THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

1898
May 30.

AND

FANNY HALL AND ROBERT WOOD..DEFENDANTS.

Title to land—Mistake—Lessor and lessee—Estoppel.

Where a person is in possession of land under a good title, but, through the mutual mistake of himself and another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. In such a case the Crown being the lessor is in no better position in respect of the doctrine of estoppel than a subject.

INFORMATION of intrusion to recover possession of certain lands.

The facts of the case are stated in the reasons for judgment.

May 11th, 1897.

The case came on for trial this day.

June 21st, 1897.

The case was referred to a special referee for enquiry and report as to the title. He subsequently reported the title to be in the defendant Fanny Hall.

February 21st, 1898.

The case was argued on a motion by way of appeal by the plaintiff from the referee's report, and on a further motion by the defendant, Fanny Hall, to confirm the same.

F. A. Magee in support of the appeal:

The learned referee erred in finding the issue of title in favour of defendant Fanny Hall. The defend-

1898

THE QUEEN v. HALL.

Argument of Counsel.

ant Hall's predecessor in title having accepted a lease from the Crown and paid rent under it, it is not now open for her to set up her title as against the Crown. Charles McCaffrey, under whom the defendant Hall claims, was not satisfied with the imperfect title which he had to the lands in dispute, and so in order to retain possession of them he applied for and obtained a lease from the Crown. I submit, therefore, that under the authorities his successor in title is estopped from setting up any title in McCaffrey anterior to the date of the lease from the Crown. McCaffrey's possession at the time he conveyed, or attempted to convey, the lands in dispute to the husband of Mrs. Hall was referable solely to the lease from the Crown. The defendant's husband was aware of the flaw in title, and it is in evidence that at the time McCaffrey executed the deed to David Hall, he handed Hall the lease to him from the Crown. Clearly, then, there are no equities subsisting in favour of the defendant Fanny Hall. He cites *Cababé on Estoppel* (1); *Malone* v. *Wiggins* (2); *Doe d. Bullen* v. *Mills* (3); *Van Deusen* v. *Sweet* (4); *Cooke* v. *Loxley* (5); *Cole on Ejectment* (6).

As to the equitable interference of the court on the ground of mistake, the utmost good faith was observed on the part of the Crown, and the acceptance of the lease was not brought about by any misrepresentation or suppression of facts. The evidence shows that it was McCaffrey himself who first applied for the lease. Under these circumstances, the court will not lend the aid of its equitable jurisdiction to the defendant Fanny Hall. (*Snell on Equity* (5). Furthermore, I submit that under the reservations in the grant to the Canada

(1) Page 25.
(2) 4 Q. B. 367.
(3) 2 A. & E. 17.
(4) 51 N. Y. 378.
(5) 5 T. R. 4.
(6) P. 213.
(5) P. 537.

Company, the Crown properly resumed possession of the lands in dispute in 1847 by setting up boundary stones indicating that it must be regarded as Ordnance lands. I submit that, under 7 Vict. c. 11, sec. 2, the lands were properly revested in the Crown by the setting up of Ordnance stones in the year 1847, long prior to the lands having become vested, as is alleged, in the defendant Hall's predecessor in title.

[BY THE COURT.—Did the Crown exercise any act of possession after the setting up of the boundary stones in the year 1847 ?]

There is no evidence of possession except the giving of the lease. No doubt the Ordnance officers considered that the setting up of the boundary stones was sufficient to vest the lands in the Crown under the Act.

A. E. Fripp, contra: I submit that where a party is in possession of land and such possession is referable to a good title, the mere fact of him taking a lease under mistake of his title from another person claiming the land does not preclude him from setting up his former title in an action for possession. He cites *Everest and Strode on Estoppel* (1); *Bigelow on Estoppel* (2); *Smith* v. *Modeland* (3).

With reference to the Ordnance Vesting Act passed in 1843, that Act simply empowered the principal officers of Her Majesty's Ordnance to take possession of lands for the purposes of the canal which had not been previously granted by the Crown. Now these lands had been conveyed to the Canada Company by the Crown prior to 1847, and therefore did not come within the operation of that Act.

Then, the stipulation in the grant to the Canada Company for arbitration, in case the Crown resumed possession of the lands, has not been observed.

(1) Pp. 252, 257. (2) P. 527.
(3) 11 U. C. C. P. 387.

1898

THE QUEEN v. HALL.

Reasons for Judgment.

But even if the provisions of the Ordnance Vesting Act could be applied to the lands in question, they have not been so fulfilled as to give the Crown possession of such lands. Under section 14 of the Act they should have entered and surveyed the lands and duly treated for them. Furthermore, section 17 required an enrollment of all lands that had been taken. There is no evidence to show that these provisions have been complied with. I submit that the only way that these lands could have been taken was in the manner set forth in the Act.

Mr. Magee replied: We rest our case upon the planting of the posts or boundary stones in 1847.

THE JUDGE OF THE EXCHEQUER COURT now (May 30th, 1898) delivered judgment.

Two questions are presented for decision by this case. First: Is the title to the lands described in the information as being part of the south half of lot No. 4 in the second concession of the Township of Nepean, in the County of Carleton, and Province of Ontario, in the Crown or in the defendant Fanny Hall? And, secondly: If the title to such lands is in the defendant Fanny Hall, is she estopped, as against the Crown, from setting up such title?

On the 12th of October, 1841, lot No. 4 in the second concession of the Township of Nepean in the County of Carleton, including, as has been said, the lands in question in this case, together with other lots, was granted by the Crown to the Canada Company in pursuance, it appears, of an agreement made as early as the year 1826. There was in the grant no reservation of any portion of the said lot or any description of it except as has been stated, viz.: "Lot "No. 4 in the second concession of the Township of "Nepean and County of Carleton." There was, how-

1898

THE QUEEN v. HALL.

Reasons for Judgment.

ever, a condition attached to all the lands including lot No. 4, that passed by the grant, viz.: "Provided "always that if any of the several lots or parcels of "land hereby granted by us to the said company, "their successors or assigns, or any part thereof, shall "be required for canals, roads, the erection of forts, "hospitals, arsenals, or any other purpose connected "with the defence or security of our said province, "then all and every the said lands which may be so "required for any or either of the purposes aforesaid, "shall revert to and become vested in us, our heirs "and successors, upon a requisition for the same being "made, either by an Act of the Legislature of our "said province, or by the Governor, Lieutenant-"Governor or person administering the Government "of our said province or by his direction—AND this "our grant of such lands, as shall be so required, shall "upon and after such requisition be made be null and "void and of none effect, anything herein contained to "the contrary in any wise notwithstanding.

"And we do hereby declare that in any such event "we, our heirs and successors, shall name and "appoint one arbitrator who shall in concurrence with "an arbitrator to be appointed by the said Canada "Company or their grantees, or lessees, and a third "arbitrator to be chosen by such arbitrator as afore-"said, determine what price it is reasonable should be "paid by us our heirs and successors to the said "Canada Company, their grantees or lessees, for any "lands that may be so resumed by us, our heirs and "successors, which determination shall be made by "the voice of the majority of the said arbitrators."

On the 9th of December, 1843, was passed the Act 7 Vict. c. 11 intituled, "An Act for vesting in the prin-"cipal officers in Her Majesty's ordnance, the estates "and property therein described, for granting certain

1898

THE QUEEN v. HALL.

Reasons for Judgment.

"powers to the said officers, and for other purposes "therein mentioned." By this Act there was vested in the principal officers of Her Majesty's ordnance the canal commonly called the Rideau Canal, made and constructed under and by virtue of the powers and authorities contained in the Act of the Parliament of the late province of Upper Canada, passed in the eighth year of the reign of His late Majesty, King George IV, and intituled "An Act to confer upon His Majesty certain powers and authorities necessary to the making, maintaining, and using the canal intended to be completed under His Majesty's directions for connecting the waters of Lake Ontario with the River Ottawa, and for other purposes therein mentioned," and the lands and other real property, lawfully purchased and taken, or set out and ascertained as necessary for the purposes of the said canal, from the Crown lands or reserves, or clergy reserves, under the authority of the said Act, and more especially those marked and described as necessary for the said purposes on a certain plan lodged by the late Lieutenant-Colonel By, of the Royal Engineers, the officer then employed in superintending the construction of the said canal, in the office of the Surveyor-General of the said late province, and signed by the said Lieutenant-Colonel By, and now filed in the office of Her Majesty's Surveyor-General for this province, and all the works belonging to the said canal, or lying or being on the said lands.

There was, however, a proviso to the first section of the Act by which such lands were vested in the principal officers of Her Majesty's Ordnance, to the effect that nothing in the Act should extend to or be construed to extend to vest in the said principal officers any lands which might before the passing of this Act, have been granted by Her Majesty, or Her Royal predeces-

sors, to any other person or party, unless the same should have been, subsequently to such grant, lawfully purchased, acquired or taken for the purposes of the Ordnance Department, nor to impair, diminish or affect any right, title or claim, vested in or possessed by any person or party at the time of the passing of the Act, to, in or upon any lands or real property whatsoever, nor to give the said principal officers any greater or better title to any lands or real property than was then vested in the Crown or in some person or party in trust for the Crown. This proviso applies to the lands in controversy.

On the 9th of June, 1851, the Canada Company conveyed lot No. 4 in the second concession of the township of Nepean, above referred to, to James O'Rourke, of the Township of Nepean and County of Carleton. On the 11th of October, 1856, James O'Rourke and Honora O'Rourke by deed of indenture conveyed to Charles McCaffrey, of the Township of Nepean, the south half of lot No. 4, aforesaid. On the 18th of May, in the year 1888, Charles McCaffrey conveyed to David Hall, of the Township of Nepean, in the County of Carleton, the said south half of lot No. 4, and it is admitted that the defendant Fanny Hall is in possession of the lands in question under the last will and testament of her late husband, the said David Hall. Against this title it appears that some time prior to the 1st of September, 1843, the lands in question had been set off for the puposes of the Rideau Canal, but when this was done does not appear. It is, however, obvious that any such setting off in order to be effective against the grant of the Canada Company of the 12th of October, 1841 would have to have been made in accordance with the terms of that grant, and this does not appear to have been done. In October, 1847, the officers of the Ordnance Department believing

1898

THE QUEEN v. HALL.

Reasons for Judgment.

no doubt that the portion of the south half of lot No. 4, which is in question in this case, had been duly set off for the purposes of the Rideau Canal, set up boundary stones upon the same which have remained there until this day. There is no evidence, however, that the Canada Company or its assigns were ever put out of possession of the land, and later and for some years prior to the date of the lease to which reference is about to be made, Charles McCaffrey was in possession of the whole of the south half of lot No. 4, and occupied it down to the river. On the 30th of January, 1877, Charles McCaffrey being, as has been stated, then in possession of the south half of lot No. 4, accepted from the Crown a lease of the portion now in dispute. By this lease the said Charles McCaffrey was to have and hold the said piece of land during the pleasure of Her Majesty, the lease being determinable at any time by Her Majesty, and the lessee covenanted, amongst other things, not to assign or sublet without leave. McCaffrey paid rent for two years, and when he conveyed the land to David Hall he handed Hall a copy of the lease; but there has been no assignment of the lease in accordance with its terms, and there is no evidence that the Crown has assented to any such assignment or subletting, or has waived the effect of the covenant therefor.

It is clear, I think, that the setting up of the boundary stones in October, 1847, was not sufficient, under the circumstances, to give the Crown title to the land in question, and there is no evidence of any other steps or proceedings being taken to acquire it or to divest the title of the Canada Company or its assigns. On this branch of the case the defendant Fanny Hall is, I think, entitled to succeed.

With reference to the question of estoppel, it is clear no doubt that if McCaffrey had been put in pos-

1898

THE QUEEN v. HALL.

Reasons for Judgment.

session of the lands under the lease from the Crown he could not now dispute the Crown's title, and that the defendant, Fanny Hall, is not in any better position in this respect than her predecessor in title would have been. But McCaffrey being at the time in possession, and the lease having been taken by him under a mistaken view on the part of the Crown and of himself as to their respective rights in the lands now in dispute, McCaffrey would not have been, I think, estopped from setting up his own title, and in a like manner the present defendant Fanny Hall is not estopped from setting up a title which has come to her through him. If the possession had come to Mr. McCaffrey and his successors through the mutual mistake made, then, of course, the defendant Fanny Hall ought not to be allowed to plead the mistake without the possession being restored to the Crown; but the defendant and her predecessors in title having been in possession prior to the time when by mutual mistake the lease was entered into, the Crown is not put to any disadvantage by the defendant being left in possession, while on the other hand to put the defendant out of possession would be to give the Crown an advantage from a mistake that was mutually made. I am, therefore, of opinion to confirm the report of the learned referee and to dismiss the information against the defendant, Fanny Hall, and with costs.

The other defendant, Robert Wood, did not appear, and the Crown is entitled to judgment against him by default, but without costs.

Judgment accordingly.

Solicitor for plaintiff: *D. O'Connor.*

Solicitor for defendant Hall: *A. E. Fripp.*