REGINA v. GUTHRIE

(1877), 41 U .C .Q .B.148

Ontario Queen's Bench, Harrison C.J., Morrison and Armour JJ., 10 March 1877

Tax sale of land rested in the Crown--Memorial--Admissibility of under 39 Vic. ch. 29, O.— Surrender to the Crown--Enrolment.

Land vested in her Majesty in trust for the Indians was exempt from taxation under 13 & 14 Vic. ch. 67; and the defendant here claiming such land under a sale for taxes imposed in 1852 and 1853, was held not entitled.

A memorial, over thirty years old, executed by the grantor, was held admissible evidence and sufficient proof of the deed, in an action of ejectment, under 39 Vic. ch. 29, sec. 1 subsec. 3, and sec. 7, O.

Enrolment of a surrender to the Crown is unnecessary in this country in order to perfect the title of the Crown.

T**HIS** was an action of ejectment, tried before Patterson, J. A., at the last Fall Assizes, at Whitby, to recover possession of lot 15 in the 2nd concession of Mara.

Her Majesty claimed title by deed of surrender from Wm. B. Robinson, the defendant merely asserting title in himself.

At the trial, in proof of the plaintiff's title, patent to Henry Fry, dated the 21st of March, 1843, for the lot was put in; also an original memorial from the registry office of a deed from Fry, dated 18th of November, 1843, to Wm. B. Robinson in fee. The memorial was executed by Fry, the grantor, dated the same day, and registered 23rd of November, 1843, A deed of surrender of the lot in question from W. B. Robinson to her Majesty in trust for the Chippewa Indians, dated 29th November, 1843, was also put in.

The defendant at the trial rested his defence on two grounds: 1st. That the title set up as being in Her Majesty by the surrender was defective--the memorial was no proof of the execution of the deed from Fry. 2nd. That the land in question had been sold for taxes in arrear from 1852 to 1859, and that he held title under the sheriff's deed, dated the 3rd of December, 1861, to one Hugh James McDonell, reciting a sale in 1860 for taxes. The defendant also put in deed of transfer from McDonnell to himself.

The taxes alleged to be due and in arrear, were from 1852 to 1859. On the part of the plaintiff it was contended that there was no evidence of taxes in arrear in 1852 and 1853, the only proof being that of a memorandum which the treasurer said he believed was a memorandum of taxes imposed by the county of York prior to the separation of Ontario. But assuming they were proved for those years the lands were exempt in 1854 under 16 Vic. ch. 182.

The learned Judge before entering a verdict, stated the grounds of his decision at length. He was of opinion, as to the defendant's title under the deed from the sheriff, that the lands were exempt under the Assessment Act, 16 Vic. ch. 182, and if they were liable before that Act, which he was inclined to think they were, the sale would then rest on the taxes for 1852 and 1853, but that even these were open to objection that the arrears for taxes for those years were not proved. The learned Judge, however, said he would hold that the conveyance from Fry to Robinson was not established by the proof of the memorial signed by Fry the grantor, and let the question be settled by this Court, as he did not think the 7th sec. of 39 Vic. ch. 29, O., applied, as in his opinion it did not substantially enact that those old memorials should be *primâ facie* evidence--they were only made so with reference to the provisions respecting vendors and purchasers, which were limited to sales made after the Act, and on that ground he entered a verdict for defendant.

During last term, November 24, 1876, *Bethune*, Q.C., acting for the Attorney-General of Canada, obtained a rule *nisi* to enter a verdict for Her Majesty, on the ground that Her Majesty was entitled to recover the lands in question.

During this term, February 12, 1877, *M. C. Cameron*, Q. C, shewed cause. The Crown at the trial put in a patent to one Fry, and then claimed under a surrender in trust for the Indians by the Hon. W. B. Robinson. The Crown has therefore shewn title out of itself in the first instance, and it has not re-acquired title, for the surrender is insufficient, not being made by deed enrolled. The enrolment since verdict cannot avail the Crown, for the defendant cannot be put in a worse position than when the action was brought. The defendant claims under a sale for taxes, and the fact that the surrender was in trust for Indians does not relieve the land from assessment or make the sale invalid. 50 Geo. III, ch 7, sec. 2, exempts Crown lands only. The memorial of the deed from Fry to Robinson was no proof of a grant. He referred to *Chitty's* Prerog. 391; 13-14 Vic. ch. 27, sec. 7.

Bethune, Q. C. The memorial being over thirty years old was sufficient proof: *Gough v. McBride*, 10 C. P. 176; *Smith v. Nevilles*, 18 U. C. R. 473; *Lynch v. O'Hara*, 8 C. P. 259; *Rose v. Cuyler*, 27 U. C. R. 270; *Covert v. Robinson*, 24 U. C. R. 282; *Russell v. Fraser*, 15 C. P. 375; *Re Higgins*, 19 Grant, 393; 39 Vic. ch. 29, O. The enrolment dates back to the grant. There was no objection at the trial. [*M. C. Cameron*.--There was no consent to put in this enrolment.] *Chitty's* Prerog. 133; 17 *Vin*. Abr. Prerogative," 172 (A. *d*.) The defendant cannot say Her Majesty did not accept the surrender, for the bringing this action is an answer to it. The sale for taxes was invalid. No arrears of taxes were shewn. There was no evidence of any warrant. He referred to *Hall v. Hill*, 22 U. C. R. 578; *Hamilton v. Egleton*, 22 C. P. 536; *Munro v. Grey*, 12 U. C.R. 647.

March 10, 1877. M**ORRISON**, J.--I am of opinion that Her Majesty is entitled a verdict with reference to the alleged arrears of taxes for the years 1852 and 1853.

It appears to have been assumed at the trial that lands held by Her Majesty in trust for the Indians were not exempt from taxation prior to 1854, but were liable during 1852 and 1853. The attention of the learned Judge was not directed by the parties to the state of the assessment law previous to the 16 Vic. ch. 182. The Assessment Act in force at the passage of that Act, the 13-14 Vic. ch. 67, 1850, expressly and in the same terms exempted all property vested in Her Majesty in trust for the Indians. So that the lands in question were not liable to be rated and sold for arrears of taxes for 1852 and 1853, and consequently the tax title under which the defendant claims is of no avail.

But it is contended that the plaintiff failed to shew title in Robinson, who executed the deed of surrender to Her Majesty. The plaintiff put in the original memorial of a deed from Fry to Robinson, dated the 18th of November, 1843, conveying the fee in the premises to Robinson. The memorial was executed on the same day and registered on the 23rd of the same month in the proper county, and the plaintiff relied on that memorial (being over 30 years old) as *primacirc; facie* evidence of the conveyance from Fry to Robinson, under sec. 7 of 39 Vic. ch. 29, O.

By the first section of that Act it is provided, that in the completion of any contract of sale of land made after the passing of the Act, the rights and obligation of vendors and purchasers shall be regulated by rules therein mentioned. The 3rd sub-section is, "In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, the memorial shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorial shall be proved to be inaccurate, and the memorials shall be presumed to contain all the material contents of the instruments to which they relate." And by the 7th section it is enacted: "In suits at law or in equity it shall not be necessary to produce any evidence which, by the first section of this Act, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *primâ facie* sufficient for the purposes of such suits."

I agree with Mr. Justice Patterson that there is some difficulty in arriving at a clear conclusion as to the intention of the Legislature in enacting the 7th section. I am inclined to think, however, that it was the object of the Legislature, with a view to facilitate and simplify the proof of titles in ordinary suits, to extend the provisions of the first section to any suit at law or equity. The tendency of legislation is in that direction, and I think properly so. The language of the seventh section is wide and general enough for such a construction. There is nothing in the section restricting the rules mentioned in the first section to any particular class of suits or litigation, and I see no injurious consequences to result from giving such proof, as it is only received as *primâ facie* evidence. If the section is not open to such a construction, I cannot see for what other object it was introduced.

In the fifth and sixth sections we find provision made for matters quite distinct from matters relating to vendors and purchasers, and by the fourth section in proceedings in Chancery to quiet a title. The rules in the first section are also made applicable, and it appears that in suits in Chancery, under the seventh section, such memorials are received as *primâ facie* evidence. Such is the view taken of that section and acted upon by Blake, V. C.

On this objection I think the plaintiff is entitled to our judgment.

During the argument it was said that Her Majesty could only take the surrender by deed enrolled. No such objection appears to have been taken at the trial. The surrender appears to have been registered in the county registry office in January, 1864, and since the trial it has been enrolled and put on record in the office of the Registrar General for the Dominion, where all grants by and to the Crown are registered, and an exemplification of the surrender under the great seal of the Dominion has been produced and filed in this Court as well as the original deed of surrender, and Mr. Bethune, on the part of the Attorney-General, has asked if it is necessary that it should be enrolled of record in this Court, and he has referred us to the authorities mentioned in 17 *Vin*. Abr. 172 (A. d). The question as to how a grant to the King may be made effectual or what should be a sufficient record of it, is far from being clear. The point is discussed in the notes to the case of *The Duke of Somerset*, Dyer 355-37. According to Dyer a deed was made by the Duke to King Edward VI., and was acknowledged to be enrolled and delivered to the Master in Chancery and delivered in Court. It was put into a chest and not enrolled, and it was held not to vest any interest in the Queen.

This is denied.

The note states that Sir Thomas Egerton, Master of the Rolls, said when he was attorney he had occasion to ask the opinion of Wray and Manwood, Chief Justice and Chief Baron, who denied that their opinions were as Dyer reported, and they said that there is no foundation that the King cannot take but by matters of record; for he said that the King is entitled in many things which are in files on the rolls and in the memorandums in the Exchequer; and yet these are sufficient titles for the King.

About 35 Eliz. this same case came in question between the Dean and Canons of Windsor, cited Mo. 676, and one Middlemore, and by the resolution of all the Judges of England it was agreed that the deed may be enrolled at this day, and so it was, and therefore Middlemore was ousted of his term, and it was also debated in the Parliament house and there also agreed accordingly. And it was also resolved by all the Justices that the acknowledgment of the deed before the Master in Chancery and delivering of it in the Augmentative Court do not make it a sufficient record before enrolment to vest the interest in the King, but when it is now enrolled with the other date it vests the interest in the King with relation, for all men are estopped to say that it is not enrolled according to the date. The contrary, the note says is holden, for if it be on the files, or in any place among the memoranda of the Exchequer, it is sufficient for the King, and in Easter 30 Eliz. in the Exchequer the case of Dyer was denied to be law, and Manwood denied his opinion to be so, for after the acknowledgment the delivering of the deed to be enrolled in Court makes it a record, and in *Abraham v. Wilcox*, Yelv. 30 adjudged the King takes not by enrolment but by the deed, so that the deed is the principal and the enrolment but testimony that the deed is of record; and though it is usually said in the books that the King cannot take but by deed enrolled this is to be intended only that the deed made to the King be recorded.

On the whole, upon this point we see no ground for holding that Her Majesty is not entitled to succeed. This deed of surrender is recorded in the usual registry office of the county. It is now enrolled and on record, as the exemplification under the great seal of the Dominion shews, in the record office where all patents and deeds to Her Majesty are recorded, and it is brought into Court to be enrolled here if necessary.

The rule will be absolute to enter a verdict for the plaintiff.

H**ARRISON**, C. J.--The first question is, as to the title of the Queen.

The Crown is *primâ facie* seized of all the land in the Province: *Attorney-General v. Harris*, 33 U. C. R. 94. The Queen has, upon the information of intrusion, the prerogative right of putting the defendant on shewing his title specially: *Chitty's* Prerogatives of the Crown 332; *Manning's* Ex. Prac. 198. The first innovation on this rule was made by 21 Jac. I. ch. 14, which provided that whensoever the King, &c., have been out of possession by the space of twenty years, &c., the defendant shall retain the possession he had, &c., until the title be tried, found, or adjudged to the King: *Attorney-General v. Stanley*, 9 U. C. R. 84. Unless it appears that the Crown having had possession was out of possession for twenty years, the Crown without proof of title on the part of the defendant must, on an information of intrusion, recover: *Regina v. Sinnott*, 27 U. C. R. 539. Where the statute 21 Jac. I. ch. 14, is inapplicable the Crown is not barred unless there be sixty years possession against the Crown: *Regina v. McCormick*, 18 U. C. R. 131.

Now the Queen has the power, if she think fit, instead of filing an information of intrusion, to bring an action of ejectment: 35 Vic. ch. 13 sec. 18, O. It is among other things argued that the effect of an appearance in such an action is, to put the plaintiff to actual proof of title, and therefore that the presumptions which would arise in favour of the Crown on an information of intrusion are inapplicable. This is one of the difficulties of the Crown waiving prerogative remedies and adopting the remedies of the subject. It is not necessary for us in this case to settle the difficulty if we are of opinion that there was independent evidence of the title of the Crown.

This depends on whether the memorial of the conveyance under which the Crown claims was admissible in evidence, and this in its turn depends on whether the memorial was in this suit admissible in evidence under 39 Vic. ch. 29, O.

It is entitled "An Act to amend the law of vendor and purchaser and to simplify titles." This would be an appropriate title to the Act if it had stopped at the end of the third section. But the remaining sections of the Act carry the original purpose much beyond the mere object of simplifying titles as between vendor and purchaser. The title should be "An Act to amend the law of vendor and purchaser, and to simplify titles, *and for other purposes*."

The Act is divisible into three distinct parts.

1. Provisions necessary "in the completion of any contract of sale of land," as between vendor and vendee. For this purpose in case of memorials twenty years old, if the memorials were executed by the grantor, or in other cases if possession has been consistent with the registered title, the memorials are sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials shall be proved to be inaccurate: Sec. 1, sub-sec. 3.

2. "In proceedings in Chancery to quiet a title" it is unnecessary to produce any evidence by the previous part of the Act dispensed with as between vendor and purchaser: sec. 4.

3. "In suits at Law or in Equity," it is also unnecessary to produce any evidence, dispensed with as between vendor and purchaser: Sec. 7.

Then follow sections 5 and 6, which are foreign to rules of evidence, but still germane to the purposes of the Act.

The idea originally was to simplify evidence necessary in the completion of a contract as between vendor and purchaser. That idea was in section 4 expanded so as to apply to proceedings in Chancery to quiet a title. And in section 7 it is still further expanded, and so expanded as to apply to all suits at "Law or in Equity."

In my opinion, therefore, the memorial was admissible evidence, if necessary, on the part of the Crown in this suit to prove title.

I cannot think enrolment in this country is necessary to perfect the title of the Crown. See *Hambly v. Fuller*, 22 C.P. 141.

It appears that the title of the Crown was proved, and the Crown entitled to recover unless the title of the defendant was proved.

I think, for the reasons given by my brother Morrison, that the title set up by the defendant failed.

I concur in making the rule absolute to enter a verdict for the Crown.

W**ILSON**, J., was not present at the argument, and took no part in the judgment.

Rule absolute.

R**EGINA** v. Mc**DONELL**.

T**HIS** was a case similar to the preceding and argued at the same time, the only difference being that the defendant here did not claim under a tax or other title, but rested his defence upon the Queen not having proved her title.

Rule absolute to enter a verdict for Her Majesty.

Rule absolute.