WILLIAM F. TOLLEY (PLAINTIFF).....APPELLANT.

AND

JOSEPH H. GUERIN AND FARMERS' & MERCHANTS BANK OF SWEET GRASS, MONTANA (DEFENDANTS).. } RESPONDENTS.

AND

JOSEPH SCHWARTZ .....(DEFENDANT.)

1926
*May 7, 10.
*Oct. 5.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Sale of land—Purchaser's lien—Priority to registered mortgage—Equitable considerations—Land Titles Act, Alta. (R.S.A., 1922, c. 133)—Sale of goods—Bulk Sales Act, Alta., 1913, c. 10, as amended 1919, c. 38 (present Act, in different form, R.S.A., 1922, c. 148).

T. bought from S. his store premises and stock-in-trade, transferring to S., as part consideration, T.'s ranch stock, which was to be applied, first on the purchase price of the land sold by S. to T., and then on the price of the merchandise. S. was to apply the proceeds of T.'s ranch stock transferred to S., in settlement of the debts of S. *pro rata*. G. was president of a bank to which S. was indebted. G. knew of the proposed transaction between S. and T. and desired it to go through. As found by this court, G. told T. that S. was not indebted to the bank, and concealed from T. certain securities taken to secure the bank, including a mortgage on the store premises which he registered; G. also procured the proceeds of T.'s ranch stock transferred to S. to be applied on the debt of S. to the bank. The wholesale creditors of S. seized the stock-in-trade under writs of execution, the seizure being based on an alleged violation of the Alberta *Bulk Sales Act* on the sale from S. to T. T. at first contested the seizure but abandoned the proceedings. T. recovered a judgment against S. for $5,500, and was declared to have a lien therefor on the store premises purchased from S., and that lien was given priority over G.'s mortgage. On this latter point a new trial was ordered by the Appellate

*PRESENT:—Anglin C.J.C. and Idington, Duff, Newcombe and Rinfret JJ.

Division, and it was this question of the priority of T.'s lien over G.'s mortgage (and the facts as to G.'s conduct, which were in dispute) which ultimately came to be decided by the Supreme Court of Canada.

Held that, even assuming (as was held by certain judges of the Appellate Division, but not decided by the Supreme Court of Canada) that the transaction between S. and T. was not a sale "for cash or on credit" within s. 2 of *The Bulk Sales Act of Alberta,* 1913, c. 10, as amended 1919, c. 38 (as being the Act applicable and not the later Act of 1922) and therefore did not violate that Act, so that T. might successfully have contested the seizure by the creditors of S., yet T.'s abandonment of his contest of the seizure did not afford an answer to his equitable claim against G.; G. was estopped from invoking his mortgage to the prejudice of T.'s lien; and the Alberta *Land Titles Act* has not denuded the courts of their equitable jurisdiction to compel persons unconscientiously asserting legal rights to do equity.

Judgment of the Appellate Division of the Supreme Court of Alberta (21 Alta. L.R. 408) reversed, and judgment of Boyle J. ([1925] 2 D.L.R. 270), declaring the priority of T.'s lien, restored with a certain modification.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta (1) which by a majority reversed the judgment of the trial judge, Boyle J. (2), declaring that the plaintiff (appellant) was entitled, in respect to a charge for a judgment against the defendant Schwartz for the sum of $5,500, to priority over the mortgage of the defendant Guerin against certain land which had been sold by Schwartz to the plaintiff.

The plaintiff and the defendant Schwartz entered into an agreement by which Schwartz was to sell to the plaintiff certain land and buildings thereon in Milk River, Alberta, and a stock of merchandise belonging to the business which Schwartz had carried on on the said premises. As part of the consideration the plaintiff was to transfer to Schwartz certain land and certain live stock and other chattels on his ranch. The property conveyed and payments made by the plaintiff to Schwartz were to be applied, first on the purchase price of the real property to be conveyed by Schwartz to the plaintiff, and then on the price of the merchandise. Schwartz was to apply the proceeds of all chattels got by him from the plaintiff in settlement of his debts *pro rata.*

(1) 21 Alta. L.R. 408; [1925] 3 W.W.R. 1; [1925] 3 D.L.R. 693.

(2) [1925] 2 D.L.R. 270.

1926

TOLLEY v. GUERIN.

The defendant (respondent) Guerin was the president and cashier of the defendant (respondent) bank at Sweet Grass, Montana, near the international boundary, which did some business in Canada. According to the findings made or sustained by the judgment now reported the following facts (on which there was conflicting evidence and certain difference of opinion in the Appellate Division) appear. Schwartz was indebted to the said bank. Guerin knew of the proposed transaction between the plaintiff and Schwartz and (believing, as he said, that Schwartz could do better in live stock than in a mercantile business), desired it to go through. Guerin told the plaintiff that Schwartz owed the bank nothing. Guerin undertook to act as trustee for distribution *pro rata* amongst the wholesale creditors of Schwartz of all moneys to be received from the sale by Schwartz of the plaintiff's ranch stock transferred to him. Unknown to the plaintiff Guerin took from Schwartz a bill of sale of the said ranch stock. He applied the proceeds of sale thereof towards Schwartz' indebtedness to the bank. He also, as security to the bank, took and caused to be registered a mortgage from Schwartz (he had previously held as security an unregistered transfer in favour of Schwartz) on property which included the land and buildings that Schwartz was transferring to the plaintiff, and disclosed this mortgage to the plaintiff only after the plaintiff had taken possession of the Schwartz property and the plaintiff's ranch stock transferred to Schwartz had been sold by Schwartz and its proceeds were already with Guerin's bank.

The wholesale creditors of Schwartz caused a seizure under writs of execution to be made of the stock-in-trade which had been sold by Schwartz to the plaintiff, the seizure being based on an alleged violation of the *Bulk Sales Act*. The plaintiff at first contested the said seizure but subsequently discontinued the proceedings.

On the first trial of the action, before Walsh J., the plaintiff was given judgment for $5,500 against Schwartz and was declared to have a lien for it upon the land in Milk River which Schwartz had agreed to sell to him and in part payment for which the plaintiff had transferred his ranch stock to Schwartz; and that lien was given priority

over the mortgage held by Guerin. In so far as this judgment gave priority to the plaintiff's lien over Guerin's mortgage it was set aside by the Appellate Division (1) and a new trial ordered. The second trial was before Boyle J. (2) who upheld the priority of the plaintiff's lien over Guerin's mortgage. This judgment was set aside by the Appellate Division and the plaintiff's action dismissed, Stuart and Clarke J.J.A. dissenting (3). The plaintiff appealed to this court.

A. L. Smith K.C. and *E. V. Robertson* for the appellant.

R. B. Bennett K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—The history of the transactions out of which this litigation arose and of the litigation itself is fully recorded in the judgments of the provincial courts. A careful study of the entire record discloses that the learned trial judge was abundantly justified in accepting the evidence of the plaintiff Tolley and his corroborating witnesses and in discrediting and rejecting entirely the conflicting testimony of the defendant Guerin. The findings of fact made by the learned judge (2) are fully sustained and warrant his conclusion that the plaintiff was the victim of a gross and palpable fraud in the perpetration of which the defendant Guerin not only actively participated but would appear to have been the instigating and controlling spirit.

Only one of the learned appellate judges has taken a contrary view of the evidence (4), and, with great respect, his reversal of the explicit findings of the trial judge as to the respective credibility of the witnesses who appeared before him cannot be supported. *Nocton* v. *Ashburton* (5).

(1) 21 Alta. L.R. 441; [1924] 4 D.L.R. 943; [1925] 3 W.W.R. 26.
(2) [1925] 2 D.L.R. 270.
(3) 21 Alta. L.R. 408 [1925] 3 W.W.R. 1; [1925] 3 D.L.R. 693.
(4) (1925) 21 Alta. L.R. 408, at p. 427.
(5) [1914] A.C. 932, at pp. 945, 957-9.

1926

TOLLEY v. GUERIN.

Anglin C.J.C.

To the findings of fact made by the learned trial judge the evidence appears to warrant the addition of further findings that the defendant Guerin not only undertook to act as trustee for distribution *pro rata* amongst the wholesale creditors of Schwartz of all moneys to be received from the sale by the latter of the Tolley stock transferred to him, but that he actually obtained $5,000 of such proceeds from the Canadian Bank of Commerce on a representation that he required this money to enable him to carry out the trust for such distribution, a bill of sale from Schwartz enabling him as holder of the legal title to the stock to compel the handing over of the proceeds of its sale to himself. Guerin's undertaking of the trust for distribution is sworn to by Tolley, corroborated by Schwartz, Berkinshaw and Moffat, and to a considerable extent by admissions forced from Guerin himself on cross-examination. He also admitted that he knew that the money in question formed "part of the realization of the first money from this deal with Tolley" and "was to be applied as payment on that real estate," i.e., the Milk River lots and buildings. Guerin, therefore, received these moneys earmarked to his knowledge with the trust impressed upon them by the agreement between Tolley and Schwartz of the 26th of August and, as to the $5,000, by asserting his purpose to carry out that trust. In direct violation of the confidence reposed in him he applied this $5,000 and other moneys received by him, which were likewise so earmarked to his knowledge, amounting in all to upwards of $6,000, to pay off in part the indebtedness of Schwartz to the Farmers' and Merchants' Bank of which he (Guerin) was the president and cashier—an indebtedness which he had not merely concealed from, but the existence of which he had more than once explicitly denied to Tolley in the course of the negotiations leading up to his agreement with Schwartz.

Concealing this indebtedness to the bank, Guerin, of course, also concealed from Tolley the existence of two securities which he held for it—one, the bill of sale of the Tolley stock already mentioned which he took from Schwartz on the day immediately following the completion of the agreement by which Schwartz acquired ownership

of it, and the other a mortgage from Schwartz for $8,500 on his property at Milk River, which included the lots and buildings that Schwartz was, to Guerin's knowledge, transferring to Tolley as free from all encumbrances. While Guerin had probably held an equitable charge on Schwartz's Mill River property for several weeks before Tolley entered into negotiations with Schwartz, his mortgage on it was perfected and registered only after Tolley had agreed to buy from Schwartz and with full knowledge by Guerin of the terms and conditions of their agreement. Guerin disclosed this mortgage to Tolley only after Tolley had taken possession of the Schwartz property and his (Tolley's) stock had been sold by Schwartz and its proceeds were already with Guerin's bank.

As a direct consequence of the fraud and breach of trust committed by Guerin in appropriating to his bank the proceeds of the Tolley stock, which the wholesale creditors of Schwartz should have received, the latter caused a seizure to be made of the stock-in-trade at Milk River, which had been sold by Schwartz to Tolley and they subsequently disposed of it. This seizure was based on an alleged violation of the *Bulk Sales Act* in the sale by Schwartz to Tolley and until the judgment rendered by the Court of Appeal on the second appeal everybody—courts, counsel and parties alike—had proceeded upon the assumption that the transaction between Schwartz and Tolley contravened the provisions of that statute and that the seizure and sale by Schwartz's creditors were unimpeachable. Tolley had at first contested the seizure but subsequently withdrew his application for interpleader, no doubt upon advice to that effect.

There have been two trials of this action. At the first trial before Mr. Justice Walsh Tolley's loss resulting from the fraud and breach of trust by Guerin was found to be $5,500; he was given judgment for this amount against Schwartz and was declared to have a lien for it upon the Milk River property of Schwartz in part payment for which he had transferred the ranch stock to Schwartz; and that lien was given priority over the $8,500 mortgage held by Guerin.

1926

TOLLEY v. GUERIN.

Anglin C.J.C.

In so far as that judgment established Tolley's claim against Schwartz and his lien for the amount thereof on the Milk River lots and buildings which Schwartz had agreed to sell to him, this judgment was not disturbed by the Appellate Division and is, therefore, *res judicata*. In so far as it gave priority to Tolley's lien over Guerin's mortgage, it was set aside, chiefly because Guerin had not given evidence at the trial before Walsh J., under a mistaken idea as to the question to be decided, and a new trial was directed solely to determine this issue (1). The formal judgment of the Appellate Division contains this paragraph:

> That there be a new trial before a judge without a jury to determine whether the respondent herein is entitled to priority over the mortgage of the appellant herein in respect of a charge for his judgment against the defendant Schwartz herein, for $5,500 against the following lands and premises registered in the name of the appellant, namely: All of Block 9 in the townsite of Milk River, according to a map or plan of record in the Land Titles Office for the South Alberta Land Registration District as Number 2227 Y, reserving unto the Crown all coal and unto the Alberta Irrigation Company all other minerals.

At the second trial (2), upon findings already sufficiently adverted to, Boyle J. upheld the priority of Tolley's lien over Guerin's mortgage but, no doubt inadvertently, included in it

> the costs of this trial to be taxed under column 5, rule 27 not to apply; and the costs of the appeal to the Appelate Division of this Honourable Court, together with the costs awarded by the Honourable Mr. Justice Walsh at the former trial, as varied by the Appellate Division on the appeal.

On the second appeal this judgment was set aside by the Appellate Division, and the plaintiff's action was dismissed with costs throughout, Mr. Justice Stuart and Mr. Justice Clarke dissenting (3). Harvey C.J.A., with whom Hyndman J.A. concurred, without at all suggesting that the findings of the learned judge were open to question, allowed Guerin's appeal solely on the ground that when the transaction between Schwartz and Tolley had taken place *The Bulk Sales Act* in force was the statute of 1913, c. 10, as amended by c. 38, s. 1, of the statutes of 1919, whereas it

(1) (1924) 21 Alta. L.R. 441, at p. 445.
(2) [1925] 2 D.L.R. 270.
(3) 21 Alta. L.R. 408; [1925] 3 W.W.R. 1; [1925] 3 D.L.R. 693.

had up to that time been erroneously assumed throughout that it was the statute of 1922 (R.S.A., 1922, c. 148) which governed. In the opinion of the learned Chief Justice the transaction between Schwartz and Tolley was not "a sale for cash or on credit" within the meaning of s. 2 of the statute of 1913, c. 10. He therefore concluded that the transaction involved no violation of that Act, that the seizure by Schwartz's creditors of the stock-in-trade which he had transferred to Tolley was indefensible and that Tolley's failure to prosecute his interpleader proceedings was the real cause of the loss suffered by him through being deprived of the Schwartz stock-in-trade. Beck J.A. wholly disagreed with the learned trial judge's findings of fact. The other members of the court, Stuart and Clarke JJ.A., as already stated, would have affirmed the judgment of Mr. Justice Boyle.

As the matter presents itself to us, it will not be necessary to express an opinion upon the application and effect of *The Bulk Sales Act* of 1913. Assuming, but without at all so deciding, that the view taken on these questions by the learned Chief Justice was correct, it is difficult to understand how Tolley's abandonment of his contest of the seizure by Schwartz's creditors affords any answer to his equitable claim against Guerin now under consideration. It may be that his failure to prosecute the contest of the seizure, if it were invalid, would have been so much the proximate cause of Tolley's loss that he would have had difficulty in maintaining an action for deceit. But different considerations govern the court when dealing as a court of equity with Tolley's equitable rights (*Nocton* v. *Ashburton* (1)), in regard to his purchaser's lien, (*Rose* v. *Watson* (2)), arising out of Guerin's fraud and breach of trust.

That Tolley had a purchaser's lien on the Milk River lots was established by the judgment at the first trial before Mr. Justice Walsh as against Guerin as well as against Schwartz. The only question left open on the new trial directed by the Appellate Division was Tolley's right to priority for that lien over Guerin's mortgage. It is unques-

(1) [1914] A.C. 932, at pp. 953, 963.

(2) (1864) 10 H.L.C. 672.

1926

TOLLEY v. GUERIN.

Anglin C.J.C.

tionable in our opinion that Tolley was induced to enter into the transaction with Schwartz largely on the strength of Guerin's false statements that Schwartz was not indebted to the Farmers' and Merchants' Bank and by his consequent concealment of the charge or mortgage which he held on Schwartz's Milk River property as security for the indebtedness to the bank which actually existed. Had Guerin's statements been true Tolley would have found himself, when deprived of the greater part of the consideration he was to receive for the transfer of his property to Schwartz as a result of the seizure by Schwartz's creditors of the stock-in-trade, with a lien for the amount of his loss on the Milk River lots and buildings unencumbered by any prior charge. In fact, when he comes to assert his lien he finds registered against the property a mortgage for $8,500 in favour of Guerin. That, under such circumstances, whatever may have been the rights of Schwartz's creditors under *The Bulk Sales Act,* a court of equity should hold Guerin estopped from invoking his mortgage to the prejudice of Tolley's lien in our opinion admits of no question. Nor does the *Land Titles Act* enable Guerin to reap the benefit of his fraud and breach of trust. That statute has not denuded the courts of their equitable jurisdiction to compel persons unconscientiously asserting legal rights to do equity.

On this short ground we are of the opinion that the judgment of the trial judge declaring the priority of Tolley's lien must be restored. In view however of the terms of the judgment directing the new trial, the addition to the $5,500, for which the lien had been established by the judgment of Mr. Justice Walsh, of the costs of the proceedings would appear to have been a mistake, which must now be rectified. With this modification the judgment of the learned trial judge (Boyle J.) will be restored.

The plaintiff should have his costs in this court and of the second appeal to the Appellate Division as well as the costs ordered by Mr. Justice Boyle to be paid by the defendants.

IDINGTON J.—This appeal arises out of a cause of action finally established by a judgment in the Appellate Division

of the Supreme Court of Alberta and out of a direction of that court, when so determining, to have an issue tried as therein directed, to determine the extent of relief to be granted as result thereof.

I have considered the judgment of the Chief Justice herein and in the main agree therewith, and absolutely as to the conclusions he has reached.

Appeal allowed with costs.

Solicitor for the appellant: *E. V. Robertson.*

Solicitors for the respondents: *Bennett, Hannah & Sanford.*