RE REED v. WILSON

(1892), 23 O.R. 552

Ontario Chancery, Meredith J., 12 October 1892

(Trial of directed issue) Ontario Chancery, Boyd C., 13 April 1893

Crown Lands--Indian Lands--Mortgage before Patent--Notice--Registration in County Registry Office--Salvage--Priorities.

A patent of Indian lands was obtained by the patentee by virtue of his title under certain assignments from the original locatee duly registered in the Indian Department, and it appeared that certain prior assignees from the locatee had executed a mortgage on the lands to the plaintiff, of which the patentee had no actual notice, neither the assignment to the mortgagors nor the mortgage having been registered in the department though the mortgage was registered in the county registry office, and the plaintiff now sought to foreclose his mortgage:--

***Held*, that the patentee was entitled to priority over the mortgage to the extent of the moneys paid for obtaining the patent, and that the registration of the mortgage in the registry office was not notice to him.**

This was a trial of an issue arising out of an appeal by the defendant Frederick W. Wilson from the report of the Master at Owen Sound, dated June 29th, 1892, made in this action which was brought by Robert Reed for foreclosure of a mortgage.

The defendants by original action were Lachlan M. Secord and his wife, Michael McGuire and his wife; and William McCleary, the Lion's Head Lumber Company, and Frederick W. Wilson had been added as parties in the Master's office.

The facts are set out in the judgment of MEREDITH, J., before whom the said appeal was argued on September 22nd, 1892, and who, in directing the present issue, gave judgment as follows:

October 12th, 1892. MEREDITH, J.:--

By deed bearing date September 20th, 1888, made in the usual form under the Act respecting Short Forms of Mortgages, the defendants Secord and McGuire granted and mortgaged to the plaintiff twenty-five lots of land in the township of Lindsay, to secure payment of $4,000 and interest; and this action was brought to foreclose that mortgage.

The abstracts of title, brought into the Master's Office under Con. Rule l25, shew that as to thirteen of these lots the patents had issued before the making of the mortgage, and that the mortgagors had good title; as to eight, that nothing but the mortgage has ever been registered; and as to the remaining four, which are those in question upon this appeal, that the mortgage and the subsequent patent only have been registered.

The lands, according to the statements of counsel for each party, were what are known as Indian lands, subject to the provisions of the Indian Act; and from the meagre evidence in the Master's office, it appears that on June 18th, 1887, David Porter acquired through the department of Indian Affairs, the timber upon the four lots in question with an option--to be exercised before January 1st, 1891-- to purchase the lands; that by deed bearing date November 20th, 1889, David Porter assigned to Michael McGuire absolutely, all his interest in the lands, described as 400 acres of timber; that by deed bearing date December 27th, 1889, Michael McGuire assigned to William McCleary, absolutely, all his interest in those lands, and in other 200 acres, described as 600 acres of timber limits; that by deed bearing date November 10th, 1890, William McCleary assigned to the appellant, absolutely, all his interest in the lands in question, described as 390 acres of land; that the last mentioned assignee, exercised the option to purchase, paid to the department the purchase money, $580; and that the patent was issued and the lands granted to him on March 20th, 1891.

The mortgage in question though registered as before mentioned was not registered with the superintendent general of Indian Affairs under the provisions of the Indian Act.

Judgment, in substantially the usual form in foreclosure actions was entered on October 24th, 1891 against the mortgagors and their wives; the appellant not being then a party to the action.

The judgment was taken into the Master's office, and, according to the Master's report, it appearing to him by the Registrar's certificates that Frederick W. Wilson, not before a party to the action, had some lien charge or incumbrance upon the lands embraced in the plaintiff's mortgage, subsequent thereto, the appellant was on March 9th, 1892, made a party, in the Master's office, to

the action. On the same day an affidavit of the plaintiff's solicitor was filed in the Master's office, setting out, among other things, the facts of the assignment by McGuire to McCleary, and by McCleary to the appellant, and the granting of the lands and issuing of the patent to him, and expressing his opinion that the appellant held the lands subject to the plaintiff's mortgage, and his belief that the appellant had actual notice of the mortgage in question where he took the assignment from McCleary.

The appellant attended upon the Master's appointments, and in the Master's office claimed to be entitled to the lands in question, under the patent, free from any claim of the plaintiff; to have title paramount--that by reason of the non-registration of the mortgage in the department of Indian Affairs it was invalid against his so registered assignment; and that, at all events, the plaintiff could not recover or have the benefit of the lands without first repaying him the amount of purchase money paid by him and interest, putting this claim as one in the nature of a claim for salvage; whilst the plaintiff claimed and urged that the appellant took and holds the lands subject to his mortgage; and the Master has given effect to this contention, but has also found the appellant to be an incumbrancer, for the amount of the purchase money and interest, subsequent to thc plaintiff.

Now, it seem to me, as pointed out during the argument, that the proceedings in the Master's office were plainly irregular, so far as this claim was concerned. The appellant was made a party, according to the Master's report, under Cons. R. 124 *et seq.*; but in no sense could he be looked upon as a subsequent incumbrancer, or treated as such. If his main contention be right he holds the lands free from any claim of the plaintiff; if he be wrong in that respect and right in his minor claim--if an incumbrancer in any sense--he is certainly not a subsequent one; whilst if he be wholly wrong, and the plaintiff's contention be right, he is merely the owner of the equity of redemption of a part of the mortgaged property. So that I am quite unable to perceive how the finding in question can in any view of the case properly stand.

The question now is: What should be done upon this appeal?

The parties seem to desire an expression of opinion, even though not binding upon them except they choose to so treat it; and although opinions expressed under such circumstances are not as a rule satisfactory, or by any means sure of saving litigation, I would, in the hope that this might prove an exception to the rule and save the parties some trouble and costs, be willing to express my views of the parties' rights in all respects, but that the facts do not seem to me to be so fully discovered, nor the means of working out in this action such rights sufficiently clear to enable me to do so in a manner satisfactory to me.

If the provisions of the Indian Act are to prevail and override all other considerations, then the appellant is owner of the lands in question, free from the plaintiff's mortgage and claims; his assignment was "valid against all assignments previously executed," because unregistered in manner provided for in that Act: R. S. C., ch. 43, sec. 43, unless indeed the patent can be successfully attacked or questioned under section 53 or section 50, (see *Church v. Fenton*, 28 C. P., 384, 4 A. R., 159, 5 S. C. R., 239); which obviously cannot be done in the Master's office, or in this action at all now; whilst if it be held that the provisions of that enactment are only for the protection or benefit of the Crown or the department, and do not affect any property or civil rights between the parties, especially the granting of the patent, and that such rights are given to the plaintiff under the provincial enactment, R.S.O., 1887 ch. 27, sec. 27, if not under the Registry Act, appellant would (apart from his claim in the nature of a claim for salvage) be simply the owner of the equity of redemption of the lots in question, and one of the persons entitled to redeem, and one who should have been made a party to the action originally; in which capacity he has not been dealt with in the Master's office, or provided for in the Master's report, but has been dealt with and provided for as if, and only as if, a subsequent incumbrancer in respect of his purchase money and interest, an untenable position in any case: for if he be not entitled against the plaintiff, how can he be entitled at all; from whom could he claim salvage? How can he be subsequent incumbrancer in this respect? See *Lally v. Longhurst*, 12 P.R., 510; *Paterson v. Holland*, 8 Gr. 238; *Buckley v. Wilson, ib*. 566.

And apart from these and other considerations and difficulties in dealing with these questions now, I may again mention the facts that the mortgage in question was made before the assignment to McGuire; and made, not by McGuire, but by Secord and McGuire, and that there is no evidence even of identity of the McGuires, or anything to account for or explain the nature of the transactions, or their connection, if any: and may call to mind such questions as are suggested by such cases as *Vance v. Cummings*, 13 Gr. 25; *Casey v. Jordan*, 5 Gr. 467, *Holmes v. Moore*, 12 Gr. 296; and *Goff v. Lister*, 13 Gr. 406 and 14 Gr. 457; and which may possibly have some bearing upon the parties' rights, but which so far seem to have received no consideration.

Under all the circumstances it seems to me that the best course to adopt now is, to amend the Master's report by striking out the finding that the appellant is a subsequent incumbrancer: to set out that he has been made a party in the Master's office in respect of any claim he might have as a subsequent incumbrancer, and (if he be willing, as doubtless he will be, there seeming to be nothing for him in the property if he has taken it subject to the mortgage) in respect of any right he may have, in the equity of redemption of the mortgaged lands or any part of them; but not in

respect of, and expressly reserving, any rights or claims he may have to the lands in question upon this appeal free from the mortgage in question or, if he have not title paramount, then to the amount of the purchase money paid by him and interest in the nature of a claim for salvage against the plaintiff or any other person claiming title to or possession of these lands: see *Crooks v. Glenn*, 8 Gr. 239; Cons. Rules 306 and 46. Thus the plaintiff may proceed without delay to redemption or foreclosure in respect of the whole property, a comparatively small proportion of which only is affected by these questions, whilst the plaintiff's rights or claims will be amply protected and can be determined by independent litigation unless the parties adopt some more profitable means of effecting a satisfactory settlement, which one would think advisable looking at the inconsiderable amount really in question between them. The report will therefore be amended accordingly.

It is not a case for costs; the plaintiff proceeded irregularly against the appellant, and the latter ought to have moved against the order adding him as a party in the Master's office; each is at fault and must bear his own costs. There will therefore be no order as to costs of this appeal; and no costs will be allowed to either party against the other of any of the proceedings in the Master's office which have proven useless.

The parties subsequently appeared before the learned Judge, and it was then arranged that no order should go upon this judgment, but that the final disposition of the appeal should be postponed until after the trial of an issue, which was then settled, between the appellant and the plaintiff.

The order provided that in the issue the present plain- tiff, Robert Reed, should be plaintiff, and the defendant Wilson defendant, and that the question to be tried should be whether the mortgage of the plaintiff took priority to the patent from the Crown of the four lots in question under which Wilson claimed, and if so, whether Wilson was entitled to a lien in respect of the purchase money paid by him to the Crown for the said lands in priority to and freed from the mortgage of the plaintiff, and the order in the meanwhile stayed all proceedings in the Master's office so far as the interests of Wilson were concerned.

The issue was tried at Owen Sound on April 11th, 1893, before BOYD, C.

Masson, Q. C., for the plaintiff referred to R.S.O. ch. 27, secs. 5, 21, 27; *ib*. ch, 114, secs. 76, 80; R. S. C. ch. 43, secs. 42, 43, 45; R. S. O. ch. 24, sec. 17; *Church v. Fenton*, 28 C.P. 384; *Dinsmore v. Robinson*, tried before Blake, V. C., at Owen Sound in 1877 (unreported).

Rykert, Q. C., for the defendant, Wilson. The Ontario registry law does not affect Dominion lands: *Watson v. Lindsay*, 27 Gr. 253, 6 A.R. 609; *Casey v. Jordan*, 5 Gr. 467 ; *Holland v. Moore*, 12 Gr. 296 ; *McQuestien v. Camp- bell*, 8 Gr. 242.

April 13th, 1893. BOYD, C:--

The lands in question are Indian lands and prior to patent were controlled by the Dominion under the provisions of Revised Statutes of Canada, ch. 43. The mortgage in question held by the plaintiff was taken upon the interest of McGuire & Secord in four lots which the Crown had agreed to sell to one Porter, who had assigned his right to the mortgagors. The Indian Act makes no pro- vision for any assignment other than absolute and does not refer to the case of a mortgage of rights prior to patent. No provision is made for the registration of such an instrument. Instruments registered were to be so in the office of the superintendent-general (section 43), and I regard the registration of this mortgage in the registry office of the county under the Ontario statute as a nugatory proceeding, so far as it is relied on to affect the defendant with notice of its existence. Actual notice of the contents of the mortgage is not proved as against Wilson or McLeary whose nominee he is. The transaction was unusual in this, that McGuire & Secord bought patented and unpatented lots from Reed; but in the conveyance only the patented lots were described or referred to, whereas in the mortgage to secure the purchase money both kinds were set forth at large. McLeary admits that he agreed to take subject to a mortgage to Reed on the land conveyed to McGuire & Secord, but he did not know that the mortgage covered the unpatented lots in question. This was a very likely mistake to fall into having regard to the frame of the papers.

It appears that there was no consideration in money paid for the assignment of the right to purchase the four lots as between McLeary and McGuire & Secord--they were to get shares in the Lion's Head Lumber Company to represent the consideration--and it is this company as represented by McLeary and Wilson which is really interested as purchasers of the four lots.

That being so, Wilson has no equity to hold under the patent as by title paramount to the mortgage so as to extinguish it *in toto*. He obtained the patent by virtue of his *status* as assignee of Secord and McGuire, who made the mortgage, and as such he should rank as subsequent incumbrancer, after being paid as a first charge, the amount expended in procuring the Letters Patent of the four lots. Being thus assignee of the original purchaser, he lawfully expended money to procure the title in fee without notice of the mortgage existing upon the lots in respect of which

the patent issued. To the extent of this purchase, he is a *bonâ fide* holder for value without notice, and takes priority according over the mortgage. But he ought not in equity to use the title under the patent to destroy the mortgage--that remains valid security for what it is worth as against him and the mortgagor--after satisfaction is first made for the purchase money of the fee from the Crown.

This does not appear to me be a case in which the subsequent acquisition of title by the assignee of the mortgagor should enure to feed the interest conveyed by the mortgage because of the want of notice of the scope of the mortgage on the part of the assignee.

The question in the issue will be answered in accordance with this judgment, and if I have to dispose of costs, they should be added to purchase money paid to the Crown.