SUTHERLAND v. SCHULTZ

(1883), 1 Man. R. 13

Manitoba Queen's Bench, Taylor J., 1883

Equitable assignment--Registration of patent--Recitals in patent.

A half-breed child conveyed all his "right, title, interest, claim, property, and demand both at law and in equity of which he is now in possession, or of which he may hereafter become possessed, of, in and to the said land to which he is, or may become, entitled as heir at law of such half-breed in the said province of Manitoba, wheresoever the same has been, or may hereafter be, allotted."

***Held*, a good equitable assignment.**

***Held*, that a vendor is bound to register the patent through which he claims title.**

***Held*, that a recital, in a patent two years old, of a death intestate, is not sufficient evidence of the fact, as between vendor and purchaser.**

G. A. F. Andrews for plaintiff.
J. B. McArthur for defendant.

[1883.]

TAYLOR, J.---This is a suit for specific performance brought by the vendor against the purchaser. There is no dispute between the parties as to the agreement, or any of its terms. The suit is a friendly one, instituted for the purpose of submitting certain questions of title for the opinion of the court.

Charles Ross, as the heir at law of one Jean Ross, one of the half-breed children entitled to share in the lands set apart for the half-breed children of the heads of families, in Manitoba, at time of the transfer thereof to the Dominion, on the 3rd of April, 1880, executed an agreement for the sale of his share of these lands. By that agreement, after reciting the fact that he was so entitled, he granted, bargained, sold, transferred, quitted claim, assigned and set over to the vendee all his "right, title, interest, claim, property, and demand both at law and in equity, of which he is now in possession, or of which he may hereafter become possessed, of, in, and to, the said land to which he is, or may become, entitled, as heir at law of such half-breed, in the said Province of Manitoba, wheresoever the same has been, or may hereafter be allotted."

The same agreement also contained a power of attorney appointing *Heber Archibald* the true and lawful attorney, irrevocable of the said *Charles Ross*, to enter into, and upon, and to take possession of all messages, farms, lands, tenements and hereditaments whatsoever, whether in possession, or in ex- pectancy, and wheresoever situated, derived, or to be derived, from the Crown, as the sole heir-at-law of the child of a half-breed head of family, under the provisions of the statutes heretofore recited. The power also authorized the attorney to sell, and convey, the lands, sign receipts for the purchase money, sign, seal, execute, and deliver, good, sufficient and valid deeds of conveyances and assurances for conveying the lands to the purchaser, his heirs and assigns.

No specific lands are mentioned or described anywhere in the agreement. The first question submitted is, whether under that assignment the title of the half-breed became vested in the purchaser from him.

In my opinion that assignment was a good equitable assignment of the interest of the half-breed in the land in question.

Many assignments and conveyances which would not be good at law, or sufficient to convey to the grantee the legal estate in law, are nevertheless recognized in equity. Thus, while a widow cannot at law convey her dower in the lands of her deceased husband until it has been assigned to her, yet a conveyance of her dower before assignment has been held good in equity, *Rose v. Simmerman*, 3 Gr., 598.

The first section of the statute, 44 Vic., c. 19, seems to have been passed for the express purpose of removing any doubt upon this subject. That section is one which it was in my opinion quite competent for the Manitoba Legislature to pass.

The second question submitted is--Can the purchaser require the vendor to register the crown patent in the registry office of the registration division in which the lands are situated?

I am of opinion that the patent should be registered. The title is a registered one--one conveyance at least having been registered as affecting the land.

In Ontario, with a registry law similar to our own, it has been held that in case of a registered title, a vendor cannot make out a good title unless all the deeds are registered. *Kitchen v. Murray*, 16 U.C.C.P. 69; *Brady v. Walls,* 17 Gr., 703. Since these cases *Scott v. McLeod*, 14 U.C.Q.B., 574, cannot be relied on as an authority. Apart altogether from the question of the title being a registered one, it is, I think, quite in accordance with the spirit of the registry laws to require registration of the patent. The policy of the registry law is that in some public office near where the lands lie, there should be a record of every transaction or alienation thereof, to use the words of the first registry act passed in the old Province of Canada (35 Geo. 3, c.5), "for the better securing, and more perfect knowledge, of the same."

It is true the patent is an instrument of record in the proper department at Ottawa, but is situated as this Province is, as such a distance from the capital, it is desirable that there should be some record of such an important instrument, more easily accessible in the event of the original being lost or destroyed.

The registration of the patent *in extenso* seems contemplated by the Registry Act, for in it provision is made for the manner in which crown patents may be registered.

It is important, too, in this connection, to remember that the Dominion Lands Act contains no such provision as that in the Ontario Registry Act, under which the Provincial Registrar is required every three months to furnish to each registrar "a statement containing a list of the names of all persons to whom patents have issued from the crown for grants of land within the country since the former statements, and with such general or particular description as the case shall require," Unless these patents are registered by the owners of the land, there will not, in our Manitoba registry offices, be found any record showing the persons to whom lands were originally granted by the crown.

The patent in the present case, after stating that Jean Ross was entitled to the land in question, contains the following recital: "And whereas, the said Jean Ross has since died intestate, leaving him surviving the said Charles Ross of the said parish of St. Francois Xavier and Baie St. Paul, his father and sole heir at law," and then grants the land to the said Charles Ross. The third question submitted is, whether that recital in the crown patent is sufficient evidence of the death, intestacy, and heirship?

The general rule acted upon by conveyancers is thus stated in *Lee on Abstracts*, page 360, "Statements contained in deeds thirty years old or upwards, may be considered as good, secondary evidence; and where the facts recited are not very important, a purchaser may be satisfied with such recitals without other evidence, even if contained in deeds of more recent date, twenty years old, for instance, may be sufficient. Where, however, the facts are very important, a purchaser should not rely on the recitals even of an old deed. Thus, it has been held, that it is not sufficient to prove an import- ant descent in a pedigree, for the vendor to produce deeds which recite the pedigree, although these deeds are upwards if thirty years old. *Slanev v. Warde*, I M. & C. 358; *Fort v. Clarke*, I Russ, 601. It is more important to require further evidence, than a mere recital, of the death of a person, where by the probable duration of life he may still be supposed living, *Coventry's Conveyancer's Evidence, 298.*

In the present case the instrument containing the recital is not yet two years old, so that clearly in the case of an ordinary conveyance, this recital could not be accepted as evidence.

Does it then make any difference, that the instrument containing the recital is not on ordinary conveyance, but a patent under the great seal? In my opinion it does not.

I have been unable to find any reported English or Canadian case upon this point. In an anonymous case reported, 12 Mod, 584, it was decided that a recital in an Act of Parliament, stating J-- S-- to be the heir of a particular person, was not evidence of the fact.

Penrose v. Griffith, 4 Binney, 231, was a case in which the Supreme Court of Pennsylvania was called upon to decide whether the recital contained in a patent from the State, of divers mesne conveyances, by which the interest of the original locatee had become vested in the patentee, was sufficient evidence of this, and the Court held it was not. The same question of the sufficiency as evidence of recitals in a patent came before the Court in *Weidman v. Kohr*, 4 S & R, 174, and there also it was said that they were not.

Reference may also be made to *May v. May*, Bull N P, 112.

Following these authorities I should hold that the recital in the patent of the death intestate of Jean Ross, and of the heirship of Charles Ross, is not sufficient evidence thereof, but that the purchaser is entitled to call for proof of these facts.

The bill contains no prayer for costs, and on the argument it was stated that neither party made any claim for these.