TOTTEN v. TRUAX ET AL.

(1888), 16 O.R. 490

Ontario Chancery, Boyd C., 28 November 1888

Crown lands--Indian lands--Assessment and taxes--Tax sale--R. S. O. ch. 193 sec. 159--R. S. C. ch. 43, s. 77, sub-sec. 3-51 Vic. ch. 22, sec. 2--Reeve purchasing at tax sale.

Held, that land in which the Indian title has been surrendered to the Crown and which has been afterwards sold or located, is liable to be sold for taxes imposed by a municipality, although while the title and interest are wholly in the Crown, the land is exempt from taxation;

Church v. Fenton, 28 C. P. 384; 4 A. R. 159 ; 5 S. C. R. 239 referred to and followed.

Held, also, that a Reeve of the township in which the land so sold for taxes are situate is not disqualified, *ex officio*, from purchasing.

THIS was an action brought by William Totten against Joseph Truax and William Plews, to recover possession of lot 11, con. 5, in the township of Keppel, and mesne profits from November 16th, 1886, and damages for alleged waste committed by the defendants, and an injunction to restrain further waste.

The facts as set out in the statement of claim, showed that in 1854, the chief and principal men of the Indians tribes residing at Saugeen and Owen Sound, made a full and complete surrender to Her Majesty of all that peninsula then known as the "Saugeen and Owen Sound Indian Reserve," in trust to sell for the benefit of the said Indian tribes, and amongst the land so surrendered, was the lot in question : that on April 1st, 1881, the Superintendent- General of Indian Affairs on behalf of the Crown agreed to sell the lot in question to one Pearson, who then became locatee and purchaser thereof: that from after that date, the land was, by the laws in force in this Province, subject to taxation for municipal purposes, and to the extent of the locatee and purchaser's interest liable to be sold for arrears of taxes: that the locatee suffered the taxes for 1882, l883,1884, and 1885, to be in arrear and unpaid: that the lot was offered for sale on October 29th, 1886, by the treasurer of the county of Grey, for arrears of taxes amounting to $168.60, but no bid was received therefor: afterwards, on November 16th, 1886, the lot was sold to the plaintiff, who received a certificate from the treasurer accordingly, and the lot not being redeemed, on November 27th, 1887, the warden and treasurer of the county executed a deed to the plaintiff of the lot, which deed was duly registered in the Indian land office at Wiarton, and in the office of the Superintendent-General of Indian affairs, who duly approved of the same, and directed the plaintiff's name to be entered in the books of his office and of the Indian land office in Wiarton, as locatee and purchaser thereof: that the defendants were in possession and claimed title from the original locatee, and refused to give up possession, and were cutting timber and committing waste, and the plaintiff accordingly claimed as above mentioned.

The defendants, by their statement of defence, amongst other things set up that the lands were not at the time of the plaintiff's alleged purchase or at any time prior thereto subject to taxation for municipal purposes, or liable to be sold for arrears of taxes: that at any rate the sale was

invalid, amongst other reasons because the plaintiff was at the time of his pretended purchase, reeve of the township in which the lot in question was situate, and a member of the county council by whose warden and treasurer the lot was put up for sale: that they the defendants had made lasting improvements on the land under the *bonâ fide* belief that they were the owners of the land, and claimed compensation for the same.

The action came on for trial before Boyd, C., at Owen Sound, on December 18, 1888.

Masson, for the plaintiff, referred to and relied on *Church v. Fenton*, 28 C. P. 384 : 4 A. R. 159 ; 5 S. C. R. 239; 51 Vic. ch. 22 (D.)

O'Connor, for the defendant. The law has been changed since *Church v. Fenton, supra*. When these lands were taxed in 1882, they were not liable: R. S. C. ch. 43, sec. 77, sub-sec. 3 ; *Stevenson v. Traynor*, 12 O. R. 804. As to the plaintiff being reeve, he could not purchase for taxes due to his own township: *Greenstreet v. Paris*, 21 Gr. 229; *In re Cameron*, 14 Gr. 612; *Beckett v. Johnston*, 32 C. P. 301, 319; *Massingberd v. Montague*, 9 Gr. 92. His interest is to get the land low, and that of the township to get the largest price. Thus there is a conflict of interest. Besides, he has influence over the officials of the township. Then the Crown should be a party, because the patent has not issued.

Masson, in reply. There has been no change of the law since *Church v. Fenton, supra*. The Act of last session 51 Vic. ch. 22 D. only removed doubts and declared the law. The Crown has approved of the sale, and so it was not necessary to make it a party. As to the disqualification of the reeve, the Assessment Act prohibits no one from buying. The reeve had nothing to do with the sale or the preliminaries thereto.

November 28th, 1888. BOYD, C.--This sale appears to me to be valid, because the principle of the decision in *Church v. Fenton*, 28 C. P. 384, applies to it. The clause in the statute, which in that case was held to justify the sale of land held by the Dominion, in which the Indian title was extinguished by surrender, was 27 Vic. ch. 19, sec. 9, which is precisely the same as and is the original of R. S. O. ch. 180, sec. 126, (1877), and R. S. O. ch. 193, sec. 159, (1887.) The clause exempting from taxation to be found in the Indian Act, R. S. C. ch. 43, sec. 77, sub-sec. 3, is in sub- stance the same provision which is referred to in *Church v. Fenton* as found in 16 Vic. ch. 182, and which is carried forward in subsequent legislation. While the title and interest are wholly in the Crown, the land is exempt from taxation, but by construction put upon the statutes, if the Crown sells or locates then the interest of the purchaser or locatee is subject to taxation by the local government. That appears to me to be a strained exegesis, but so far as I can judge, it is the one promulgated by Mr. Justice Gwynne, which received the sanction of a majority of the Judges in the Supreme Court : 5 S. C. R. 239. The fact that the taxation in the one case began before Confederation, and was continued after it; and in this case, that the whole of the taxation was after Confederation, does not, to me, appear a material distinction. The recent legislation at Ottawa is in recognition of the right thus to sell the interest of holders of Indian lands while yet unpatented. By 51 Vic. ch. 22, sec. 3, the part of the Indian Act which exempts is repealed, and the following substituted:

3. All land vested in the Crown or in any person, in trust for or for the use of any Indian or non-treaty Indian, or any band or irregular band of Indians, or non-treaty Indians, shall be exempt from taxation, except those lands which, having been surrendered by the bands owning them, though unpatented, have been located by or sold or agreed to be sold to any person; and except as against the Crown and any Indian located on the land, the same shall be liable to

taxation in like manner as other lands in the same locality ; but nothing herein contained shall interfere with the right of the superintendent-general to cancel the original sale or location of any land, or shall render such land liable to taxation until it is again sold or located.

That affirms the right of the municipality to make sale for taxes subject to the recognition of that sale by the superintendent-general of Indian affairs. I suppose the usual course would be to accept all such sales if validly conducted, and to treat the purchaser as assignee of the original purchaser from the Crown. In this instance the superintendent-general has acted under the provisions of sec. 2, sub-sec. 5 of this late Act, and has signified his approval of the plaintiff's tax deed by endorsement thereon made on July 4th, 1888, and prior to this action.

I see no reason to invalidate the tax sale and deed for any breach of statutory requirements under the Assessment Act of Ontario. If there was the right to impose taxes at all, they were regularly levied by sale of the land.

The only remaining point is the objection that the plaintiff as reeve of Keppel in which the lands are situate, and a member of the county council of the county of Grey by whose warden and treasurer the lands were put up for sale was disqualified from purchasing at the sale for taxes. But the plaintiff had no powers or duties with reference to the taxes, or to the sale, of a personal or official nature, and no interference in fact is proved or even suggested on his part.

On the other facts of the case, I was of opinion at its close, that the damages resulting from the user and cutting on the part of the defendants, should be set off against their claim for improvements of which the plaintiff gets the benefit, so far as the fixtures are concerned. The one may very well go against the other. The plaintiff is, however, entitled to his costs of action and injunction.