RICHARDS v. COLLINS

(1912), 27 O.L.R. 390 (also reported: 3 O.W.N. 1479, 22 O.W.R. 592, 9 D.L.R. 249)

Ontario Chancery, Boyd C., 22 June 1912

(On appeal) Ontario Divisional Court, Falconbridge C.J.K.B., Riddell and Lennox JJ., 12 November 1912

Assessment and Taxes--Tax Sale--Indian Act, R.S.C. 1906, ch. 81, secs. 58, 59, 60--Action to Set aside Sale and Deed--Statutory Time-limit--Application of--Action of Superintendent General--R.S. O. 1697, ch. 224, sec. 209--Essential Preliminaries to Validity of Sale not Observed--Right to Attack after Expiration of two Years--Locus Standi of Plaintiffs--Lien of Purchaser for Improvements and Money Expended--Assessment Act, 4 Edw. VII. ch. 23, sec. 176 (1)--Non-retroactivity--Adoption of Statutory Rule notwithstanding--"He who Seeks Equity must Do Equity"--Right to Possession--Condition-- Costs--Notice--Evidence--Sec. 181 of Act of 1904.

The provision of secs 58, 59, and 60 of the Indian Act, R.S.C. 1906, ch. 81, are to be read as applicable to a case where the Superintendent General of Indian Affairs has actively intervened as between the tax purchaser and the original purchaser of Indian lands. Where the Superintendent General has consider a tax deed and approved of it as a valid transfer, his ruling may be questioned by an action, which must be brought within two years after the date of the tax deed. But there is no such limit of time, so far as the Indian Act is concerned, in attacking an illegal tax sale and deed, if no action by way of approval has been taken by the Superintendent General; and, where that is the case, the general law of the Province as to tax sales applies.

The statutory protection of sec. 209 of R.S.O. 1897, ch. 224--the Assessment Act in force at the time of the tax sale and tax deed in question in this action (1901-02)--does not avail, if there has been no legal impost of taxes, and if these, though legally imposed, have not been in area for three years next preceding the furnishings of the list of lands liable to be sold under sec. 152 of the Act, and if there has been no such list furnished at all.

And *held*, upon the evidence, that each one of these necessary preliminaries was absent in regard to the sale for taxes of unpatented Indian lands and the deed made pursuant to the sale, attacked in an action brought after the expiry of two years from the date of the deed; and the sale and deed should be set aside.

***Held*, also, that the plaintiffs had a sufficient *locus standi* to seek the intervention of the Court.**

***Held*, also that the defendant, the purchaser at the tax sale, under the particular frame of this action was entitled to a lien upon the lands for improvements and for money expended for taxes and statute labour; but not under the Assessment Act of 1904, 4 Edw. VII. ch. 23 sec. 176 (1), as that Act did not come into force till the 1st January, 1905, and was not retroactive; nor under the Assessment Act in force when the rights of the plaintiffs accrued, R.S.O. 1897, ch. 224, sec. 212, for that applied only when the sale was invalid by reason of uncertain and insufficient designation or description; the statute R.S.O. 1897, ch. 119, sec. 30, under which the relief is more restricted than under the Act of 1904, might be applied; but the Court was entitled to go beyond that in aid of the defendant; the plaintiffs, having come into a Court of Equity and obtained equitable relief--a declaration and adjudication that the sale and deed were invalid and should be set aside--must do equity; and the Court might well adopt as equitable the statutory rule laid down in sec. 176 (1) of the Assessment Act, 1904.**

***Held*, also, that the plaintiffs entitled to judgment for possession of the lands, not, however, to be made effective until the expiration of one month nor until the plaintiffs had paid into Court the amount for which the defendant was declared to have a lien: Assessment Act, 1904, sec. 176 (2), first clause.**

***Held*, also, that the prerequisite for the application of sec. 217 (1), (2), of R.S.O. 1897, ch. 224 (sec. 181 of the Act of 1904), is that, at the trial, it must be found that a certain notice was not given; and, as it was not so found and there was no evidence upon which it could be so found, the section did not apply; and, at any rate, awarding the costs of the action to the plaintiff was a sufficient compliance with the section, without awarding also the costs of a reference, which were left to be disposed of by the Master.**

Judgment of BOYD, C., affirmed

ACTION to recover possession of land and to set aside a tax sale. Counterclaim by the defendant for money expended in taxes, statute labour, and improvements.

The action was tried before BOYD, C., without a jury, at Gore Bay.

F. E. Titus, for the plaintiffs.
R. R. McKessock, K.C., for the defendant.

June 22. BOYD, C.:--An objection not on the pleadings was raised *ore tenus*, that, by reason of

some provisions of the Do- minion Indian Act, this action was not well-founded.

The Indian Act, as found in R.S.C. 1886, ch. 43, sec. 43, was amended in 1888 by 51 Vict. ch. 22, sec. 2, now found in the revision of 1906 as ch. 81, secs. 58, 59, and 60, and brings in an entirely new provision as to dealing with Indian lands which have been sold for taxes. The substance of this new legislation appears to be, that, when a conveyance has been made by the proper municipal officer of the Province, purporting to be based upon a sale for taxes, the Superintendent General may "approve of such deed or conveyance, and act upon and treat it as a valid transfer" of the interest of the original purchaser (sec. 58 (1)).

When the Superintendent General has "signified his approval of each deed or conveyance by endorsement thereon," the grantee shall be substituted (in all respects, in relation to the land) for the original purchaser (sec. 58 (2)).

The Superintendent General may cause a patent to be issued to the grantee named in such conveyance, on the completion of the original conditions of sale, unless such conveyance is declared invalid by a Court of competent jurisdiction, in a suit by some person interested in such land, within two years after the date of the sale for taxes, and unless within such delay notice of such contestation has been given to the Superintendent General (sec. 59).

These provisions are, I think, to be read as applicable to a case where the Superintendent General has actively intervened as between the tax purchaser and the original purchaser: where the Superintendent General has taken under consideration the tax deed and has approved of it as a valid transfer, by endorsement thereon. This *primâ facie* ruling of his may be brought into question and disputed in the Court by suit brought within two years after the date of the tax deed. But, in my view of these sections, there is no such limit of time in attacking an illegal tax sale and deed, if (as in this case) no action in respect of the tax deed by way of approval has been taken by the Superintendent General. If the Superintendent General remains silent and inactive, there is no restriction as to time placed upon the right of the original purchaser to claim the assistance of the Courts, so far as the Indian Act is concerned. He may otherwise lose his legal status by delay and adverse possession; but in this case no such barrier exists.

This case rests under the general law as to tax sales then in force, namely, that, where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some Court of competent jurisdiction, by some person interested, within two years from the time of sale: sec. 209, R.S.O. 1897, ch. 224.

This statutory protection does not avail if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Assessment Act, and if there-has been no such list furnished at all. Each one of these necessary preliminaries appears to be absent in the case in hand, as may now be briefly noted.

The action relates to certain conflicting claims made to the possession of an interest in land situate in the district of Manitoulin, part of an Indian Reserve, and as such subject to the control of the Department of Indian Affairs for the Dominion of Canada. Lot 21 in the 12th concession of the township of Howland, in that district, containing 147 acres, was sold in June, 1869, to Thomas F. Richards, and a certificate of sale was duly issued. This land was so dealt with that a patent from the Crown was issued for the westerly 100 acres, in 1879, to Jane Mackie, and that part is not in controversy. The easterly 47 acres was assigned in 1876 to David Richards by his son Thomas, and that assignment was duly registered in the Indian Department, and that part still stands in the name of David Richards, and has not been patented.

David Richards died in February, 1890, leaving a will by which he left all of his belongings to his wife to hold for her life. He gave her power to sell a part or all of the real estate and personal, and declared that at her death what remained was to be equally divided between his sons Thomas and Luther. These two are the plaintiffs, and I see no reason to question that they take directly through their father. I do not give effect, therefore, to the contention that the widow made a valid disposition of the 47 acres by will so as to give a life estate to her second husband, Moore, and a remainder to the plaintiffs.

The disability of the original purchaser to hold or to transfer on the ground of infancy is raised by the pleadings. It appears that he was born in 1854, and he was of age in 1875, when he assigned to his father, and that assignment had been recognized and acted on by the Indian Department, and I think any controversy as to his status will have to be decided by that

Department if and when he applies for a patent. He has sufficient *locus standi*, with his brother, to seek the intervention of this Court.

The intervention is sought in respect of a tax sale held in 1901, and a certificate of purchase obtained by the defendant. That certificate sets out that a sale was had on the 4th September, 1901, of the right, title, and interest of the owner in the patented lot, being lot 21 in the 12th concession of Howland, containing 48 acres more or less, and that Collins became the purchaser for the sum of $8.65.

That sum was directed to be levied by warrant of the Reeve, dated the 27th May, 1901, of which $7.85 was for arrears of taxes alleged to be due up to the 31st December, 1900.

On this state of facts, the tax deed was executed by the proper officers of the township on the 17th September, 1902, and has been duly registered upon the land and in the Indian Department. By this deed, the defendant claims, he has cut out any right of the plaintiffs to the land, and is alone entitled to claim a patent from the Indian Department. The validity of the tax sale is, therefore, the main issue in this litigation.

Evidence is given as to the taxes for the years 1897,1898, and 1899, which appear to form the aggregate of the arrears alleged to be sufficient to support the sale. But I have seldom seen a case where the evidence was so limping and unsatisfactory, and where so many flagrant mistakes and omissions are manifest in all the proceedings.

The radical error appears to be this: that the 100 acres patented, being the westerly part of the whole lot, was treated as being lot 21 in the 12th concession of Howland, and all the taxes on that part have been duly paid. The officers appear to have assessed the easterly 47 acres of lot 21 in the 13th concession of Howland as an entirely different lot in another concession, which concession has no existence. Among other mishaps, the assessment rolls of 1898 have been lost; but, on production of the assessment rolls of 1897 and 1899, it clearly appears that lot 21 in the 13th concession is assessed as belonging to Richards and as containing 48 acres. I cannot suppose that this mistake was remedied in the missing roll of 1898, though some reliance is placed upon the collector's roll of 1898 as shewing taxes of $2.47 on 48 acres, concession 12, lot 21, owned by Thomas Richards; yet it does not seem to be clear that this is not the roll of 1899. But, even if the roll of 1898, Richards was not notified of the tax till the 10th October, 1898, which would be less than three years before the sale in September, 1901. Besides, by the tax deed the sale purports to be for arrears alleged to be due up to the 31st December, 1900. Upon the evidence, I can find no valid assessment of the land intended to be sold for the year 1897 or 1899, and I much doubt the validity of that in 1898.

The lands were assessed as "resident," and no list of lands containing these as liable to be sold for taxes was furnished by the treasurer; this statutory warning, which is an indispensable prerequisite to a valid sale, was not in this case given (sec. 152).

What was substituted is frankly told by the treasurer: "The clerk and I found that this lot had been missed in being assessed, and we went back three years and computed the taxes; I do not remember notifying anybody; they would see it when it was advertised. I had no authority to fix the amount in this way."

This summary ascertainment of what ought to have been assessed from year to year appears to be the only foundation upon which this land was confiscated by enforced sale for taxes. Apart from all other objections (which need not be further discussed), those I have mentioned are fatal to the validity of the tax sale, which has to be vacated upon proper terms.

The defendant has counterclaimed for his outlay in taxes, statute labour, and improvements by way of clearing and fencing in the lands. These should be ascertained and declared to be a lien on the land, and against this should be set off any profit derived from the land or which could reasonably have been derived from it by the purchaser.

The plaintiffs should get the costs of action and the defendant the costs of counterclaim, to be set off. The amount of the lien to be ascertained by the Master if the parties cannot agree, and he will say how the costs in his office of the reference should go.

The defendant appealed from the judgment of BOYD, C.; and the plaintiffs cross-appealed.

November 12. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LENNOX, JJ.

A. G. Murray, for the defendant, argued that the trial Judge should have held that, the lands in question being unpatented Indian lands, the Court had no jurisdiction to entertain the action; that under the provisions of sec. 59 of the Indian Act, R.S.C. 1906, ch. 81, the Court had no jurisdiction to entertain an action to set aside a tax sale of unpatented Indian lands after the expiration of two years from the date of such sale. The judgment infringed upon the jurisdiction of the Superintendent General of Indian Affairs to declare such tax sale valid or invalid, under the provisions of sec. 58 of the Indian Act and the Indian Land Regulations, and was in conflict with the power conferred upon the Superintendent General to cause a patent of the lands to be issued to the tax purchaser after the expiration of two years from the date of such tax sale, upon the conditions set forth in sec. 59 of the Act.

THE COURT dismissed the defendant's appeal.

F. E. Titus, for the plaintiffs, in support of the cross-appeal, contended that the judgment should contain an order for possession. He also objected that the judgment should not have left the costs of the reference in the discretion of the Master, referring to R.S.O. 1897, ch. 224, sec. 217 (1), (2). He also complained of the defendant having been awarded the costs of his counterclaim, saying that the judgment had been wrongly based upon the Assessment Act of 1904, 4 Edw. VII. ch. 23, see. 176 (1), which did not come into force until the 1st January, 1905. This statute was not retrospective; and the present case was governed by R.S.O. 1897, ch. 224, sec. 217. This was not a question of procedure merely, but of substantive right. On the question of the Act of 1904 not being retrospective, he referred to Maxwell on the Interpretation of Statutes, 5th ed., p. 348. He also referred to *Carter v. Hunter* (1907), 13 O.L.R. 310, at p. 318; *McKay v. Crysler* (1879), 3 S.C.R. 436, at pp. 472, 473, 476, and 481; and *Hislop v. Joss* (1901), 3 O.L.R. 281.

Murray, in answer to the argument on the cross-appeal, con- tended that the Act of 1904 was retrospective and did apply, and that the question here was one of procedure, and not of substantive right. He urged that the maxim "He who seeks equity must do equity" applied here, and he referred to *Paul v. Ferguson* (1868), 14 Gr. 230; Maxwell on the Interpretation of Statutes, 5th ed., p. 357; *Campbell v. Fox* (1867), 17 C.P. 542; and *Doe d. Earl of Mountchashel v. Grover* (1847), 4 U.C.R. 23.

Titus, in reply.

November 20. RIDDELL, J.:--This is an appeal from the judgment of the Chancellor; the plaintiffs also cross-appealing. Upon the argument, we dismissed the defendant's appeal, entirely agreeing with the Chancellor's view of the law.

The plaintiffs cross-appeal as follows:-- The defendant counterclaimed for $400 for improvements and for money expended for taxes and statute labour, for an account to be taken of the same, and for an order declaring a lien on the lands for such amount as might be found due. The formal judgment declared that the defendant "is entitled to . . a lien upon the lands . . . for the amount of the purchase money paid by him . . . and interest . . . and for taxes and statute labour paid or performed by him and for the value of any improvements made by the defendant upon the said lands . . . before this action was commenced, and for the costs of his counterclaim . . . after deducting . . . the rents and profits received . . . or which might have been received . . ." And it is referred to the Master at North Bay to determine the amount, leaving the costs of the reference in the discretion of the Master. The plaintiffs contend that this is not justified by the law.

The judgment is said to he based on the Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), considered in *Sutherland v. Sutherland* (1912),3 O.W.N. 1368; but this Act did not come into force till the 1st January, 1905: see sec. 229. And this is not a mere matter of procedure or practice, but of substantive rights: I, therefore, think the statute is not retroactive.

We must see how the law stood when the rights of the plain- tiffs accrued, which may, for the purposes of this action, be considered as 1901 or 1902, at any rate before January, 1905. The statute then in force was R.S.O. 1897, ch. 224, sec. 212; but that applies only when the sale "is invalid by reason of uncertain and insufficient designation or description"--which is not the case here. We may, however, apply The statute R.S.O. 1897, ch. 119, sec. 30, if necessary. This comes from (1873) 36 Vict. ch. 22, sec. 1: "In every case in which any person has made, or may make, lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvement."

This statute very much extends the application of the principle of remuneration by the true

owner of the land to one who under a mistake of title has made permanent improvements upon it--the former Act going as far back as 1819, 59 Geo. III. ch. 14, by sec. 3 providing for the case of mistake in boundaries occasioned by unskillful surveys, which were by no means uncommon in those days of dense forest, deep morasses and cheap whisky. This statute is in substance repeated as R.S.O. 1897, ch. 119, sec. 31.

The relief granted by sec. 30, however, is much more restricted than that given by the Act of 1904. But, I think, in the present instance, we are entitled to go beyond sec. 30 in aid of the defendant.

It is a well- recognized principle of equity that "he who seeks equity must do equity." In many instances this contains a pun on the word "equity" and means nothing more than that, "he who seeks the assistance of a Court of Equity must in the matter in which he so asks assistance do what is just as a term of receiving such assistance." "Equity" means "Chancery" in one instance and "right" or "fair dealing" in the other.

Accordingly, while a plaintiff asserting a legal right in a common law Court would receive justice according to the common law, however harsh or unjust the law might be--yet, if he required the assistance of the Court of Chancery to obtain his rights according to the common law, he would--or might--not be assisted unless he did what was just in the matter toward the defendant.

This case was represented, on the argument, as a simple case of ejectment--and it might well have been framed as a simple action in ejectment. Had it been such, I think we should have had great, if not insuperable, difficulty in giving the defendant any relief beyond what the statute, sec. 30, gives him--and that is why one of us said on the argument that, had he been solicitor for the plaintiff, he would have brought the action in that way. There could on the facts have been no defence at law, the deed under which the defendant claims being void at law as well as in equity.

The action, however, is not a simple ejectment, as it might have been. The statement of claim sets out the facts as in ejectment indeed, but in the prayer, in addition to possession, etc., a claim made for: "5. Such further relief as the nature of the case may require." This is ambiguous, and might mean only relief as at common law or it might mean equitable relief. We accordingly look at the judgment the plaintiffs have taken out and are insisting upon holding. Clause 2 of the judgment declares "that the sale for taxes . . . and the deed . . . made to the said defendant . . . are and each of them is invalid, and that the same should be set aside and vacated, and doth order and adjudge the same accordingly." No appeal is taken by the plaintiffs against this clause; but, on the contrary, they attend to support it in this Court. This relief, which the plaintiffs asked for and received, could not have been granted by a common law Court, but the plaintiffs must have come into Equity for it.
They cannot now be allowed to change their position: and they have come into a Court of Equity for equitable relief not grantable in a common law Court.

They must, therefore, do equity. *Paul v. Ferguson*, 14 Gr. 230, is directly in point. The head-note reads: "Where the Court is called upon to set aside a tax sale which is equally void at law and in equity, the Court does so, if at all, only on such terms as are equitable." At p. 232 the Chancellor (Van Koughnet), speaking of putting the machinery of the Court in motion to aid a hard legal right, says that in certain cases this will not be done, and continues thus: "And when the Court, in its discretion, does interfere, it does so only on such terms as it deems equitable . . . The Court says . . . 'You need not have come here at all. The deed is void at law and here, and cannot be enforced against you in any tribunal; but, if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will aid you only on terms.' " It is not at all necessary to cite other cases to establish the principle-- but, if desired, the many cases may be looked at referred to in Story's Equity Jurisprudence, 2nd Eng. ed., p. 64 (*e*); Snell, 16th ed., p. 14 (6); Josiah W. Smith's Manual of Equity Jurisprudence, 14th ed., p. 30 (IX.); and notes in the several works.

What is equitable in this case? fair play? justice? I can find nothing inequitable, but, on the contrary, what is wholly equitable, in the statutory rule laid down in 1904. The Legislature, in definite and unmistakable terms, have said what they thought was fair. With that commendable tenderness for vested rights which characterizes a responsible and representative Parliament, they have refrained from making the statute retrospective--but there is no reason why the Court, untrammelled by authority, should not adopt the statutory rule as its own. I think, therefore, this ground of appeal without merit.

It is also complained of by the plaintiffs that the judgment contains no order for possession. That is the fault of the plain- tiffs themselves, so far as appears; they take out an order and judgment

which should be such as satisfies them. If there be any omission, *e.g.*, if the trial Judge has not passed upon any matter which it is thought should be passed upon, the matter should be brought to his attention before being made a ground of appeal. There can be no objection to the judgment containing an order for possession, not, however, to be made effective "until the expiration of one month thereafter nor until the plaintiff has paid into Court for the defendant the amount" for which the defendant is declared to have a lien: 4 Edw. VII. ch. 23, sec. 176 (2), first clause.

It is also objected that the judgment should not have left the costs of the reference in the discretion of the Master; and R.S.O. 1897, ch. 224, sec. 217 (1), (2), is cited in support of that proposition.

This section was repealed as of the 1st January, 1905, by 4 Edw. VII. ch. 23, see. 228, schedule M, first item. What is provided for in this sec. 217 (1), (2), is practice and procedure, and not substantive right--and, accordingly, the section must go; but it is found repeated in the new Act, sec. 181. Sub-section 2 provides that "if on the trial it is found that such notice" [*i.e.*, a notice which the defendant is by sub-sec. 1 authorized to give "at the time of appearing"] "was not given as aforesaid, or" (adding other cases) "the Judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff . . ."

The prerequisite for the application of this section is that on the trial it must be found that such notice was not given. The Chancellor did not so find; he was not asked so to find; there was no scrap of evidence offered upon which he could so find. The plaintiffs claiming some right following such a finding, the onus was upon them to establish the fact, and they failed to do so. *De non apparentibus et de non existentibus eadem est ratio*. It is of no avail for counsel to tell us on the argument that no such notice was served--that is not evidence, and we do not even have an affidavit of the fact, if it is one.

In any event, the plaintiffs have been awarded the costs of the action--the statute does not compel the Court to award all costs, of reference, etc., to the plaintiff--the word used is "costs." The defendant is literally ordered to (I use the words of the statute) "pay costs to the plaintiff"--and, in my view, awarding the costs of the action to the plaintiffs, as has been done, sufficiently complies with the statute without awarding also the costs of a reference which it is possible may be caused or rendered necessary by the unreasonable demands or conduct of the plaintiffs themselves.

Both the appeal and (with the trifling modification spoken of) the cross-appeal fail; both must be dismissed. And, as success has been divided, there should be no costs of the appeal or cross-appeal.

Of course, we express no opinion as to the effect (if any) of any action by the Superintendent General under the provisions of the Indian Act, R.S.C. 1906, ch. 81.

FALCONBRIDGE, C.J., and LENNOX, J., agreed in the result.

Appeal and cross-appeal dismissed without costs.