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JUDGE BROOKS ON THE TORRENS LAW

His Recent Decision Which Has Aroused General Interest Among Real Estate Men and Lawyers—Text of Memorandum Which Discusses the Law and Its Operation.

Wide interest and discussion have been aroused among real estate men and lawyers by the recent decision of Judge C. F. Brooks of the Hennepin county district court, in the case of E. A. Ernst against Katherine and Michael Martin, John and Josephine Carl, defendants, and C. H. Dean, intervenor, and its relation to the Torrens law. The decision holds that there may be conditions under which registration of title does not insure it.

It is the generally expressed opinion of those conversant with the case that it is an extreme one, involving as it does, rather than usual features of conspiracy and fraud, which is not likely to have a parallel. Judge Brooks' thorough discussion of the Torrens law and its application, and his citation of cases bearing upon it, make it interesting to all who have or intend to acquire or transfer property.

An appeal will be taken and a supreme court decision will be awaited with interest. Judge Brooks' memorandum is, in full, as follows:

This action is brought to foreclose a real estate mortgage for \$1,850, executed by the defendants Martin to one Casper Ernst, on Sept. 27, 1897, and on the same day assigned by Ernst to plaintiff. Incidental to such relief, a decree is sought adjudging the invalidity of an unauthorized foreclosure of such mortgage, a forged power of attorney, pursuant to which the same was had, and a forged instrument in the form of a warranty deed, purporting to be a conveyance of the title acquired under such foreclosure to the defendant, John Carl.

The sole question presented is whether plaintiff's cause of action is barred by a decree of registration obtained in alleged conformity with the Torrens law during the pendency of this action, which decree is set forth in the intervening complaint

with the intent that plaintiff should not receive any notice of the registration proceedings until a decree therein should be obtained, conforming title in fee to the applicant.

Plaintiff Was Not "Unknown."

Under the evidence, it must be held that when Carl instituted the registration proceedings he knew that he had himself no title, that the defendants Martin owned the fee, and that the plaintiff had first lien by virtue of his said mortgage. Before the summons issued in such proceedings, Carl had been served with the complaint in this action, which set forth fully the nature of the plaintiff's claim. He knew, from that time, at least, that the papers, which upon their face divested the title of the mortgagors, and merged plaintiff's mortgage into a fee title, in form transferred to him, had no place upon the record and were in fact null and void. Plaintiff was therefore not an "unknown" party, but was, on the contrary, a party whose name and address and whose rights were known to Carl, who, nevertheless, on Jan. 23, 1904, instituted proceedings to register his alleged title, in which the summons issued on March 5, 1904 (twenty-seven days after the service of the complaint herein), and in which the plaintiff was not proceeded against by name, or otherwise than as a party or person unknown.

In the application signed and verified by John Carl in person, he falsely averred that he was himself the owner of the premises in fee and that no person other than himself had, or claimed to have, any estate, title, or lien, therein or thereto. Because of such untrue statements, the examiner reported that Carl owned the premises in fee and that no person should be made a party defendant, except Alzeor O. Brusna and D. E. Polo, who were tenants under Carl. And by such report, by the false application, and an affidavit made in behalf of Carl praying therefor, the court was induced to order the issuance of a summons in which plaintiff was not named, a party defendant, or otherwise named, in the application for a final decree. Carl testified as a witness in his own behalf, at the very time that this cause was at issue and upon the calendar for trial, that there was no mortgage upon said premises, and that he did not know of any claim against the same, which testimony Carl now concedes he knew at the time he gave it to be untrue.

upon the court as well, has given birth to a bona fide purchaser, and what is said is so that the court can no longer question its correctness or undo the wrong which it sanctions.

Was a Conspiracy.

This case does not involve the rights of a bona fide purchaser, and what is said has no reference to such a party. The intervenor was not an innocent purchaser. The evidence does not show that he bought in good faith or for value (the burden of proof as to which was upon him), and for this reason alone the finding is warranted that he secured his conveyance with full notice and knowledge of plaintiff's rights and that he paid no consideration therefor. The evidence, indeed, shows affirmatively a lack of good faith. He did not buy in the ordinary course of business. For some reason not satisfactorily explained, he suddenly became possessed of a desire to purchase property in a remote part of the city, and sent an agent there whom he would have us believe accidentally found Carl and his particular tract. He testifies that on the day of the purchase and for ten days previously, he had on deposit from \$2,000 to \$4,000, whereas in fact his deposits were at this time only about \$120.

The whole transaction evidences a conspiracy by the parties concerned to defraud plaintiff by the pretense that Deane was an innocent purchaser, instead of being, as he was, a party to the attempted fraud. Plaintiff's rights were not affected by the filing of the copy of Carl's application with the register of deeds. He has not taken by conveyance, attachment, judgment lien, or otherwise, any right, title or interest subsequent to the filing of such copy, within the meaning of Sec. 32 of the act in question, and was not, by reason of such section, required to appear or answer in the registration proceedings. He was not, within the meaning of Sec. 27, mentioned by name in the application or included in "all other persons or parties unknown." The decree was not, therefore, "binding and conclusive" upon him, nor was he "affected thereby." Sec. 28 of said act merely regulates procedure when a person not served or notified desires to "appear and file his sworn answer" in the proceedings. It does not conflict with and is not inconsistent with Sec. 29 immediately following, which requires, if it does not confer, the right of or to the party who is not bound or concluded by the decree to prosecute an action such as this, provided the same be not commenced more than sixty days after the decree.

The action at bar was not brought since the expiration of such sixty days. It was pending three months before the decree was entered, and was, indeed, brought before the action was begun in which the decree was obtained; for it was by the issuance of the summons and not by the mere filing of the application that the action

was instituted. The absence, moreover, of any issue in this case referring directly to the decree, for more than sixty days after its entry, was due entirely to the intentional default of the defendants, and not to any default or neglect of the plaintiff.

Construction of Torrens Law.

The principle upon which the Torrens law is based is not new in this state. It was introduced by Chapter 81 of the Laws of the Extra Session of 1881, which authorizes an action to determine adverse claims to be brought against persons unknown on the service of the summons upon them by publication. That statute was amended in *Ware vs. Easton*, supra, where it was held that it must "be strictly construed and followed" and that interested parties must be specially named "who are known and those who appear to be such by the records," and that otherwise the court acquires no jurisdiction. The Torrens statute itself, it would seem, was given the same construction in *Dewey vs. Kimball* (89 Minn. 454), in which the decree of registration was, as against one not specially named in the summons, held to be invalid and void for want of jurisdiction, because in omitting to name such a party the applicant had not followed the advice and direction of the examiner, and upon the further ground, apparently, that, aside from the examiner's report, there was "sufficient notice to the applicant to put her upon investigation and inquiry, and slight search for the truth would have disclosed the real facts," i. e., that a person not named claimed an interest in the property. As said in the *Westphal* case (88 Minn. 453), "It is only on non-residents and unknown persons or parties served by publication may be made."

The court should, and doubtless does, have the inherent power to purge its records of a judgment such as this, because of the fraud practiced upon it. It is, however, not merely because of the fraud that plaintiff is not bound, but because, not being a party defendant to the action, the court for that reason acquired no jurisdiction to render any decree therein which could affect or bar his right of action. As has been seen, he was not specially named in the proceedings, and could not be included among the parties unknown. In fact, his rights were of record, as much so as were those of Benjamin Homan in the case of *Ware vs. Easton*. Legally speaking, his lien was of record to the same extent as it was when the mortgage was recorded; and as between the parties, should be so treated, for forged instruments "cannot affect the title one way or the other, and are therefore not entitled to record." *Fry vs. Fry*, 109, 111, 466, 476. Carl was not merely put upon inquiry, as was the applicant in the *Dewey* case. He had actual notice and knowledge.

Surely it was never intended by the framers of this law that it should enable a felon, by means of a forged conveyance and a registration decree obtained as this one was, to appropriate to himself and his heirs forever the property of his victim. Yet, as to John Carl (in whose shoes this intervenor stands) this case is in principle the same as though he, and not Casper Ernst, had forged and placed of record the alleged power of attorney and deed and procured the unauthorized foreclosure to be made. And if he could, as claimed, under such circumstances obtain jurisdiction of plaintiff by describing him as a party unknown, then truly, as was said in the *Dewey* case, "The Torrens law would prove an instrument of oppression, and its enforcement would result in incalculable injury."

Other Points of the Law.

It is not the law, as many seem to suppose, that a certificate of registration is conclusive evidence of ownership in the holder, either before or after sixty days from the entry of the decree on which it is founded. By the express terms of the Torrens law, the registered land is held subject to "liens, claims or rights arising or existing under the laws of the constitution of the United States, which the statutes of this state cannot require to appear of record in the registry." One, therefore, who accepts a registered title may find it subject to pending litigation, bankruptcy proceedings or a judgment or other lien, the existence of which can only be ascertained from an examination and search of the records in the federal courts. It has, moreover, been expressly decided that the decree is void because rendered without jurisdiction, as against the owner of the land in terms registered, who was in actual possession but not made a party or served with a summons. Such want of jurisdiction may easily arise

when, as is frequently the case (and as in fact occurred in this instance) in determining the supposed tenants or other occupants who should be made defendants, the husbands or heads of families are alone included and no regard paid to the married women or others, any of whom may in fact own the property in fee and be in actual possession. Such a decree is also void as against one whom the examiner finds should be made a party and who is not specially and by name made such. And if a person is proceeded against as a non-resident, and as such served by publication, when in fact he is a known resident and should be served personally, the court would appear to be without jurisdiction, and the decree and resulting registration invalid as to the applicant or any person other than an innocent purchaser for value. And the same would seem to be true as respects any known party proceeded against not by name but as a party unknown. And after a registration in all respects regular, a loss may ensue through a forged deed or mortgage, and the party sustaining the loss have no redress whatever against either the land or the assurance fund. *Gilbs vs. Messer*, 27 A. M. L. R. 89, also reported in 54 Central Law Journal, p. 234. Such infirmities in a registered title cannot be obviated until forged, perjury and fraud become obsolete or our constitution be so amended that one's property may be appropriated by another without due process of law.

It does not follow, however, that the Torrens system is therefore ineffectual or its usefulness destroyed. As to lands not bought within its provisions, a purchaser relies upon the records and an examination of the same by a competent expert. He is not, and cannot be, protected against forged deeds and instruments appearing in the chain of title. Under the Torrens system the records are examined by an attorney designated by the court and styled an examiner; such parties are brought in as the applicant and the examiner designate; and the court, after a hearing, if the evidence be sufficient, adjudges that the applicant is the owner in fee, subject to such liens and encumbrances as the decree discloses. Such an examination and decree, if the applicant proceeds in good faith, should give much greater assurance than a mere examination of the records. And under this system a purchaser may, if he so desires, secure the opinion of an attorney of his own selection as to all the records, including those upon which the decree of registration is based and subsequent conveyances which the law requires to be on file with the registrar. But parties must still take their chances. The title may prove invalid because of the failure of the court to acquire jurisdiction. This is true as to an innocent purchaser, whom the law would protect if it could; and is still more true, and should not be otherwise, as to parties who undertake to secure registration by methods such as those disclosed by the record in this case.

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And again with this cause was so upon the calendar at the April, 1904, term, Carl, by his attorneys, under various pretenses, induced plaintiff's attorneys to consent and agree to a postponement of a trial to the September term following. This was done, as it is found, so that more than sixty days might elapse before plaintiff should learn of the decree and so that an alleged innocent purchaser might be secured. And such sixty days having elapsed and such alleged purchaser having been found in the person of this intervenor it is now claimed that all this perjury and fraud practiced against the plaintiff, and

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