

BRIDGE v. JOHNSTON

(1903), 6 O.L.R. 370 (also reported: 2 O.W.R. 738)

Ontario High Court, Ferguson J., 9 September 1903

(Appealed to Ontario Divisional Court, *infra* p.36)

Indian Lands--Assignment of Timber--Interest in Land--Registration--Conditional Assignment--Priorities--Actual Notice.

The owner of unpatented Indian lands administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R.S.C. 1886, ch. 43, made a sale of certain timber thereon and executed an assignment or transfer to the vendee, by which the vendor agreed to sell and the vendee to purchase all the timber of a certain specified kind upon the land described, for a named price, payable as set out, and by which the vendee was "to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said pro- perty during that said term:"--

Held, that the interest assigned was an interest in land, and not a mere chattel interest.

Summers v. Cook (1880), 28 Gr. 179, and *Ford v. Hodgson* (1902), 3 O.L.R. 526, followed.

Held, also, that the assignment was not an unconditional assignment within the meaning of sec. 43 of the Indian Act, and was incapable of being registered in the manner prescribed by the Act, and therefore did not require registration to preserve its priority, and was entitled to priority over a sub- sequent registered assignment.

Harrison v. Armour (1865), 11 Gr. 303, followed.

Semble, that, although there is no provision in the Indian Act as to "actual notice," the law laid down in *Agra Bank v. Barry* (1874), L.R. 7 H.L. 135, at pp. 147, 148, would apply if the subsequent assignee had at the time of registration such notice of the prior assignment.

ACTION for an injunction and damages in respect of alleged trespasses to land. The facts are stated in the judgment.

The action was tried by FERGUSON, J., without a jury, at Walkerton, on the 26th May, 1903.

David Robertson, for the plaintiff.

C.S. Cameron, for the defendant.

September 9. FERGUSON. J.:--The lands in question are lot number 8 in the 8th concession east of the Bury road in the township of Eastnor, in the county of Bruce, and are lands originally surrendered by and set apart for the use of the Chippewas of Saugeen, Owen Sound Indians, and held, sold, and administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R.S.C. ch.43. The lands are unpatented. It was freely admitted by counsel at the trial that on the 27th November, 1899, James W. Freckleton was the owner of and had a good title to these lands. On that day the said James W. Freckleton made a sale of certain

timber on these lands to one Jamieson Johnston, and duly executed an assignment or transfer of this timber. The operative parts of the assignment are in the words and figures following, that is to say:--

"The party of the first part (Freckleton) agrees to sell and the party of the second part (Jamieson Johnston) agrees to purchase all the timber 10 inches and over in size on lot 8, concession 8, township of Eastnor, E.B.R., for the price or sum of \$350, payable as follows." (The times and mode of payment of the purchase money are then stated.) "The party of the second part is to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term."

Jamieson Johnston did not register this assignment in the office of the Superintendent General, nor has it, nor have any of the assignments made under it hereafter referred to, been so registered.

On the 2nd March, 1902, Jamieson Johnston assigned and transferred all his interest in respect of the said timber and land to his brother Robert James Johnston, and on the 16th December, 1902, the said Robert James Johnston assigned and transferred all his right and interest to another brother, Samuel Johnston, the defendant.

A part of the timber mentioned in the assignment to Jamieson Johnston has been cut and removed, but there is a substantial part of it remaining uncut upon the land. On the 15th November, 1900, the said James W. Freckleton sold, assigned, and transferred the land, this lot No. 8, to the plaintiff, Thomas John Bridge, his heirs and assigns forever, and at the trial it was admitted that this conveyance had been duly registered in the office of the Department of Indian Affairs, with the Superintendent General, on the 29th November, 1900. Freckleton had contracted to sell the land to one Bosley, who had contracted to sell it to the plaintiff. It was agreed that Freckleton should convey and assign to the plaintiff, instead of having two conveyances, and the conveyance was accordingly made directly to the plaintiff. At the time this was done, and of course before the plaintiff registered his conveyance, both Bosley and Freckleton told him that Jamieson Johnston had the right to cut timber on the land until the spring of 1902, but there was not anything said about any assignment or transfer from Freckleton to him, and it is not shewn that the plaintiff had notice or knowledge of such an assignment or transfer till long after the registration by him of the transfer to himself.

The defendant was proceeding to cut and take away timber from the lot in the spring of 1903, when the plaintiff brought this action.

Section 43 of the Act provides for the keeping of a book by the Superintendent General for registering, at the option of the party interested, the particulars of any assignment, and provides that every assignment registered shall be valid against any assignment, previously executed, which is subsequently registered or is unregistered, and that every assignment when registered shall be unconditional in its terms. The original Act, 43 Vict. ch. 28, sec. 43 (D.), provides, amongst other things, that any assignment to be registered must be unconditional in its terms.

This law of registration seems to apply to an assignment made as well by the original purchaser or lessee of Indian lands or his heirs or legal representatives, as by any subsequent assignee or the heirs or legal representatives of any such assignee. The section of the Act respecting

registration would, according to its terms, seem to be absolutely decisive as to priority. There does not seem to be any provision (as in our Registry Act) as to "actual notice" had by the subsequent assignee who first registers his assignment, but I think the law so clearly laid down by Lord Cairns in the case *Agra Bank v. Barry* (1874), L.R. 7 H.L. 135, at pp. 147, 148, must apply, and that, although the plaintiff's assignment was registered as aforesaid, yet, if he had at the time actual notice of the assignment to Jamieson Johnston, he cannot have the priority he seeks. Such actual notice has not, I think, been proved. There are other cases to the same effect as the *Agra Bank* case.

A question may arise as to whether the law of registration has any application. This rests upon the contention that the interest purchased by Jamieson Johnston from Freckleton was a chattel interest, and not an interest in land. The cases in our Courts relating to this subject are somewhat numerous and not all in accord. I have perused a large number of these cases, among them being *Johnston v. Shortreed* (1886), 12 O.R. 633; *Corbett v. Harper* (1884), 5 O.R. 93; *Summers v. Cook* (1880), 28 Gr. 179; *McNeill v. Haines* (1889), 17 O.R. 479; *Steinhoff v. McRae* (1887), 13 O.R. 546; *Handy v. Carruthers* (1894), 25 O.R. 279; *Ford v. Hodgson* (1902), 3 O.L.R. 526; and I cannot avoid being of the opinion that the interest assigned by Freckleton to Jamieson Johnston was an interest in land and not a mere chattel interest. To this opinion I am bound by the cases *Summers v. Cook* and *Ford v. Hodgson*, above. It would appear, as I think, if there were no further or other controlling elements in the case, that the priority is in favour of the plaintiff. See the cases *McLean v. Burton* (1876), 24 Gr. 134, and *Ferguson v. Hill* (1854), 11 U.C.R. 530.

I am, however, after the best consideration I have been able to give the subject, of opinion that the assignment from Freckleton to Jamieson Johnston was a conditional document, that is to say, that it was not an unconditional assignment within the meaning of the Act. It was not, as I think, unconditional in its terms, and, according to the words, and, as I think, the spirit of the Act, it was incapable of being registered in the manner prescribed by the Act. The local agent of the Department was called as a witness, and he was of the opinion that the document was incapable of registration, and said that, had it been offered to him to forward for registration, he would have rejected it, on the grounds stated above. Then, according to the doctrine of the case *Harrison v. Armour* (1865), 11 Gr. 303, and the cases and authorities referred to in it, this document (the assignment from Freckleton to Jamieson Johnston) did not require registration to preserve its priority.

This assignment was first in time. It was not, as I think, affected by the registration of the assignment to the plaintiff. I am of the opinion that the title of the defendant is superior to that of the plaintiff, and that the plaintiff's action should be dismissed, and I see no good reason for withholding costs. The interim injunction is also dissolved with costs, including the costs of the motion for it. The action is dismissed with costs.

Order accordingly.