the conclusions reached by the specialized tribunals whose determination is the subject of the appeal. This is natural when a judge is exercising appellate jurisdiction for the first time. But there have been enough appeals in relation to land valuation, liquor licensing and town and country planning for the members of the Division to have acquired the same mastery in the field as is assumed to be possessed by the inferior tribunal. There is little or no evidence of the Division contributing to the development of "doctrine" as distinct from statutory interpretation. Unless the Division does this, its position as the appellate body under present and future legislation may not be secure or unchallengeable. There is little point in appointing the Administrative Division as the appellate body if its intervention is limited to what it could have achieved under the common law or statutory powers of review. Those of us who shared in the creation of the Division and others who are watching its progress expected to see the Division exert greater influence than it has achieved so far over the development of Administrative Law.

—J. F. NORTHEY*

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LAND TITLES ACT—ASSURANCE FUND: *BARTY* v. *KERR AND THE REGISTRAR*

Alberta authority on the liability of the assurance fund is scanty. For that reason, among others, it is unfortunate that the only reference in the law reports to the judgment of Haddad D.C.J., as he then was, in *Barty* v. *Kerr and the Registrar* (D.C. 186832, Edmonton, January 7, 1975) is a note at [1975] W.W.D. 59 which casts less than complete illumination on the case.

Mrs. Barty, an elderly widow, executed a transfer of land in favour of Kerr. Over a period of years she had advanced money to Kerr to finance a salvage operation designed to lift a ship in the Great Lakes containing walnut. In 1970 he told her that it was necessary to raise $50,000 to prevent the salvage operation from being taken over by another party. He induced her to transfer the land to him to raise the money. In fact, there was no such venture, and Kerr sold the property to bona fide purchasers who acquired title and from whom Mrs. Barty found herself obliged to repurchase the land. The judge held that the transfer was induced by fraud.

The greater part of the judgment deals with the plaintiff's contention that the doctrine of *non est factum* applied to the transfer. In order to understand why that doctrine would affect the liability of the assurance fund it is necessary to analyze section 165 of the Land Titles Act which reads as follows:

> 165. Any person sustaining loss or damage through an omission, mistake or misfeasance of the Registrar or an official in his office in the execution of his duties, and any persons deprived of any land or encumbrance or of an estate or interest therein through the bringing of it under this Act, or by the registration of another person as owner of the land or encumbrance or by an error, omission or misdescription in a certificate of title, and who by the provisions of this Act is barred from bringing an

> action for the recovery of the land or encumbrance or interest therein, may bring an action against the Registrar of the district in which the land is situated for the recovery of damages.

It will be seen that the section deals with two classes of persons who suffer loss. The first class is those persons who sustain loss or damage through an omission, mistake or misfeasance in the Registrar's office. The second is those persons who are deprived of land by the operation of the Land Titles system. The facts which have been recited brought Mrs. Barty within the second class, as she suffered loss by the registration of another person as owner of the land. Her difficulty arose from the next words. She must be a person "who by the provisions of this Act is barred from bringing an action for the recovery of the land."

It is clear from the judgment that in order to succeed against the assurance fund Mrs. Barty had to show that she would have had an action at common law and that that action was barred by the Land Titles Act. The following passage appears at pages 14 and 15 of the judgment:

> In order to establish liability against the Registrar on the grounds of *non est factum* the plaintiff must establish a right of action at common law which would entitle her to recover her land from a bona fide purchaser. The function of the assurance fund under the Torrens system of land titles is to compensate for loss suffered by those persons whose common law remedies to recover land of which they have been deprived wrongfully or by a mistake of the Registrar have been extinguished by the operation of the statute affording protection to bona fide purchasers for value by securing their titles.

The judgment then implicitly assumes that if Mrs. Barty could have established *non est factum* she would, in the absence of the Land Titles Act, have had a common law right to recover the land from a bona fide purchaser, but that if she merely established that she had been induced by fraud to execute the transfer she would not. That assumption appears to be justified. If *non est factum* is established, a conveyance is void and the grantee cannot convey title to anyone. If *non est factum* does not apply, a conveyance induced by fraud is voidable only, and until it is set aside the grantee can convey good title to an innocent third party and the original grantor has no common law cause of action for its recovery. If Mrs. Barty would not have had a common law action anyway, it could not be said that she was barred by the Act from bringing an action.

In the result, the judge, after a careful analysis of the evidence, found himself "unable to say that she was mistaken in mind as to either the character or contents of the document." He said:

> By her conduct throughout she was dedicated to the purpose of raising money to satisfy Kerr's request therefor and I am convinced that she was prepared to sign any document presented to her by Kerr whether or not she knew its nature and effect. The signing of the transfer by the plaintiff was induced by the fraudulent scheme to which she had already innocently contributed, but having been induced to support the fictitious salvage venture she signed the transfer freely and voluntarily with the intent that it be accepted to be her act. She has not discharged the onus of proving that her mind did not follow her signature.

She therefore failed on that argument.

Mrs. Barty also put forward a second argument, which was based upon the formalities of execution. She and Kerr took the transfer into the office of a commissioner for oaths. The commissioner called an employee in to act as witness. While the employee was temporarily out of the room Mrs. Barty signed the transfer and the commissioner signed as witness.

Later the employee's name was inserted as the deponent in the affidavit of execution and the employee signed the affidavit. The commissioner then signed the jurat without administering an oath. Both the commissioner and the witness acted in good faith.

When the transfer was deposited at the Land Titles Office for registration there was therefore a patent irregularity in the formalities of execution in that one person had signed as witness and another had deposed to the affidavit of execution, which is at variance with section 158(1) of the Land Titles Act. Underlying that patent irregularity was the fact that the deponent did not see the plaintiff sign, and the further fact that no oath was administered to the deponent. The Land Titles Office accepted the transfer. The plaintiff claimed on those facts to have sustained "loss or damage through an omission, mistake or misfeasance of the Registrar or an official in his office in the execution of his duties." The judge rejected that claim also. He thought that the purpose of the affidavit of execution is to verify and authenticate the signature of the transferor in order to avoid the registration of forged documents; and he pointed out that the transfer, though induced by fraud, was in fact executed by the plaintiff and delivered to Kerr with the duplicate certificate of title. The validity of the instrument does not depend upon the formalities of execution. It was in his opinion more than mere speculation to suggest that if the transfer had been rejected an affidavit of execution could have been acquired without difficulty from the commissioner. "The important fact is that it was not the acceptance by the Registrar of the instrument of transfer accompanied by a faulty affidavit of execution which deprived the plaintiff of her land." She was deprived by the fraud of the defendant Kerr in extracting the transfer from her. Section 165 "contemplates an omission or mistake which goes to the root or substance of the transaction and of the instrument itself and its registration as opposed to an oversight in observing the correctness in the formality of proving execution." The oversight in this case did not go to the root or affect the substance of the matter and was not the kind of omission or error envisioned by the section.

Some reference should be made to the earlier case of *Teel* v. *Forbes* (1924) 2 W.W.R. 996 (App. Div.). There the Registrar had incorrectly refused to accept a tax transfer for registration, whereupon the registered owner had commenced legal proceedings which delayed the transferee until new legislation was passed under which the owner was able to redeem the land so that the transferee was permanently deprived of the property. Mr. Justice Hyndman, dissenting, held that the Registrar had wrongfully refused to accept the transfer, and that, since registration would not have been required at common law, the Registrar's refusal and the system which required registration had deprived the plaintiff of the land and the plaintiff was entitled to recover from the assurance fund. Mr. Justice Stuart held that the assurance fund was not liable, but did so on the strength of a passage in the then current counterpart of section 165 which does not now appear in the section, and his judgment is therefore irrelevant. Mr. Justice Beck also held that the assurance fund was not liable. Upon his analysis of the then existing section, it had to be shown:

> (1) That if the claimant has the same right of action as he would have had before the Land Titles Act, he should not be given an additional or substituted right of action against the assurance fund;

(2) That the operation of the Act should be to extinguish absolutely some of the rights of action which previously existed; and

(3) That if such a right of action became extinguished not merely by reason of the operation of the Act but because of some omission, mistake or misfeasance of the Registrar, the assurance fund should be liable and liable only in that event.

That seems to be at variance with section 165 as that section seems to confer a right of action upon a person deprived of land by adverse registration whether or not the registration occurred by reason of the error of the Registrar. That leaves the law in some doubt, as the subsequent change in the section does not appear to have affected its interpretation on that point.

There is another problem of interpretation with section 165. Do the words "and who by the provisions of this Act is barred from bringing an action for the recovery of land or encumbrance or interest therein" relate back to those persons claiming to have sustained loss or damage through an omission, mistake or misfeasance of the Registrar, *i.e.*, must a person claiming to have suffered loss from an error of the Registrar show that he would have had a common law action which has been barred by the Act? Grammatically the section could be read either way, and the comma immediately before those words might suggest that they relate back to both classes. On the other hand the words "barred from bringing an action for the recovery of the land or encumbrance or interest therein" do not seem appropriate in relation to a person claiming against the Registrar for an error in an abstract or something of that kind. Mr. Justice Beck thought that the words did relate back to both classes of complainants, but the reason which he assigned related to the words which have since been removed from the section. The passage from Mr. Justice Haddad's judgment, *supra,* says the same thing but it was not necessary to his judgment and he may not have directed his mind to the point. The interpretation should be clarified.

In any event, *Barty* v. *Kerr and the Registrar* does provide some useful guidance as to the interpretation of section 165 and as to the basis of liability of the assurance fund.

—W. H. HURLBURT, Q.C.*

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IRREGULARITY OR NULLITY—RULES 558 AND 559—FAILURE OF SERVICE OF PROCESS: *FONTAINE* v. *SERBEN*

At the May, 1976 sittings of the Alberta Appellate Division in Edmonton, the defendant's appeal from the decision of Haddad D.C.J., as he than was, in *Fontaine* v. *Serben* [1974] 5 W.W.R. 428 was dismissed without written reasons. The appellant argued that as he had not been served with the Small Claims Summons issued against him in the action, the default judgment which was entered against him was therefore a nullity and, being a nullity, the judgment ought to be set aside *ex debito justitiae.*

Judge Haddad expressly declined to follow the principle (*Craig* v.