Privy Council Appeal No. 38 *of* 1926.

The Attorney-General of Ontario and others - - - *Appellants*

v.

The McLean Gold Mines, Limited - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 22ND JULY, 1926.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT DUNEDIN.
LORD ATKINSON.
LORD JUSTICE WARRINGTON.
CHIEF JUSTICE ANGLIN.

[*Delivered by* CHIEF JUSTICE ANGLIN.]

At the threshold of this case lies the important question whether the claim asserted by the plaintiffs (respondents) in this action should not rather have been made the subject of a petition of right.

The facts material to the determination of this question are as follows:—

In the year 1914 the Crown, in right of the Province of Ontario, granted Mining Claims L.O. 321 and L.O. 322 to one Haldane Miller. In 1917 Miller transferred these claims to the plaintiffs, who became the registered owners thereof, with an absolute title under the Land Titles Act (R.S.O. 1914 c. 126) as parcels Nos. 184 and 185. For alleged default in payment of taxes for several years, proceedings were instituted in 1919-20 by the Department of Mines under Section 21 of the Mining Tax Act (R.S.O. 1914, c. 26) for the forfeiture to the Crown of these mining claims. The proceedings culminated in the issue, on the 7th October, 1920, of two certificates under the hand

and seal of office of the Minister of Mines, one of which declared Mining Location L.O. 321, and the other Mining Location L.O. 322, forfeited to and vested in the Crown in right of the Province of Ontario, and that the patents or leases thereof were revoked and cancelled. These certificates were duly recorded in the Land Titles Office as provided by sub-section 5 of Section 21 of the Mining Tax Act, and parcels Nos. 184 and 185 were thereupon declared " closed " in the Land Titles Register. The result of the foregoing steps, if validly taken, was that the lands known as Mining Claims L.O. 321 and L.O. 322 were revested in the Crown, and the title to them stood as it had before their staking and location by, and the grant of them to, Haldane Miller.

The two mining claims (L.O. 321 and L.O. 322) having been declared " open for staking and recording " by Order in Council passed on the 13th October, 1920, under the authority of sub-section 4 of Section 21 of the Mining Tax Act, appear to have been subsequently taken up by one Fuller, who, on the 27th May, 1921, obtained Crown grants thereof to himself, which he caused to be duly registered in the Land Titles Office in June, 1921, and he was thereupon given certificates of absolute ownership of the claims thereafter known as parcels Nos. 542 and 543 respectively. Fuller, in August, 1921, transferred his title to the defendants (appellants), the Porcupine Paymaster Mines, Limited, which took possession of both claims and has since expended large sums of money in development work upon them.

Having made a tender of the arrears of taxes on the 27th September, 1922, which was refused, the plaintiffs, on the 1st November, applied to the Mining Commissioner for relief. That Officer upheld the defendant company's title ; and on appeal the Appellate Division held the Mining Commissioner incompetent to entertain the proceedings and set them aside. Thereupon alleging that, owing to defects in the proceedings taken therefor, the alleged forfeiture of its rights was null and void, the plaintiff company brought this action against the Attorney-General for Ontario, the Minister of Mines for Ontario, and the Porcupine Paymaster Mines, Limited, claiming *inter alia* a declaration that they (the plaintiffs) are the true owners of the lands known as Mining Claims L.O. 321 and L.O. 322 ; a declaration that the two certificates of forfeiture of those lands were and are void, and an order that they be struck off the register in the Land Titles Office ; a declaration that such mining lands were not open for location and staking by Fuller, and that the patents issued therefor to Fuller and his transfers to the defendant company were and are void ; and an order directing the Local Master of Titles to make all necessary corrections in the register so that the plaintiffs will appear as registered owners in fee simple of the lands in question ; incidentally an injunction, damages and an accounting are also sought.

Taking the view that the plaintiffs' remedy, if any, was by petition of right, and holding moreover that they had failed to

establish any defect in the proceedings for forfeiture fatal to their validity, the learned Trial Judge dismissed the action. His judgment was reversed by the second Appellate Divisional Court, which held that, as the recovery of the possession of the lands was sought from the defendant company which was in actual possession of them, the remedy by action was open to the plaintiffs, and also that there were defects and irregularities in the proceedings for forfeiture which were fatal to the validity of the Minister's certificates in which they had culminated. That Court accordingly allowed the plaintiffs' appeal, and granted them the relief prayed for in their statement of claim, including a declaration that the proceedings for forfeiture of Mining Claims L.O. 321 and L.O. 322 were null and void, and an order directing the Master of Titles to expunge from the register the two certificates of forfeiture issued by the Minister of Mines and recorded in the Land Titles Office. From this judgment appeal has been taken to the King in Council.

It is obvious that it is vital to the success of the plaintiffs that they should obtain the particular declaration and order last set forth. Had the judgment merely set aside the Crown grants to Fuller and his transfers to the defendant company and vacated the registration of these several instruments, the result would have been to leave the title to the mining claims vested in the Crown. Indeed, it is essential to the plaintiffs' status to seek relief against the defendant company that they should re-establish their interest in the lands by avoiding the forfeiture of that interest under the provisions of the Mining Tax Act. Until that has been done the plaintiffs cannot be regarded as having any interest which would enable them to impeach the title of the defendant company.

However the plaintiffs' claim may be viewed, it seeks in substance and reality to avoid the title acquired by and vested in the Crown as the result of the impugned forfeiture. The real matter in issue is the Crown's title and its consequent right to grant the two mining claims in question to the defendant company's predecessor in title. If that were determined in the plaintiffs' favour, the relief sought against the defendant company (subject perhaps to some question as to the effect under Section 42 of the Land Titles Act of the transfers by Fuller, who was registered as owner with an absolute title) might follow as a consequence. Indeed, the chief, if not the sole, ground of the attack on the grants under which the defendant company claims is the absence of title in the grantor—the Crown.

When this aspect of the matter is appreciated the present case seems to their Lordships to fall within the very terms of the Ontario Rule of Practice, No. 741 :—

> "Where the petition (*i.e.* the petition of right) is presented for the recovery of real or personal property, or any right in or to the same, which has been granted or disposed of by or on behalf of His Majesty or his predecessors, a copy of the petition and fiat shall be served upon or left at the

last or usual or last known place of abode of the person in the possession, occupation or enjoyment of the property or right, indorsed with a notice according to Form No. 126,"

This rule corresponds to Section 5 of the Imperial Petitions of Right Act, 1860, 23 and 24 Vict. c. 34, a procedure which was made use of in the case of *In re Gosman* 15 Ch. D. 67 ; 17 Ch. D. 771), as noted in Robertson's Civil Proceedings By and Against the Crown at p. 372. The plaintiffs' claim is for the recovery of property " which has been granted or disposed of by or on behalf of His Majesty," and it rests on the assertion that His Majesty could not effectively grant or dispose of that property because he lacked title thereto, owing to the invalidity of the forfeiture proceedings on which that title depended.

Such a case differs widely from that with which this Board was called upon to deal in *Esquimalt and Nanaimo Railway Company* v. *Wilson et al*, 1920, A.C. 358, relied upon by the respondents. There, as Lord Buckmaster observed, " the title of the Crown to the land (was) not in controversy." The reason for allowing the Attorney-General to be added as a defendant to the Esquimalt Railway Company's actions was that if the Crown grants there attacked were set aside and the lands covered by them revested in the plaintiffs, the Crown would, as an incidental result, lose the benefit of certain reservations in its favour made in the impugned grants to the defendants which had not been made in the earlier grant to the plaintiffs. Only in that way were the interests of the Crown involved.

A similar consequence would ensue in the present case were the plaintiffs granted the relief they seek, the reservations in the grants to Fuller covering some matters not excepted from the earlier grants to Miller. But there the similarity between the two cases ceases. In the present case the setting aside of the grant to the defendant company's predecessor in title (Fuller) would not revest the title in the plaintiffs, as would have happened upon the grants to the defendants being set aside in the *Esquimalt* case. In the case now before their Lordships the plaintiffs, in order to recover the lands they seek, must first set aside the forfeiture proceedings which, if valid, extinguished their ownership of them and vested the title to those lands in the Crown.

This feature of the present litigation serves to distinguish it from *Dyson* v. *Attorney-General*, 1911, 1 K.B. 410, 414, 421-2, and also from two cases in the Ontario Courts cited for the respondents—*Farah* v. *Glen Lake Mining Company* (1908, 17 Ont. L.R. 1), and *Zock* v. *Clayton* (1913, 28 Ont. L.R. 447). In each of these two Ontario cases the only relief sought in regard to the lands in question (in the former by counter-claim ; in the latter by action) was the setting aside of a Crown grant or patent of them which stood in the claimant's way, and the jurisdiction invoked was a statutory power (4 & 5 Vic. c. 100, s. 29) formerly exercised by the Ontario Court

of Chancery, to set aside Crown patents for lands "issued through fraud or in error or improvidence." A principal point for decision was whether this statutory power was vested in the Supreme Court of Ontario under the Judicature Act. The case before their Lordships does not fall within that statutory power; neither fraud upon, nor error or improvidence of the representatives of the Crown in making the grants to Fuller is alleged; want of title in the Crown because of invalidity in its proceedings for forfeiture is put forward as the ground of relief. As said by Moss, C.J.O., in the *Glen Lake* case (*supra*) at p. 17:—

> "Cases involving questions in relation to grants by the Crown of a different character were left to the operation of the common law or were specially provided for by legislation."

Confronted with this difficulty, counsel for the respondents invoked the Land Titles Act, Sections 115 and 116, as enabling them to maintain this action for the rectification of the Land Titles register. Those provisions appear to their Lordships to be intended to confer on the Court jurisdiction to direct the correction of the Land Titles register where, in proceedings otherwise competent, rights have been established to which effect can thus be given. They confer power to direct consequential relief, but they do not purport to create a right to proceed by action to establish claims which would otherwise be enforceable only by petition of right. Moreover, these sections of the Land Titles Act cannot be taken as intended to deprive the Crown, which is not mentioned in them, of its prerogative to decline to be impleaded in the Courts for the recovery of property otherwise than by a petition for the hearing and disposition of which it has accorded its fiat "that right be done." Mitford on Pleading, p. 30. The elementary rule of construction embodied in Section 11 of the Interpretation Act (R.S.O., 1914, ch. 1) that:—

> "No Act shall affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

applies. The plaintiffs cannot invoke Sections 115 and 116 of the Land Titles Act to dispense them from the necessity of presenting the claim which they assert in this action by petition of right bearing the fiat of the Lieutenant-Governor.

The view which their Lordships take of this aspect of the case before them renders it unnecessary that they should consider the merits of the objections made by the plaintiffs to the validity of the proceedings which led up to the granting of the Minister's certificates declaring forfeiture of its interest in the two mining claims to the Crown.

In the result their Lordships think that this appeal must succeed, and they will humbly advise His Majesty that the judgment of Lennox J. dismissing this action should be restored, and that the costs of the appellants here and in the Appellate Division of the Supreme Court of Ontario should be paid by the respondents.

In the Privy Council.

THE ATTORNEY-GENERAL OF ONTARIO AND OTHERS

v.

THE McLEAN GOLD MINES, LIMITED.

DELIVERED BY CHIEF JUSTICE ANGLIN.

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