Privy Council Appeal No. 99 *of* 1919.

The Esquimalt and Nanaimo Railway Company - - - *Appellants*

v.

The Granby Consolidated Mining, Smelting and Power Company, Limited - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH AUGUST, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD ATKINSON.
MR. JUSTICE DUFF.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the order dated the 1st April, 1919, of the Court of Appeal of British Columbia, allowing an appeal from an order dated the 17th June, 1918, of Mr. Justice Macdonald, whereby he ordered that the petition of the respondent should be dismissed.

The legal proceeding out of which the appeal arises was a petition presented upon the 23rd May, 1918, by the respondent Company under Sections 108 and 114 of the Land Registry Act, 1906, to the Supreme Court of British Columbia, praying that the Registrar-General, having theretofore refused to register the respondent Company's title to a piece of land, about 160 acres in extent, situate in the Cranberry District of the Province of British Columbia, and described on the official plan of said district as Section 2, and the east 60 acres of Section 3, Range 7, he might be ordered by the Court to do so.

These lands may be conveniently referred to in this judgment as the lands in suit.

On the other side the appellant Company, under the provisions of Section 110 of the aforesaid Act, applied by summons to the said Supreme Court for an order inhibiting any dealing with or registration in connection with the above-mentioned lands or for the issue of a caveat in respect of them.

The petition and the motion came on for hearing together before Mr. Justice Macdonald, who, thinking that the District Registrar had acted properly in the course which he took, dismissed the petition, thereby rendering it unnecessary for him to make any order on the appellant Company's motion for an inhibition. The reasons given by the District Registrar (who was also an examiner of titles under the aforesaid Statute of 1906) for so refusing to register the respondent Company's interest in the lands in suit, as an indefeasible fee, as was demanded, were stated by him in writing to be, that three *lites pendentes* which had been registered against the lands must first be released. Of these three, two had been registered by the appellant Company under the circumstances hereafter mentioned.

The respondent Company appealed from the order of Mr. Justice Macdonald, and the Court of Appeal, by order dated the 1st April, 1919, allowed the appeal.

The crucial and relevant part of this order runs as follows :—

> "THIS COURT DOTH ORDER that the Appeal of The Granby Consolidated Mining, Smelting and Power Company, Limited, be and the same is hereby allowed.
>
> "AND THIS COURT DOTH FURTHER ORDER that the Registrar-General of Titles do register the title of the Appellant, The Granby Consolidated Mining, Smelting and Power Company, Limited, to the lands mentioned in the Petition of the said Appellant, dated the 23rd day of May, 1918, in the Register of Indefeasible Fees, in accordance with the provisions of the Land Registry Act.
>
> "AND THIS COURT DOTH FURTHER ORDER that the application of the Esquimalt and Nanaimo Railway Company for an Order prohibiting any dealing with or registration in connection with the above-mentioned lands be dismissed and that the costs of and incidental to such application be paid by the Esquimalt and Nanaimo Railway Company to the Appellant, The Granby Consolidated Mining, Smelting and Power Company, Limited, forthwith after taxation thereof."

To enable one to judge of the legality and propriety of the Registrar's action, it is essential to consider what was the precise nature of each *lis pendens* which the appellant Company had filed, and in order to do that it is necessary to trace shortly the respondent Company's title from its root downwards.

The Government of the Dominion of Canada, in exercise of the powers conferred upon it by the 48 Vic. c. 6, made on the 21st April, 1887, a Crown grant to the appellant Company of a large tract of land which came to be known as the Esquimalt Railway Land Belt. The lands in suit lie within this Belt and form part of it. On the 24th December, 1890, the appellant Company granted to one Joseph Ganner, since deceased, the surface rights, as they are styled, in these latter lands, the lands in suit. That is to say, they granted the land in fee, excepting and reserving

to themselves the mines and minerals thereunder. Joseph Ganner died upon the 26th January, 1904, having by his last will appointed Angus Mackenzie and Chas. Wilson his executors and trustees of his estate. By divers mesne assignments which it is unnecessary to particularise, these so-called surface rights became on the 6th October, 1917, vested in the respondent Company. The Vancouver Island Settlers' Rights Act, 1904, came into operation on the 10th February, 1904. By Section 2 (*bb*) it defined a settler as " a person who prior to the passing of the Act occupied or improved lands situated within the Railway Land Belt with the *bona fide* intention of living thereon." It is not disputed that Joseph Ganner, deceased, came within this definition.

By the third section of this Statute it is enacted that upon application being made to the Lieutenant-Governor in Council within twelve months from the passing of the Act, *i.e.*, within the twelve months terminating on the 10th February, 1905, showing that if any settler occupied or improved any parcel of land within the said Railway Land Belt prior to the enactment of 48 Vic. 14, with the *bona fide* intention of living on the same, accompanied with reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple of such land should be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when the said lands were first so occupied or improved by the said settler.

It was not suggested that had Joseph Ganner lived till after the 10th February, 1904, he would not have been entitled to have had a Crown grant made to him of the lands in suit if he had applied for it. Though the word representative is used in the singular, their Lordships are of opinion, that for the purposes of this section, the two executors and trustees of Ganner's estate together constitute his representative.

The operation and effect of a Crown grant of the fee simple of any land within the Railway Land Belt under this section is apparently to supersede and defeat all existing interests in the same, no matter in whom vested.

The executors of Ganner, deceased, for over thirteen years from the passing of the Act of 1904 never made any application for a Crown grant of the lands in suit. The Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, however, was passed upon the 19th May, 1917. By it the words " On or before the first day of September 1917 " were substituted in the Act of 1904 for the words " within twelve months from the coming into force of this Act," used in the third section of the latter Act. The trustees and executors of Ganner thereupon apparently resolved to bestir themselves. They applied for and on the 15th February, 1918, obtained a grant in fee simple from the Crown of the lands in suit. On the 18th February, 1918, they conveyed all their estate and interest in the land so acquired to one Harry

Whitney Treat, who by a deed of equal date conveyed the same to the respondent Company.

This Company, on the 22nd May, 1918, applied to the Land Registry Office to be registered as the owners of an indefeasible fee in the said lands in suit, which is the application with which the District Registrar refused to comply. It is unnecessary to deal with the *lis pendens* filed by one Bing Kee. Those filed by the appellant Company are the matters of importance.

On the 30th May, 1918, the said Vancouver Island Settlers Act, 1917, was disallowed by the Governor-General in Council. The operation and effect of this disallowance and consequent annulment under the provisions of Sections 56 and 90 of the British North America Act of 1867, upon the Crown grants of land in the Railway Land Belt made while it was operative is a serious question. The appellant Company contend that these Crown grants all became void, inasmuch as they were not made within the time originally fixed by the Act of 1904. On the 14th February, 1918, the latter Company, thinking that the Crown grant applied for by Ganner's executors had in fact been made, instituted an action against these executors, claiming amongst other things a declaration that the Crown grant made to them was null and void so far as it purported to grant to them the mines and minerals under the lands in suit, or that part of the surface of the said lands to which or upon which the present appellant Company were entitled to exercise acts of ownership, purchase or rights of easement, and also claiming an injunction to restrain the said executors from working the mines, and from registering or applying to register any title to the said mines and minerals under the Crown grant, or from exercising any ownership in respect thereof, or from registering or applying to register any title to the surface of the said lands adverse of the appellant Company's rights therein. On the same day the appellant Company filed this action as a *lis pendens*. Finding that they were premature in their proceedings, they on the 18th February, 1918, three days after the issue of the Crown grant to the said executors, instituted a second action against the said executors in precisely the same form and claiming the same relief as the first, and on the same day filed a second *lis pendens* in respect of it in the proper Land Registry Office.

The point the appellant Company thus raise may be good or may be bad. Their Lordships express no opinion as to its soundness. The Chief Justice apparently thought it bad. But he is the only Judge who expressed that opinion. If it be good, then the Crown grant made to the executors of Joseph Ganner being null and void, the respondent Company took nothing by their conveyance from these executors, and have not now, and never had, by virtue of the same, any estate or interest in, or any right or title to, or any claim upon the lands in suit. They could not, therefore, be properly registered as the owners under this grant of an indefeasible fee in these lands. The point goes to the very root of their title. The suit in which it is raised and insisted upon

is not brought to fix any charge, liability or encumbrance upon this indefeasible fee, or to establish a right to any estate or interest in it. It is on the contrary brought to establish that never at any time was such an estate owned by or was vested in the respondent Company.

It appears to their Lordships to be contrary to common sense to hold that an interest in land, which may, as the result of a pending lawsuit, be found to-morrow to be non-existent, should be treated to-day, by one who knew of the existence of this suit, as an indefeasible fee, since that term means an estate in fee simple held under a good safe holding and marketable title. A *lis pendens* may be described by any name the Legislature chooses to bestow upon it, whether appropriate or inappropriate. But the giving of the name does not stay the action which constitutes the *lis*. That, however miscalled, may go on to its appointed end. It appears to their Lordships that while the title of the respondent Company was being actively assailed by this pending suit, the Registrar, who in this case is also the examiner of titles and therefore a judicial officer, would be acting entirely within his powers in refusing, as he has refused, to register the respondent Company's title as an indefeasible fee. Section 14 of the Land Registry Act prescribes how he is to act when a person claiming to be registered as owner in fee simple of land applies to him in Form A in the first Schedule to the Act, for registration, depositing with him at the same time all the applicant's title deeds. He, the Registrar, is then, upon being satisfied that a good safe holding and marketable title in fee simple has been established by the applicant, to register the title of such applicant in a book called the Register of Indefeasible Fees. He is not to register a title as an indefeasible fee for the asking. It is provided by Section 114 of the Act that if a person be dissatisfied with any refusal, &c., of the Registrar or examiner of titles, he may, as was done in this case, apply by petition to a Judge in Chambers, setting forth the particulars and grounds of dissatisfaction, and this Judge may then make such order in the premises as the circumstances of the case may require and as he may direct. Under Section 115, whenever upon the examination of the title to any land, the Registrar or examiner of titles, after hearing all the evidence procurable, entertains a doubt, he may state a case for the opinion of a Court or Judge. Section 116 provides for the reference by the Registrar or Examiner to a Judge in Chambers for his decision or in some cases for his direction of any one of a number of different matters. Among others the following : the true construction, legal validity or effect of any instrument or as to the persons entitled. And then Section 116*a* provides that, except as in Section 50 (which does not apply) provided, the Registrar shall not issue a certificate of indefeasible title under or in pursuance of any order of the Court or Judge unless such order declares that it has been proved to the satisfaction of the Court or Judge upon investigation that the title of the person to whom the certificate is directed to issue is a good safe and marketable title. The order

of the Court of Appeal does not contain any such declaration. That order merely directs the Registrar-General to register in the Register of Indefeasible Fees the title of the present respondent Company to the lands mentioned in their petition. It is, however, suggested that this is a mere slip in the order and may be rectified. The Chief Justice, as has been already pointed out, expressed the opinion that the point raised by the appellant Company, arising from the disallowance of the Act of 1917, was a bad point. The Court of Appeal did not base their judgment on that, they base it on the fact that a *lis pendens*, which must mean any *lis pendens* whatever its nature, is, by Section 71 of the Land Registry Act, when registered against land a charge upon that land. The words of the section are :—

> "Any person who shall have commenced an action or being a party thereto as making a claim in respect of any land, may register a *lis pendens* against the same as a charge and there shall be embodied in the certificate of the Registrar of the Court a copy of the endorsement upon the writ or a copy of the plaint."

No doubt "charge" is defined to mean and include any less estate than the fee simple or any equitable interest whatever in real estate and shall include any incumbrance, Crown debt, judgment, mortgage or claim to or upon any real estate. Now it is clear that in the present case the action instituted by the appellant Company has not been brought to establish that the plaintiffs in it are entitled to some estate less than a fee simple in the fee simple estate which the respondent desires to have registered. Neither is it brought to establish that they are entitled to an equitable interest in that fee simple, nor that it is subject to any incumbrance, Crown debt, judgment, mortgage, or have any other claim upon it. It is brought to establish that the respondent Company who claim to be owners of the lands in suit, are not now and never were the owners of the fee simple in these lands. The plaintiffs claim nothing in the suit of a proprietary or pecuniary nature for themselves. The relief they ask is purely negative, namely, to prevent the illegal creation in the respondent Company of an interest in the lands in suit which would supersede and destroy their own estate and interest in the same.

It would appear to their Lordships that the action of the appellant Company does not come within Section 71 at all. The action with which that section deals is one in which the plaintiff is making a claim in respect of land, and that action may be registered as a *lis pendens* against this land as a charge, obviously to prevent the person having dominion over the land defeating the plaintiffs' claim by alienating or encumbering it. Section 71 is the last of a fasciculus of eleven sections, touching caveats and *lis pendens*. The first ten sections deal with caveats. They refer to lands already registered, in which the caveator claims to have an interest under any one of the several instruments named. He is empowered by leave of the Registrar to lodge a caveat to prevent any disposition of the land being made without notice to him.

The land referred to in Section 71 may or may not be

registered, but there is this similarity in the position, of the caveator and of the plaintiffs dealt with in Section 71, that they are both asserting a claim to land or any interest in it. The means of protecting their interests are no doubt different.

It is also quite true that Section 22 of the Act provides that every certificate of indefeasible title issued under the Act shall be conclusive evidence, while it remains in force against everybody, that the person named in such certificate is seised of an estate in fee simple in the lands therein described, against the whole world, subject to a number of things enumerated, and amongst others to :—

> "Any *lis pendens*, mechanic's lien, judgment, issue or other charge, or any assignment for the benefit of creditors registered since the date of their application for registration."

There may be some question whether these latter words do not apply to all that has gone before, and are not confined in their application to assignments for the benefit of creditors. If not, the Registrar would be obliged to register as indefeasible a title which a judgment already recovered would show did not exist.

The contention of the Granby Consolidated Mining, Smelting and Power Company in this appeal is that the Registrar should register the respondent Company as having a good estate in fee simple to the land in suit, subject to a pending action instituted to establish that they have not and never had any fee simple or estate or interest in the land at all. It is a misuse of terms to call a title threatened as the respondent Company's is as either a safe holding title or a marketable title. By the defeat or discontinuance of the appellant Company's action and by that alone can the title of the respondent Company to the lands in suit be made either the one or the other at least, where the would-be purchaser had notice of, or was aware of the existence of the pending suit.

The questions the appellant Company have raised in their action are not such as the Registrar was called upon or required to decide. The Court of Appeal have not decided them. The Registrar took the course Section 14 of the Land Registry Act authorises him to take when he is not satisfied that the title shown by the person applying for registration was a good holding and marketable title. In their Lordships' opinion he was completely justified by the facts of the case in so doing. They think that a *lis pendens* of the nature of the appellant Company's action is not "a charge" within the meaning of the Land Registry Act, that the decision appealed from, based entirely, as it was, on the ground that it was "a charge," was erroneous and should be reversed, that the decision of Mr. Justice Macdonald was right and should be restored, and that this appeal should be allowed, with costs here and in the Courts below, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY

v.

THE GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED.

DELIVERED BY LORD ATKINSON.

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