McDIARMID V. McDIARMID

(1862), 9 Gr. 144

Upper Canada Court of Chancery, Spragge V.C., 1862

Repeal of patent--Heir and devises commission--Contingent estate--Statute of Frauds.

The heir and devisee commission having reported that the heirs at law of A. were entitled to a patent of certain lands in the Indian reserves, Charlottenburg, the Governor in council afterwards, upon a report of the Solicitor-General in favour of B., a brother of A., issued a patent to B. for the lands. The heirs of A. thereupon filed a bill to have a patent set aside, and a new patent issued to themselves, upon the grounds of the patent having been issued to B. under an error. The court having found that there was no error of fact, *held,* that the patent was properly issued to B. notwithstanding the finding of the commission.

***Semble,* this court may, in a proper case, set aside a patent issued upon the finding of the heir and devisee commission.**

***Semble,* the purchase of a devisee's contingent interest in real estate is a purchase of an interest in lands within the Statute of Frauds.**

Duncan McDiarmid, the father of *Hugh* and *Finlay McDiarmid,* was in possession of certain lands in the Indian Reserve, in the township of Charlottenburg, under a lease from the St. Regis Indians, for upwards of forty years prior to his decease in 1847. He devised one half of these lands to his son *Hugh*, and the other half to his son *Finlay*. After the death of *Hugh*, his heirs at law applied to the heir and devisee com- mission for a report in their favour, as entitled to a patent for the half of the lands devised to *Finlay*; and the commission certified in their favour accordingly, but upon statements which, it afterwards appeared, were erroneous, and without the claims of *Finlay* having been considered by them. The latter then presented his case to the Governor in council, who referred the matter for inquiry to the Solicitor-General, and upon his reporting in favour of *Finlay McDiarmid*, a patent was issued accordingly. The heirs of *Hugh McDiarmid* then filed their bill for a declaration that this patent was issued improvidently, and through error or fact and law, charging that the finding of the commission was final, and praying that the patent to *Finlay* might be set aside, and a new patent issued to themselves.

Mr. Hodgins, for the plaintiff, contended that the finding of the commission was final, and referred to the Consolidated Statutes of Upper Canada, chapter 63, section, 17, and Broome's Maximes, 295, 4th ed.

Mr. McGregor, for the defendant *Finlay McDiarmid* contended that there was no error in fact or law in the issuing of the patent; but that, on the contrary, the finding of the commission was clearly based on certificates issued from the Indian department, which misrepresented the facts of this case and the rights of the parties. He also contended that this court may set aside the finding of the heir and devisee commission in cases of fraud, error or mistake, as much as it sets aside a judgment at law, in analogous cases, and referred to *Jeffrey* v. *Boulton*, (a) App. Rep. III. *Scane* v. *Hartick*, (b) Ante Vol. 7, p. 161. Earl of *Bandon* v. *Becher*, (c) 9 Blight. N.S. 532.

The facts of the case appear from the judgment of

Judgment.--SPRAGGE, V. C.--[Before whom the cause was heard.]--The questions raised in this cause are substantially between the heirs of the late *Hugh McDiarmid,* the plaintiffs, and the defendant *Finlay McDiarmid; Duncan McDiarmid,* the father of *Hugh* and *Finlay*, was occupant of certain lands in what was styled the Indian Tract or Reservation of the St. Regis Indians from the year 1801 to his death in April, 1847. He cultivated these lands as a farm; *Hugh* for the latter years of his father's life managing it for him, and continuing the occupation after his death; his mother, however, living with him until his death, which occurred in February, 1858.

Very shortly after the death of *Duncan*, and in the same year, a surveyor under instructions from the Indian department made a survey of the tract and a report to the department, and reported *Hugh* as in possession of the southerly halves of lots 7, 8, 9, 10, 11, and 12, in the 9th concession of the reservation, in the township of Charlottenburg, containing 240 acres, and *Hugh* claimed a patent for the Crown accordingly, desiring to purchase the same upon the terms prescribed by the Indian department; *Finlay* made a contra claim as to the north halves of the above parcels as devisee under the will of his father; and before any patent was issued or any decision arrived at by the Indian department or the government, *Hugh* died, and his heir claimed before the heir and devisee commission, and the like counter claim was made by *Finlay* before the commissioners as had been made before the government.

In support of *Hugh's* claim a certificate of Mr. *Chesley*, of the Indian department, was put in; he

certified the report of the surveyor to which I have referred; that *Hugh* was occupant and possessor, and as such was accepted by the Indian department as the person entitled to purchase the same under the arrangements entered into for commuting the tenure under which the settlers on the tract held their several lots; that he had paid in full for the same at the rate of a dollar an acre on the 5th of February, 1858, and that a patent would have issued in his favour had he survived. Upon these claims of the heirs of *Hugh* as to the whole, and of *Finlay* as to the half, I find the following note of the decision of the commissioners: "Mr. *Jackson* applies that the case may be deferred until the next sittings: applies on affidavit of the Hon. *J. S. Macdonald* on behalf of *Finlay McDiarmid;* but it appears that he has no claim except as devisee of his father, who is represented to have been lessee of the St. Regis Indians; and therefore this claim goes behind the certificate from the Indian department, contesting the right of *Hugh McDiarmid*. Allowed: "that is, the claim of the heirs of *Hugh* was allowed upon the certificate from the Indian department; and the claim of *Finlay* as devisee of his father was not adjudicated upon by reason of its going behind the certificate. The claim of *Finlay* was however pressed upon the government; at first with the view of getting a report from the Attorney- General and an order to stay the patent within thirty days from the report of the heir and devisee commission in order to a rehearing before that tribunal, and failing that to obtain a patent to *Finlay* for the parcels devised to him by his father's will, and this was eventually successful, after a report from the Solicitor- General setting forth the principal facts of the case."

This bill is filed to repeal that patent as having been issued in error; and the plaintiffs' first position is that the decision of the heir and devisee commission is final and conclusive to all intents and purposes. Upon this branch of the case the alleged error consists in issuing a patent to one, when the decision of the commission was in favour of another; and it is contended that this court will look no further, and that it is not open to *Finlay* to show that the patent was rightly issued to himself; and this involves the position that this court has not jurisdiction to enquire whether or not *Finlay* was entitled to the patent. It is quite clear that but for the intervention of the commission the matters said to be concluded would have been proper subjects of investigation in this court, and that to whichever party the patent had issued, or if no patent had issued to either: the branches of jurisdiction applicable to such cases being "to decree the issue of letters patent from the Crown to rightful claimants" and "to repeal and avoid letters patent issued erroneously or by mistake, or improvidently, or through fraud."

This jurisdiction was conferred upon the Court of Chancery without making any exception in favour of patents issued upon the reports of the heir and devisee commission. In subsequent statutes touching the constitution and jurisdiction of the commission, no mention is made of ouster of the jurisdiction of the court, and in the Consolidated Statutes, where the provisions concerning this court and concerning the commission form in a sense one statute, the respective jurisdictions are left the same; and there is the principle that the jurisdiction of a superior court is not ousted except by express words or necessary implication: of express words there are none, nor can I see that such ouster of jurisdiction is necessarily implied from the language of the act or the purposes for which that tribunal was erected, Its office, according to the original act was, " to ascertain, determine, and declare, who is, or are the heir or heirs, devisee or devisees of the said nominee or nominees of the Crown to such lands," and it is the same now (although comprised in language somewhat different) as will appear by reading together section 7 and the conclusion of section 17, of cap. 80 of the Consolidated Statutes of Upper Canada . Then the 17th section provides that the report of the decision of the commission shall be final and conclusive, and that the Governor in council shall direct a patent to issue for granting the lands in question to the party who has been determined by the decision of the commissioners to be entitled to the same as representing the original nominee of the Crown. Assuming that the report concludes the Crown as to the point reported; does it necessarily do any thing more ? It may be that the Crown cannot after such report issue a patent to any one as representing the original nominee except to the person whose title as such is affirmed by the report; but it does not follow that the Crown may not for good reasons decline to issue the patent to any one representing such original nominee, and even if the Crown were bound, could in fact only act ministerially upon such report, it by no means follows that this court, not named in reference to the report, cannot, by virtue of its general jurisdiction over the subject matter, enquire who is entitled. Suppose the commissioners to have proceeded upon a forged certificate; or the certificate, whether from the Indian department or the Crown lands department, to misstate some material fact upon which the rights of the parties turned; or that the commissioners were mistaken as to the identity of the parties in whose favour they reported; or that they proceeded upon a forged will or a forged assignment. All these things might be, consistently with the exercise of the soundest judgment on the part of the commissioners; they might merely be mistaken in their premises, and documentary evidence might be produced to this court demonstrating this. Certainly in a case not unlike this in principle, this court does exercise jurisdiction; I allude to the case of a receipt being found after recovery at law of the money, for the payment of which the receipt was given.

It is not necessary to go further and assert the jurisdiction of this court to review the grounds of a decision arrived at by the heir and devisee commissioners. It may be that this was not intended

by the statute, and looking at the composition of the court there may be reason for so thinking; but on the other hand there is no limit to the value of the property that may be in question, or to the importance of the questions involved, and unless this court has such jurisdiction, the party failing is concluded by the decision of the tribunal of the first resort; while if the question were before any of the ordinary superior courts, he could carry it to the court of last resort; and would be able to do so if this court has the jurisdiction I refer to. If the decision of the commissioners could be reviewed it would of course be upon the same principles as under the statute govern the commissioners themselves. The question of jurisdiction is raised in this case in a peculiar shape: the plaintiff invokes it for one purpose, to repeal the patent, and denies it for another--the enquiry as to whether after all it was not rightly issued. If *Finlay* could have filed a bill in the event of the patent having issued to the heir of *Hugh,* he can of course show the same matter by way of defence to this bill--the same question of jurisdiction would arise either way, and the objection necessarily goes to this extent that the decision of the commissioners is final and conclusive as to all courts and to all persons.

The person sought to be bound in this case was not a claimant before the commissioners; his rights can hardly be said to have come in question at all. The only questions decided by the commission were two: who was the original nominee of the Crown; and who were entitled as representing him; any rights or equities outside of those questions were pointedly excluded by the commissioners. Assuming *Hugh* to have been the original nominee of the Crown, a point which I will come to presently, *Finlay*, when brought into this court to defend the patent granted to him, alleges equities outside the questions decided by the commission, and upon them claims to be entitled to retain it. In this view of the case the decision of the commission is in, no way impugned, and *Finlay's* position is simply this: that he has rights independently of the commissioners and of any circumstances which give the commissioners jurisdiction, and which are properly cognizable in equity; and the circumstance that the death of a rival claimant gave the commissioners jurisdiction to consider the claim of his heirs, upon which they have decided certain questions, leaving untouched his, *Finlay's*, equitable rights, cannot oust this court of its jurisdiction to give effect to those rights or deprive him of his right to have them protected in this court. If *Hugh* had lived, the respective rights of the parties would undoubtedly have been cognizable here; he is dead, and *Finlay's* rights not having been adjudicated upon elsewhere, they surely must continue to be cognizable by this court. For these reasons I am of pinion that the decision of the heir and devisee commission is not a bar to *Finlay's* shewing in this court that the patent was rightly issued to him.

Two other objections were raised apart from merits of the case, one that *Finlay* by appearing before the commissioners submitted to their jurisdiction, and is bound; the other that he should, within a month from the commissioners' report, have obtained from a commissioner a stay of the issue of the patent. I am against the plaintiff upon both these points; upon the first because the rights he submitted as a reason against the claim of the heirs of *Hugh* were excluded from consideration, and no jurisdiction exercised upon them; in fact jurisdiction disclaimed, to go behind the certificate from the Indian department; upon the other, because *Finlay's* solicitor acted with promptitude and diligence, and because he is not in the position that such proceeding is intended to avert, viz., the issuing of a patent to those whose claim has been allowed by the commissioners.

Upon the merits, apart from the decision of the heir and devisee commission, the case made by the bill is that *Hugh McDiarmid* in his lifetime occupied and was entitled to the several parcels of land which were claimed by his heirs; that all the rents and the full amount of the purchase money for all of them were paid by *Hugh*; and that the several installments were received by the government after fully investigating and finally rejecting the claims of *Finlay*; and that if *Finlay* ever had any claim to, or interest in, these lands, or any portions thereof; *Hugh* in his lifetime gave him a valuable consideration thereof.

The facts as to possession and payment of rent are not truly stated in the bill: *Duncan*, the father, and not *Hugh*, had possession and paid rent for 46 years, that is, up to his death. He brought up his family and among them *Hugh* upon the farm, and there is no evidence to shew any change in the possession; and as to the rents the evidence is, that they were paid by or in the name of *Duncan.* He was a lessee of the Indians, and occupied paid rent as such, and if the survey made by *Bruce* had been made in his life-time, no person but himself could properly have been reported as in possession. *Hugh* was his manager, and looked forward to becoming owner, of a part at least, upon his father's death, but in no proper sense was he in possession; the real position of *Hugh* was not truly and accurately stated either to the Indian department or to the heir and devisee commissioners. It is plain from the instructions to the surveyor that what the government desired to be informed of was not the mere fact of what individual might happen to be in personal occupancy of land in the tract. The government was about to grant patents in fee to settlers who had claims on its consideration as lessees from the Indians, and the instructions to the surveyor were framed accordingly. He was directed to survey the tract and divide it into concessions and lots of such dimensions as would leave the lessees in possession of the lands they then occupied. In relation to what is called clashing between the tract and adjacent townships, he is directed to report whether the lands in dispute were held in possession by Indian lessees or by grantees of the Crown, and he was directed to mark upon his "plans" the position

and extent of the clearing and buildings, and the names of *the lessees*. Now *Hugh* was not a *lessee* nor did be represent a lessee unless as a devisee under his father's will, for he was not the heir- at-law: the surveyor for a time, while making his survey, lodged in his house, where his mother also resided, and could scarcely have avoided, one would think, learning what was his true position. But at any rate, he reported him as the person in possession of the whole farm of which his father had died possessed. This report certainly misstated the material fact upon which it was manifest, from the surveyor' s instructions, the government desired to be informed, and enabled *Hugh* to appear in a character to which plainly he was not entitled, that is, as nominee of the Crown--the government intending to convert those who were in possession as lessees into nominees for patents; and it was upon this character, assumed without right, that the heirs of *Hugh* succeeded before the heir and devisee commissioners. The surveyor might with as much justice have reported a yearly tenant as the person in possession within the meaning of his instructions. Except as devisee of *Duncan, Hugh* was a mere stranger, who happened to be in visible possession but without a shadow of claim. According to the evidence of the surveyor, he knew nothing of *Duncan* and was a stranger to the parties; he says that in making his survey he asked the occupant as to his title, and acted upon his statement. If he asked *Hugh*, as I understand him to mean, *Hugh* must have misled him as to the facts. *Hugh* himself, after his father's death, claimed to have been forty years in possession, and his heirs in their petition to the government stated that he had been many years in possession. All this was at variance with fact, and the plain object was to give them a claim upon the government to which they were not entitled. In few words, the lessee from the Indians is the person recognized by the Crown as entitled to be its nominee for a patent; the lessee dies, and a younger son, who had been his farm bailiff, sets up that he is the person entitled. The claim was a very gross one, and it is a matter of surprise that it should have imposed upon the surveyor. It really will not bear examination; it is quite impossible that such a claim can be supported.

The plaintiffs ask the repeal of the patent upon another ground--that *Hugh* purchased from *Finlay* his prospective interest in the homestead. *Duncan's* will was made many years before his death, and it seems to have been well understood in the family that he had devised one-half of the homestead to *Hugh*, the other half to *Finlay*. The plaintiff's case is, that several years before *Duncan's* death *Finlay* expressed a wish to have a lot in Kenyon instead, and that such lot was purchased for him and paid for by *Hugh*. It is proved that a lot in Kenyon was purchased for *Finlay* for £200, and that it was paid for partly in cash, and that part of the purchase money was lent by a brother, and a joint note by *Finlay* and *Hugh* given for it; the principal part of the purchase money was paid by the hand of *Hugh* and all this was done with the cognizance and, as it would appear, with the approbation of the father. It is claimed that the money furnished for the payment of the purchase money was the money of *Hugh*. It may have been so, or it may not, or it may have been partly his money and partly his father's. He appears to have had the entire management of his father's business, and that the profits of the farm passed through his hands; these would strictly be his father's moneys, though it was probably understood that he was not to be called to account for them; but if they were wholly his moneys it would still have to be shewn, and that clearly, that *Finlay* agreed to relinquish to him for that consideration his prospective interest in the lands in question. It seems to have been thought by some members of the family that *Finlay* was to have the Kenyon lot, instead of half of the homestead, but the evidence that *Finlay* accepted it as a substitute is weak. *Thomas Waddell* is the only witness to that effect. What he says is that *Finlay* said to him that his brother *Hugh* was going to pay for the Kenyon lot, "in substitution of the homestead lot: that it would not do to divide the homestead." The evidence of this witness is shaken by his denying explicitly and repeatedly what he had previously sworn to upon affidavit. There is no evidence whatever of any actual agreement between *Hugh* and *Findlay* to the above effect, and as both were able to write it might be expected that they would have put it in writing. *John*, who appears to have had good deal of intercourse with his Fathe's family, says, that he never heard in his father's lifetime that the Kenyon lot was in exchange for the homestead. The Kenyon lot was partly stocked from the stock of the homestead, and it was probably from the profits of the homestead that the purchase money of the Kenyon lot was paid; and if *Finlay* did receive that lot in exchange for what he was to have under the will, the devise to him would probably have bean revoked; and this appears to have been expected by *Peter,* a brother of *Hugh* and *Finlay. Peter* was named as an executor in the will, and the testator, about a year before his death, handed him the will and desired him to keep it. *Peter* asked him if he was going to make any change in it; he said he would make no change, that what he had done he would not alter. *Peter's* idea was that it might be his father's intention to revoke the devise of half the homestead to *Finlay*, but he does not seem to have suggested it. If *Duncan* remembered the contents of his will, as *Peter* thinks he did, what passed between him and *Peter* would be evidence that he did not understand that *Finlay* had received the Kenyon lot in substitution for half the homestead, and that he intended him to have both.

There is indeed a piece of evidence the other way, that of *John*, another brother: *Hugh's* habits had become very intemperate before his father's death, and *John* says that his father in conversation with him alluded to it, and said: Although the whole homestead has been left to

Hugh, it would not last long. This it is contended was an affirmation by *Duncan* that he had so devised the homestead; but even suppose *John's* recollection of the words to have been strictly accurate (which cannot be certain) they may only mean that if he had left the whole homestead to *Hugh* it would not last long--the word "altho" being used in the same sense as "though" in the well known passage, *"Though I give all my goods to feed, the poor."* But supposing the words meant as an affirmation, they could only be used to counteract the inference from the conversation with *Peter*; they could not operate as a revocation of the devise.

A very strong piece of evidence against the existence of such agreement as is now set up, is the conduct of *Hugh* himself after his father's death; when the will was read, he made no objection; when asked by *Peter* and *John* if he wanted anything but what was in the will, his answer was that he wanted nothing but what was in the will; so far this is deposed to by *Peter* only, who, as appears by his evidence, has assisted *Finlay* in the defence of this suit, and has made a provisional contract for the purchase of the land; but it appears by other evidence, also, that a release or quit claim as to the land in dispute was prepared for *Hugh's* signature and that *Hugh*, when it was presented to him for execution, only said that he must get advice before he signed it: not at all the answer which a man would give if asked to release land which he had purchased and paid for. It is also in evidence, though resting chiefly on that of *Peter,* that after *Hugh* had determined upon claiming the whole lot he at first rested his claim only upon possession, and that the purchase of the Kenyon lot for *Finlay* as a consideration for relinquishing the homestead was only an after thought. It is not a very violent supposition that the father intended *Finlay* to have half the homestead as well as the Kenyon lot, for he had many years before purchased a lot for *Hugh*.

There is one document which, if authentic, would seem to be conclusive against the alleged substitution of the Kenyon lot for half of the homestead. It purports to be an account against *Finlay*, and one of the items is, "Bought 200 acres, cost £200," which is the price of the Kenyon lot. Another item is for stock. The account no doubt refers to the Kenyon lot, and if it is a genuine account made out by *Hugh* it is obviously inconsistent with the present claim. I find the document, together with what purports to be a retired note given by *Finlay* to *Hugh*, and a cancelled note joint and several, the signatures torn off, among the papers before the heir and devisee commission. The handwriting is of persons not accustomed to write, but there is nothing to prove the papers genuine, or to shew by whom they were put in, and I must therefore discard them from consideration: I only refer to them because in case the plaintiffs should desire to carry the case further, it may be well to inquire whether they are genuine, and under what circumstances, and for what purpose, they were made out.

Upon the last branch of the case it was not contended but that *Finlay* is entitled as devisee of *Duncan*, unless *Hugh* purchased his interest, the consideration being the Kenyon lot; indeed, it is as- sumed that he is devisee, for unless he is so, the heir of *Duncan*, not *Hugh*, would be entitled; the purchase of his prospective estate by *Hugh* is then the point to be established. It was not taken as a point in argument that the purchase set up is a purchase of an interest in lands within the Statute of Frauds, and must be proved in the way prescribed by the statute. It certainly is not co proved, and were it out of the statute, the evidence is not such as, in my judgment, will warrant the court in adjudging for the plaintiffs.

The bill must be dismissed with costs.