

### NOTICE UNDER THE ONTARIO LAND TITLES ACT.

The effect of notice on the title of a purchaser who seeks to be entered as an owner under the Ontario Land Titles Act is not anywhere in that Act completely dealt with but under sec. 41 of the Ontario Land Titles Act the words defining the title of a registered purchaser for value of freehold land as being, "free from all other estates and interests whatsoever" (i.e., other than registered incumbrances and the liabilities, rights and interests mentioned under sec. 23) make it clear that express notice of an adverse claim shall have no effect, unless such claim is protected on the register, as stated under sec. 68(3), by such notices, cautions, inhibitions or other restrictions as are authorized by the Act. These methods of protection for unregistered interests are provided by secs. 70, 71 and 72. If notice of a lease for a term of 3 or more years is registered under sec. 70 or if notice of a widow's estate in dower is registered under sec. 71, such lease or estate (as the case may be) is protected as being "an incumbrance." So too, registration of a restrictive covenant running with the land under sec. 99 protects the covenant, such registration making the entry in the register effective as notice.<sup>1</sup>

The Ontario Land Titles Act 1885 (48 Vict., ch. 22) contained the following section, viz.:

50. No person other than the parties thereto shall be held to have any notice of the contents of any instrument beyond the particulars contained in the register, or necessarily to be inferred therefrom.

In 1893 by 56 Vict., ch. 22, the above section was repealed and a section substantially the same as sec. 80 of the present Act, substituted.

Sec. 80 reads as follows:

80. No person other than the parties thereto shall be deemed to have any notice of the contents of any instruments other than those mentioned in the existing register of title of the parcel of land or which have been duly entered in the books of the office kept for the entry of instruments received or are in course of entry.

It has been pointed out by Mr. J. E. Hogg in *Registration of Title to Land* (Ed. 1920) at pp. 124-5 that, as it is definitely enacted under sec. 80 that notice of an unregistered interest is not to affect the registered title and as fraud is not here mentioned but is dealt with in a separate sec. 123, it seems clear that mere notice is not necessarily to be "imputed as fraud."

<sup>1</sup> *Wille v. St. John*, [1910] 1 Ch. 325 (C.A.).

In Harvey's Land Law and Registration of Title, 1910, the characteristics of an ideal register of title are discussed. At p. 198 the following paragraph is to be found:

Now it is one of the main objects of registration of title to abolish questions of notice and to enable the purchaser to confine his attention to the incumbrances entered on the Register . . . Thus a clear enactment will be required that the purchaser, in the absence of actual fraud, is to take free of any unregistered interest or incumbrance even with notice.

It is instructive to consider, by way of contrast, the provisions of the Ontario Registry Act as to the doctrine of notice. Under the Ontario Registry Act first passed in Upper Canada in 1795, such was the force of the Act that in a Court of law, at least, the registration of a conveyance protected the person claiming under it against a prior unregistered conveyance of the same land of which he might have had full knowledge and notice.<sup>2</sup>

In 1867 it was enacted that priority of registration should in all cases prevail, except as against actual notice.<sup>3</sup>

The policy of this legislation is to make the registration of an instrument *per se* notice to all persons subsequently dealing with the land; it is immaterial whether a search is actually made or not. Under the present Registry Act the notice which a subsequent-registered purchaser for value must have in order that his title may be affected is actual notice, express and direct, and not merely a knowledge of facts which may put him on further inquiry.<sup>4</sup>

Suspicion, or even constructive notice, or any notice less than actual notice, will not avail as against the registered instrument even when the grantee is aware that some one other than his grantor is in possession.<sup>5</sup>

A curious error appears to have been made in sec. 66, subsec. 3, of the Ontario Land Titles Act. The draftsman evidently thought that the doctrine of notice under the Registry Act was applicable also to the Land Titles Act.

This subsec. 3 reads as follows:

Where a tax purchaser fails to lodge a caution or to lodge his deed for registration prior to the registration of the title of a purchaser or chargee, claiming from or through the person who was the registered owner at the time of the tax sale, for valuable consideration and without actual notice of the tax sale, he shall lose his priority.

This amendment was made by 4 Geo. V, ch. 24, in the same year, 1914, as Meredith, C.J.C.P., dealt with sec. 66 in *Re Lord & Ellis*.<sup>6</sup>

<sup>2</sup> *Doe d. Major v. Reynolds*, 2 U.C.R. 319; Armour on Titles, ed. 4 at p. 59.

<sup>3</sup> Armour on Titles, ed. 4 at p. 61.

<sup>4</sup> *Sberbouneau v. Jeffs*, 15 Grant 574.

<sup>5</sup> *Roe v. Braden*, 24 Grant 589; Armour on Titles, ed. 4 at pp. 97-8.

<sup>6</sup> (1914), 30 O.L.R. 582.

There is printed with the amendment a reference to the Registry Act, R.S.O., ch. 155, sec. 77, and it is the only place in the Land Titles Act in which the doctrine of "actual notice," which is peculiar to the Registry Act and foreign to a Land Titles Act, affects a transfer or charge of land. The learned judge in *Re Lord & Ellis (supra)* did not base his decision on the want of actual notice: The tax purchaser in that case was cut out because he failed to lodge a caution or to get himself registered as owner under his tax deed. It is unfortunate that the draftsman of subsec. 3 did not appreciate that "actual notice" has no place in the Land Titles Act.

There is still another singular phrase in the amending subsec. 3. While subsec. 1 speaks of lodging a caution and subsequently entering the purchaser as owner, a practice well known under the Land Titles Act, yet the amended subsec. 3 declares that "Where a tax purchaser fails to lodge a caution *or to lodge his deed for registration*, prior to the registration of the title of" a purchaser or chargee from the registered owner, such tax purchaser shall lose his priority. Under the Land Titles Act, a purchaser does not "lodge his deed for registration." This phrase appears in no other place in the Land Titles Act. Lodging a deed is a practice obviously borrowed from the Registry Act and is something unknown to the Land Titles Act.

Sec. 37 may be called the heart of the Land Titles Act and it is there enacted that

The transfer shall be completed by the proper master of titles entering on the register the transferee as owner of the land transferred and until such entry is made the transferor shall be deemed to remain owner of the land.

So too as to the ownership of a charge by the chargee under sec. 29(2) and by the transferee of a charge under sec. 53(2). The title vests in the owner only upon entry in the register.

The meaning of sec. 66 as it stood before the amendment was clear. "If such a (tax) purchaser does not take the precaution to lodge a caution, or become registered as owner under his deed, he runs just the same chance as anyone else neglecting to register—he may be cut out. There was no need to express this in sec. 66; the earlier sections make it plain" per Meredith, C.J.C.P., in *Re Lord & Ellis (supra)* at p. 587. Under the Registry Act, deeds and other documents are registered to preserve priorities but under the Land Titles Act, the title itself is registered and the question of priority cannot arise and the phrase in subsec. 3 that the tax purchaser "shall lose his priority" and the phrase introduced by amendment into subsec. 1 "if no other person has become entitled by priority of registration" are wrong and meaningless in a Land Titles Act.

Mr. C. F. Brickdale, who was formerly the Registrar under the Land Registry in England, in giving evidence before the Royal Commission on the Land Transfer Acts in 1908 at p. 14 of the Minutes of Evidence says that if a purchaser of registered land gets a transfer from the registered proprietor and gets himself registered in his place

that will entitle him to neglect all questions of notice that may reach him from outside the register. A man may come to him and say, "Look here, I am the purchaser of this land, and I gave the value of it to the registered proprietor; he has no right to sell it to you." The purchaser may say: "That does not matter to me. Have you protected yourself on the register in the statutory way? If not, I shall complete." That is what I believe to be the intention and meaning of this Act.

And again at p. 83 of the Minutes of Evidence, Mr. Brickdale says:

I think, too, with regard to notice, that it might be more clearly set forth than it is (though I believe the Act intends it and would be held to mean it) that *bona fide* purchasers and mortgagees of registered land may disregard even express notice of documents and things not protected on the register. The register gives such easy means of protecting genuine claims that no person ought to be allowed to interfere with genuine business by using the old-fashioned and irresponsible method called "fixing with notice."

To sum up, (modifying and adapting to the Ontario Land Titles Act, the words of Brickdale and Wallace in their text-book on the English Land Registration Act, 1925, Ed. 3, at p. 16) the position of the registered purchaser for value of freehold land registered with an absolute title would appear to be this: He obtains the legal estate in the land described in the register, free from claims arising out of express, implied or constructive notice. Such description of the land in the register is not conclusive as to boundaries or extent, as against adjoining owners, secs. 23(2) and 98(1). He takes subject only to registered incumbrances, to executions filed under sec. 62 and to certain liabilities, rights and interests under sec. 23, (e.g., municipal taxes), which are usually the subject of inquiry under any system of registration of documents, such as prevails under the Ontario Registry Act. Under sec. 80 he is fixed with notice of the contents of any instrument to which he is a party, even though such instrument is not mentioned in the register. He is not affected by adverse possession (sec. 28).

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