REX v. EASTERBROOK

[1929] Ex.C.R. 28

Exchequer Court of Canada, Audette J., 28 May 1928

(Appealed to Supreme Court of Canada, reported sub nom. Easterbrook v. The King, infra p. 304)

Crown--Intrusion--Indian Title--Right to Compensation for Improvements made by Tenant

Held, that at common law a tenant is not entitled on quitting to any compensation for permanent improvements made by him during his tenancy on the premises leased.

2. That under the statute law of Ontario, in order that the occupant of any land may be entitled to compensation for "lasting" improvements on the land he must show that the improvements were made "under the belief that the land was his own," and a tenant recognizing another as the owner by the payment of rent to him is not entitled upon the lease being terminated to any compensation for any improvements made by him.

3. The question of Indian title discussed.

INFORMATION of intrusion exhibited by the Attorney-General to recover possession of certain parcels of land in possession of the defendant.

The action was tried before the Hon. Mr. Justice Audette at Ottawa.

W. C. McCarthy and *A. S. Williams* for the plaintiff.

George I. Gogo, K.C., for the defendant.

AUDETTE J., now (May 28, 1928), delivered judgment.

This is an information of intrusion exhibited by the Attorney-General of Canada, whereby the plaintiff claims

(1) (1925) Ex. C.R. 47; (1926) S.C.R. 105.

(2) (1924) Ex. C.R. 158.

possession of a certain parcel of land situated on Cornwall Island, in the province of Ontario, forming part of certain tracks of land ever set apart, prior to the 10th March, 1821, for the use and benefit of the band of Iroquois Indians, known as the St. Regis tribe, and which have never been surrendered by the said Indians to the Crown. The Crown is making no claim to the fee in these lands, but claims on behalf of the Indians, the wards of the nation, the use and benefit of these lands for the Indians themselves.

The plaintiff further claims from the defendant a reasonable sum for use and occupation of the said lands and premises and of rents and profits thereof, from the 10th of March, 1920, until possession of the said land and premises be delivered.

The defendant claims title, under an indenture or lease, bearing date the 10th March, 1821, between the British Indian chiefs of the St. Regis and one Solomon Youmans Chesley, his predecessor in title, of the 196 acres in question herein paying therefor to the said chiefs the sum of $100 before the signing and sealing of the said indenture, together with a yearly "rent" of ten dollars. The lease is for a period of 99 years or

for and during the full term of 99 years fully ended and completed, and at the expiration of that period for another and further like period of 99 years and so on until the full end and term of 999 shall be fully ended and completed .

It is admitted the rent was duly paid during the full term of 99 years. It was tendered at the expiration of that period but refused by the Crown. It appears that the rent was at the beginning paid direct to the Indians and at a later period paid to the Crown for the use and benefit of the Indians.

Looking to the "root of title," we find that these lands upon which the Indians title might have been a burden, but which never amounted to a fee, form part of the unalienated Crown lands, upon which the Crown had all along a substantial and paramount estate. The Proclamation of 1763 prohibited the purchase of lands from Indians, their tenure being only a personal and unsufructuary right dependant upon the good-will of the Sovereign. Therefore this lease of 1821 is null and void *ab initio*, for want of power and authority on behalf of the Indians to enter into such agreement.

This question of the Indian title has become a trite question which it is unnecessary for me to discuss. Suffice to say that this question has been settled beyond cavil, *inter alia*, by the well known cases of *St. Catherine's Milling and Lumber Co. v. The Queen* (1) (1886) 13 S.C.R. 577; 14 A.C. 46.; *Attorney-General for Quebec v. Attorney-General for Canada* (2) (1921) 1 A.C. 401.; *Attorney-General v. Harris* (3) (1872) 33 U.C.Q.B.R. 94.; *The King v. Bonhomme* (4) (1917) 16 Ex. C.R. 437., confirmed by the Supreme Court of Canada; *The King v. The Ontario & Minnesota Power Co. Ltd.* (5) (1920) 20 Ex. C.R. 279; (1925) A.C. 196.; *The King v. McMaster* (6) (1926) Ex. C.R. 68..

This case of McMaster (*ubi supra*) decided quite recently involves questions of law and facts absolutely identical with the present case, and concurring entirely as I do in the *ratio decidendi* therein it becomes unnecessary to repeat here what has been said in that case which clearly and absolutely decided the questions involved in the present controversy.

Upon the evidence adduced I find that the Crown is en- titled to the sum of $400 a year for the occupation of these lands from the 10th March, 1920, until possession thereof.

There remains the question of the improvements claimed by the defendant. He had possession of this land under the lease in question and was regularly paying a yearly rent for the same. He could not under such circumstances have a reasonable belief he was the owner of the land and he cannot either set up prescription by possession as he cannot prescribe against his own title, nor could the doctrine of acquiescence be invoked by him from the correspondence or behaviour of the officers of the Crown, as the doctrine of estoppel does not apply to or operate against the Crown. 13 Hals. 167-168.

At common law the tenant is not entitled on quitting to any compensation for permanent improvements which he has made during his tenancy, but he may be entitled to re- cover under statutory right. 18 Hals. 567.

Turning to the statute law in Ontario, we find that, by sec. 37, R.S.O., ch. 109, it is provided that

> where a person makes lasting improvements on land under the belief that the land is his own . . . he is entitled to such improvements.

That enactment dates very far back. It is clear and self evident that the present defendant does not come within the ambit of such enactment. He was in occupation of the land under lease for which he was regularly paying rent. Under such circumstances he could not have any reasonable belief or doubt that he was not the owner of the land. He is therefore not entitled to recover the value of his improvements. *Ramsden v. Dyson* (1) (1865) L.R. 1 E. & I. Ap. 129 at 141.; *Commissioners Niagara Falls Park v. Colt* (2) (1895) 22 Ont. A.R. 1.; *Smith v. Gibson* (3) (1865) 25 U.C. Com. P. 248..

In a court of law when the plaintiff is found entitled to judgment, the law must take its course, even when the defendant *ex equo et bono* might show equity in his favour.

In view of all the circumstances of the case I was asked to make a declaration that if the defendant could not in strict law recover the value of his improvements, that he was in equity and justice morally entitled to the exercise of the mercy and bounty of the Crown in his favour. It may indeed appear to be a severe measure of justice that deprives the defendant from recovering the value of his improvements which go to enhance the value of these lands, therefore enabling the Crown to enrich itself at his expense. However that may be, it is a matter to be dealt with by the officers of the Crown who will have to decide whether or not the case commends itself to the benevolence of the Crown, but it is not enforceable in a court of law. In such event the rent for the use and occupation at $400 a year since the 10th March, 1920, might be allowed *pro tanto* as the value of the improvements.

Therefore there will be judgment adjudging and declaring the lease in question null and void *ab initio* and that the Crown do recover the possession of these 196 acres of land mentioned in the lease. Moreover that the plaintiff do recover the sum of $400 for the use and occupation of these lands from the 10th March, 1920, until delivery of the same.

On the question of costs, I will follow the finding in the McMaster case (*ubi supra*) but not without hesitation, as the defendant was already aware of that decision before coming to trial. Each party will pay his own costs.

Judgment accordingly.