed.

Section 256 of the *Land Registry Act* enables the registrar to exercise a limited power of cancellation, or correction, where he discovers that error has occurred. The power thus conferred on him is one which he is authorized to exercise at his discretion. There is no provision in the section for an application to the registrar by an interested party, nor is there any direction that, upon such application, the registrar shall proceed to exercise his powers. This was not, therefore, a provision which imposed a duty to exercise the power to enforce the right of a party, such as was mentioned by Lord Blackburn in *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 241.

The registrar's powers were limited by the words "so far as practicable, without prejudicing rights conferred for value". Although it appeared that the consideration stated in the conveyance from the appellant to the respondent was the sum of $1, the registrar would not, without receiving additional evidence, be in a position to know, merely by

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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looking at the conveyance itself, whether the rights conferred upon the respondent by the conveyance were for value or not. It was no part of the function of a registrar, under this section, to adjudicate upon contested rights of parties, for the determination of which it would be necessary for him to hear, receive and weigh evidence. He can only act upon the material which is before him in his own records.

The error in the present case was not in relation to the issuance of a title according to the tenor of the transfer, but was in respect of the failure to have required the production of the duplicate certificate of title of the appellant (s. 157). *C.P.R. and Imperial Oil Ltd. v. Turta,* [1954] S.C.R. 427, distinguished. There was nothing before the registrar, on his own records, to indicate whether or not that duplicate certificate of title was available and would be produced by the respondent. Any information which he had in that regard could only be obtained on the basis of outside evidence submitted by the appellant, which might be contested by the respondent.

Under s. 35, as between the appellant and the transferee, the conveyance had become operative. Furthermore, under s. 159, the holder of any duplicate certificate of title covering land for which he has given a conveyance or transfer is required to deliver up his duplicate certificate of title to the registrar. The appellant's position was, therefore, that in order to obtain redress as against the respondent, he would have to establish, by evidence, that there had been an incomplete gift, that there had been no delivery of the deed, or that there was fraud on the respondent's part, any of which issues, could not properly be determined by a registrar, under the provisions of s. 256, but which could only be determined by an action in court.

Finally, although the point was not argued in this Court, nor in the Courts below, and consequently without expressing a final opinion, it was doubtful whether the registrar's decision to act, or his refusal to act, under s. 256 was the proper subject-matter of the appeal provisions contained in Part XV of the Act.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Brown J. Appeal dismissed.

Douglas Norby, for the petitioner, appellant.

Miss Mary F. Southin, for the respondent: Mary Elizabeth Heller.

The judgment of the Court was delivered by

MARTLAND J.:—On February 10, 1958, the respondent Mrs. Mary Elizabeth Heller (hereinafter referred to as "the respondent") presented to the Vancouver Land Registry Office a conveyance, from her husband, the appellant, to herself, of title to the lands at that time registered in his name under Certificate of Title 152412L. The stated consideration was $1. The conveyance was registered and title

[1] (1960), 33 W.W.R. 385, 26 D.L.R. (2d) 154.

to the lands in question was issued in her name under Certificate of Title 380035L. The conveyance was registered under the erroneous impression that the appellant's duplicate certificate of title was lodged at the Registry Office.

On January 5, 1959, the appellant's solicitor wrote to the respondent the Registrar of the Vancouver Land Registration District, requesting that the certificate of title issued to the respondent be cancelled and that the cancellation stamp on Certificate of Title 152412L be removed. In this letter it was stated:

> Mr. Heller wishes it to be understood that he is not asking you to adjudicate on the validity of the deed of land to Mrs. M. E. Heller covering the above property.

The Registrar refused to comply with this request and, in his letter in reply, stated, among other things:

> With respect I point out that the said paragraph 2 and paragraph 3 of your letter are contradictions in terms in that I cannot interfere with Mrs. Heller's registration without agreeing with Mr. Heller's contention of fraud on her part, none of which is disclosed by the conveyance itself, nor does the said conveyance give any intimation that even an error has been made in this office.

The appellant then filed a petition in the Supreme Court of British Columbia, by way of appeal from the Registrar's decision, containing a number of allegations, which included the following:

> 2. THAT in the summer of 1949 Your Petitioner was by his physician advised to undergo a serious surgical operation and on the 8th day of August, 1949 drew and duly executed a deed conveying the said property to Mary Elizabeth Heller, Your Petitioner's wife, the consideration mentioned therein was $1.00 but no money actually passed it being Your Petitioner's intention that the conveyance operate as a testamentary instrument if Your Petitioner did not survive the operation.
>
> 3. THAT the said deed was never delivered to Mary Elizabeth Heller but was placed among Your Petitioner's private papers and at no time did the said Petitioner intend to deliver the same.
>
> 4. THAT Your Petitioner on the 30th day of August, 1949, entered into an Agreement for Sale of an undivided one-half interest in the said property and a building to be built thereon, to one W. P. Cuff, which Agreement has not been registered in the Land Registry Office in the said City of Vancouver.
>
> 5. THAT Your Petitioner subsequently caused to be constructed upon the said property a building of the value of approximately $20,000.
>
> 6. THAT by Deed of Land dated the 15th day of July, A.D. 1953, Your Petitioner conveyed a one-half interest in the said property to the said W. P. Cuff.
>
> 7. THAT the Deed of Land mentioned in the preceeding paragraph contained a reference to the said unregistered Agreement for Sale and the said Cuff encountered difficulty in registering the said Deed.

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8. THAT Gordon Johnson, Esquire, Solicitor to the said Cuff requested from Your Petitioner a registrable Deed for the said one-half interest and the Duplicate Certificate of Indefeasible Title numbered 152412L, in pursuance of such request Your Petitioner caused to be delivered to the said Gordon Johnson the said Certificate to be held by him pending and for the purpose of the registration of the said Cuff's interest in the said property.

9. THAT the said Mary Elizabeth Heller was at all times cognizant of the aforesaid agreements.

10. THAT on or about the 10th day of February, A.D. 1958, the said Mary Elizabeth Heller without Your Petitioner's knowledge or consent and in some manner unbeknownst to Your Petitioner became possessed of the Deed above mentioned, and caused the same to be registered in the said Land Registry Office from which office, in due course, issued a Certificate of Indefeasible Title numbered 380035L citing the said Mary Elizabeth Heller as the registered owner of the said property.

This petition was supported by an affidavit of the appellant in which he swore that he verily and truly believed the statements set out in the petition were true and correct in substance and fact. It was heard by Brown J., who, according to his formal order, heard evidence, and who ordered the Registrar to cancel Certificate of Title 380035L and to remove the cancellation stamp from Certificate of Title 152412L.

From this order the respondent appealed to the Court of Appeal for British Columbia. Before that Court it appears that for the first time a statement of facts was agreed upon, on the basis of which the Court directed the appeal to proceed. Included in the statement of facts is the following material:

> It was also alleged by the Petitioner (Respondent) that the deed was an attempted testamentary disposition but it was agreed between Counsel in the Court Below that the question of delivery or non-delivery of the deed was not in issue.
>
> So far as the Registrar of Titles was concerned he had before him a deed valid and duly delivered on its face which complied with the requirements of the "Land Registry Act".
>
> It is not suggested that the Appellant knew that the duplicate certificate of title was not in the Registry nor is it suggested in these proceedings that she was guilty of any fraud in applying to register this deed.

The respondent's appeal was allowed and the appellant's petition was dismissed with costs[1].

The situation, therefore, exists that, whereas Brown J. dealt with a petition which contained the allegations previously cited, supported by affidavit, the appeal to the

[1] (1961), 33 W.W.R. 385, 26 D.L.R. (2d) 154.

Court of Appeal was argued on an agreed statement of facts substantially different from what had been alleged in the petition itself.

Leave to appeal to this Court was refused by the Court of Appeal for British Columbia. On a motion before this Court for leave to appeal, it was not disputed by counsel that the amount in issue exceeded $10,000 and consequently it became unnecessary to consider whether or not leave should be granted. It was not until the argument of the appeal itself that it first became apparent that, as the issues of delivery of the deed to, and the fraud of, the respondent were not in issue before the Court of Appeal, the rights of the parties had not finally been determined by its judgment. In the circumstances it was felt that, the matter having proceeded as far as it had, leave should be granted to the appellant in order that the submissions of the parties might be heard.

It is, however, at once apparent that a judgment of this Court in the present proceedings, in their existing form, could not finally determine the rights of the parties if the appeal fails, since there would still remain serious issues as between the parties which had not been before either the Court of Appeal or this Court. The Court, therefore, finds itself in the position where, in the light of what occurred before the Court of Appeal, it cannot determine the issues on the basis on which, according to the petition, they were presented before the learned trial judge, and that it is being asked to determine the question, which is really hypothetical, as to whether, under the British Columbia *Land Registry Act*, a Registrar, who, erroneously acting under the belief that he has in his possession a duplicate certificate of title, registers a conveyance and issues a new certificate of title, must automatically, on discovering his error, cancel the new certificate of title under the powers conferred upon him by s. 256 of the *Land Registry Act*, R.S.B.C. 1960, c. 208. Throughout these reasons I will be referring to those section numbers which appear in the Act as it presently stands, rather than to the numbers which existed at the time these proceedings were commenced, as the sections which require consideration are identical in their wording with the sections which appeared in R.S.B.C. 1948, c. 171, although not having the same numbering throughout the Act.

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Section 256 provides as follows:

256. If it appears to the Registrar

(*a*) that any instrument has been issued in error or contains any misdescription; or

(*b*) that any entry, memorandum, or endorsement has been made in error or has erroneously been omitted to be made on any register or any instrument; or

(*c*) that any registration, instrument, entry, memorandum, or endorsement was fraudulently or wrongfully obtained,

and whether the instrument is in his custody or has been produced to him under summons, the Registrar may, so far as practicable, without prejudicing rights conferred for value, cancel the registration, instrument, entry, memorandum, or endorsement, or correct the error in the register or instrument or any entry, memorandum, or endorsement made thereon, or in any copy of any instrument made in or issued from the Land Registry Office, and may supply entries omitted to be made. In the correction of any error the Registrar shall not erase or render illegible the original words, and he shall affix his initials thereto and the date upon which the correction was made or entry supplied. Every register or instrument so corrected, and every entry, memorandum, or endorsement so corrected or supplied, has validity and effect as if the error had not been made or the entry omitted. Every cancellation of an instrument, entry, memorandum, or endorsement under this section has validity and effect as from the issuing of the instrument or the making of the entry, memorandum, or endorsement.

In my opinion the appeal should be dismissed.

In the first place, the power conferred on the Registrar by this section is one which he is authorized to exercise at his discretion. The section provides that, if it appears to the Registrar that certain things have occurred, he *"may"* do certain things. There is no provision in the section for an application to the Registrar by an interested party, nor is there any direction that, upon such an application, the Registrar shall proceed to exercise his powers. This is not, therefore, a provision which imposed a duty to exercise the power to enforce the right of a party, such as is mentioned by Lord Blackburn in *Julius v. Lord Bishop of Oxford*[1]. The section, which is similar to like provisions in other statutes in Canada creating a Torrens system of titles, is one which enables a Registrar to exercise a limited power of cancellation, or correction, where he discovers that error has occurred.

In the second place, his powers are limited by the words "so far as practicable, without prejudicing rights conferred for value". Although it appears that the consideration stated in the conveyance from the appellant to the respondent was

[1] (1880), 5 App. Cas. 214 at 241.

the sum of $1, the Registrar would not, without receiving additional evidence, be in a position to know, merely by looking at the conveyance itself, whether the rights conferred upon the respondent by the conveyance were for value or not. In my opinion, it is no part of the function of a Registrar, under this section, to adjudicate upon contested rights of parties, for the determination of which it would be necessary for him to hear, receive and weigh evidence. He can only act upon the material which is before him in his own records.

I realize that the provisions of para. (*c*) of s. 256 may appear to be inconsistent with this conclusion. That paragraph relates to a situation where "any registration, instrument, entry, memorandum, or endorsement was fraudulently or wrongfully obtained". If, however, these words were to be construed in their widest sense, so as to enable a Registrar to act, under the section, upon evidence submitted to him upon which he could make a finding of fraud, I would have grave doubts as to whether this provision could be held to be *intra vires* of the Legislature of British Columbia. So construed, the Registrar would be clothed with an original jurisdiction to determine questions of title to land in relation to which fraud had been alleged (*Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd. et al.*[1]).

The present case is in no way comparable, on its facts, to the situation which had arisen in *C.P.R. and Imperial Oil Ltd. v. Turta*[2], at the stage where the transfer from the C.P.R. to Podgorny had been registered. In that case the error which had arisen was the issuance of a title to land, including certain minerals, in the name of Podgorny, when the transfer to him from the C.P.R., which gave rise to his title, had specifically reserved them to the C.P.R. The error was apparent on the face of the records in the Land Titles Office. In the present case the title issued to the respondent was that which the conveyance provided for. The error was not in relation to the issuance of a title according to the tenor of the transfer, but was in respect of the failure to

[1] [1960] S.C.R. 32, 21 D.L.R. (2d) 97.
[2] [1954] S.C.R. 427, 3 D.L.R. 1.

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have required the production of the duplicate certificate of title of the appellant. Section 157 of the Act provides:

> 157. Where a conveyance or transfer is made of any land the title to which is registered, the grantee or transferee is entitled to be registered as the owner of the estate or interest held by or vested in the former owner to the extent to which that estate or interest is conveyed or transferred; and the Registrar, upon being satisfied that the conveyance or transfer produced has transferred to and vested in the applicant a good safe-holding and marketable title, shall, upon production of the former certificate or duplicate certificate of title, register the title claimed by the applicant in the register.

There was nothing before the Registrar, on his own records, to indicate whether or not that duplicate certificate of title was available and could be produced by the respondent. Any information which he had in that regard could only be obtained on the basis of outside evidence submitted by the appellant, which might be contested by the respondent.

In the third place, I do not see how a party, who has executed and delivered a conveyance (and, on the basis of the agreed statement of facts before the Court of Appeal, delivery was not in issue), but who has failed to deliver the duplicate certificate of title to the transferee, is in any position to complain of the conduct of the Registrar in respect of the registration of that conveyance without proof of further facts. Under s. 35 of the Act, as between himself and the transferee, the conveyance had become operative. Furthermore, under s. 159, it is provided:

> The holder of any duplicate certificate of title covering land for which he has given a conveyance or transfer shall deliver up his duplicate certificate of title to the Registrar. . . . .

The appellant's position was, therefore, that, in order to obtain redress as against the respondent, he would have to establish, by evidence, that there had been an incomplete gift, that there had been no delivery of the deed, or that there was fraud on the respondent's part, any of which issues, in my opinion, cannot properly be determined by a Registrar, under the provisions of s. 256, but which can only be determined by an action in court.

Finally, I have some question in my mind as to whether a decision of the Registrar not to act under s. 256 can properly be the subject of an appeal under the provisions of Part XV of the Act. This point was not argued before us, nor in the Courts below, and consequently I would not wish to express a final opinion with respect to it. I note, however,

that the provisions dealing with appeals from the Registrar are contained in ss. 235 and 237 of the Act. An appeal under s. 235 arises in respect of a refusal by the Registrar, as described in s. 234(1), which reads as follows:

234. (1) In case the Registrar refuses to issue a certificate of title or to effect registration, renewal, filing, lodging, deposit, or cancellation in accordance with the tenor of any application, he shall forthwith notify the applicant, or the solicitor or agent of the applicant, in writing, of his refusal, stating briefly the reasons therefor and his requirements, and in case a subsequent application is affected by his refusal he shall also similarly notify the subsequent applicant.

Section 237 provides as follows:

237. If any person is dissatisfied with any decision of the Registrar, that is to say, any summary rejection of application, act, omission, decision, direction, or order of the Registrar in respect of any application, other than a refusal of the Registrar to which section 234 applies, he may forthwith require the Registrar to furnish to him, set forth in writing under the hand of the Registrar, the reasons of the decision; and may, within twenty-one days after the receipt by him of the Registrar's reasons, apply to a Judge of the Supreme Court in Chambers upon a petition by way of appeal from the Registrar's decision; and sections 235 and 236 apply in respect of the petition and the proceedings thereon.

It will be noted that s. 234(1) refers only to a refusal of the Registrar to issue a certificate of title or to effect registration, renewal, filing, lodging, deposit, or cancellation *"in accordance with the tenor of any application"*.

Section 237 refers to dissatisfaction with a decision, act or omission of the Registrar *"in respect of any application"*.

It would seem to me that the word "application", though not specifically defined in the statute, relates only to those matters in respect of which the Act gives to a person a right to apply to the Registrar to do something which the Act requires him to do, examples of which are to be found in the forms of application set forth, in Forms A to E inclusive, in the First Schedule to the Act. There is no provision for an application to the Registrar to act under s. 256. I would doubt whether his decision to act, or his refusal to act, under that section is the proper subject-matter of the appeal provisions contained in Part XV of the Act.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the petitioner, appellant: Jestley, Morrison, Eckardt, Ainsworth and Henson, Vancouver.

Solicitors for the respondent, Mary Elizabeth Heller: Ladner and Southin, Vancouver.