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*April 18.

*June 12.

MARY M. JOHNSON (DEFENDANT).....APPELLANT;

AND

EVELYN GEORGIANA KIRK (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Registry law—Registration of tax deed—Certificate of title—Priority over earlier certificate—R. S. B. C. c. 111.

Sec. 13 of the British Columbia Land Registry Act (R. S. B. C. ch. 111) provides that a person claiming ownership in fee of land may apply for registration thereof and the registrar, on being satisfied after examination of the title deeds, that a *primâ facie* case is established shall register the title in the "Register of Absolute Fees." Sec. 19, which authorizes the register to issue a certificate of title to the person so registering, contains this provision: "Every certificate of title shall be received as *primâ facie* evidence in all courts of justice in the province, of the particulars therein set forth." And by sec. 23 "the registered owner of an absolute fee shall be deemed to be the *primâ facie* owner of the land described or referred to in the register for such an estate of freehold as he may possess" * * *

Held, affirming the judgment of the Supreme Court of British Columbia (7 B. C. Rep. 12 sub nom. *Kirk* v. *Kirkland*) that a certificate of title issued on registration of a deed from the assessor of taxes issued to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the plaintiff.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 7 B. C. Rep. 12 sub nom. *Kirk* v. *Kirkland.*

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The facts of the case are sufficiently stated in the above head-note and in the judgment of the court.

Gormully Q.C. and *Orde* for the appellant referred to the provisions of the British Columbia Statutes and argued that they made the certificate *primâ facie* evidence of title and cast the burden of rebutting it on the plaintiff.

J. Travers Lewis for the respondent was not called upon.

The judgment of the court was delivered by :

GWYNNE J.—This case presents the most singular case of a claim to title to land alleged to have been acquired in virtue of a sale for alleged arrears of taxes which has ever, in my experience, come before the courts. The plaintiff resides in England and is the wife of one Robert Arthur Lawrence Kirk, who upon the 24th day of January, 1888, became seized in fee simple in possession of two town lots in the City of Vancouver, in the Province of British Columbia, one of which is situate on Hastings Street, and the other on Dupont Street, in the said city. His title to the former of the said lots was acquired by a deed executed by one John Callister whereby he granted and conveyed to the said Robert A. L. Kirk, his heirs and assigns,

all that piece or parcel of land lying and being situate in the City of Vancouver, Province of British Columbia, and known and numbered as lot twenty-four, block eight, according to the subdivision of the west part of lot one hundred and ninety-six, group one, New Westminister District.

The title to the other of the said town lots the said Kirk acquired in virtue of a deed also executed upon the said 24th day of January, 1888, whereby one Southam A. Cash granted and conveyed to the said Kirk his heirs and assigns

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all that piece or parcel of land lying and being in the City of Vancouver, Province of British Columbia, and known and numbered as lot twenty, block thirteen, according to the subdivision of the west part of lot one hundred and ninety six, group one, New Westminster District.

From the said 24th day of January, 1888, the said Robert A. L. Kirk remained seized in fee simple in possession of the said respective pieces of land so conveyed to him, until the 25th day of July, 1894, when by a deed executed by him he granted and conveyed unto the plaintiff, her heirs and assigns forever, the said respective pieces of land, and the plaintiff has ever since been and still is in possession of the said respective pieces of land by her agents and tenants holding under her. Both of these town lots have buildings erected thereon, and one is occupied by certain persons trading in the sale of wines and liquors under the name of Mynhart Brothers who have a stock in trade of the value of about three thousand dollars upon the premises, of which they are in occupation in virtue of a contract made with the plaintiff for the purchase thereof upon payment of a principal sum payable by annual instalments in lieu of rent. The other of the said lots is also occupied by persons doing business therein as proprietors of a Chinese store and restaurant. The plaintiff only learned in September, 1895, through her agents, that one E. J. Kirkland, assuming to act in the character of assessor of the District of New Westminster, had in the month of July, 1898, executed a deed whereby he purported to convey to the defendant in fee simple the said pieces of land so as aforesaid situate in the City of Vancouver, and thereupon, upon the 5th of October, 1888, she instituted the present action for the purpose of having the said deed produced and declared to be null and void, and in her statement of claim she alleged that since the commencement of her action the said deed

had been registered and she claimed the right to have the said deed, or so much thereof as related to her said two town lots, set aside and declared to be null and void. The defendant in her statement of defence pleaded that

on the 15th day of July, 1896, the said lots were offered for sale by auction by E. L. Kirkland, assessor of the District of New Westminster, *for arrears of taxes due thereon*, with costs and expenses of sale, and that S. K. Twigge being the highest bidder became the purchaser thereof and had issued to him by said assessor under the provisions of said "Assessment Act" a certificate of such purchase. This certificate together with all the right, title and interest of S. K. Twigge in and to the said land was afterwards on or about the 18th day of July, 1898, for value received, assigned and transferred to the defendant. *Taxes were due and in arrear upon the land so sold to S. K. Twigge and transferred to the defendant for a sufficient time to entitle the said assessor to sell the same, and all assessments, levies, notices (prior and subsequent) and advertisements required by the "Assessment Act" were made, given* and published, and all other requirements of said Act necessary to the validity of said sale were fully complied with.

And the defendant further admitted the execution of the deed of the 20th day of July, 1898, in the plaintiff's statement of claim mentioned, and pleaded that,

the said conveyance had been duly registered and a certificate of title issued to her in respect thereof under the provisions of the "Land Registry Act."

Upon the above matters pleaded by way of defence to the plaintiff's statement of claim the defendant claimed a right

to have the plaintiff's action dismissed with costs and a declaration made that she (the defendant) is the owner in fee and entitled to the possession of the said lots.

Issue having been joined upon the above defence the case was brought down for trial when the plaintiff proved that she was in possession of the said respective lots under and by virtue of the above several deeds executed as to one of the said lots by John Callister, and as to the other of the said lots by Southam A.

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Cash, both dated the 24th day of January, 1888, and the transfer deed above mentioned bearing date the 25th day of July, 1894, executed by Robert A. L. Kirk, the grantee in the said first mentioned deeds to the plaintiff in fee, and she also produced an instrument entituled "certificate of title," dated the 28th day of August, 1894, signed "J. O. Townley, District Register," certifying to the registration of a transfer deed or conveyance in fee of the said lots dated the 25th day of July, 1894, from Robert Arthur Lawrence Kirk to Evelyn Georgiana Kirk, his wife, in fee, and that the name of the said Evelyn Georgiana Kirk was entered in the absolute fee book as the owner in fee of the said lots.

The defendant by way of defence produced an instrument also entituled "certificate of title," dated the 29th day of November, 1898, and signed "J. O. Townley, District Registrar," certifying to the registration of a deed or conveyance in fee of the said two lots *inter alia* in pursuance of the provisions of the Assessment Act for taxes due to 31st December, 1896, from E. L. Kirkland, assessor of the District of New Westminster, to Mary M. Johnson, and that in virtue of such deeds of transfer the name of Mary M. Johnson was entered in the absolute fee book as the owner in fee of the said two town lots.

The defendant rested wholly upon this certificate and contended that it was *primâ facie* evidence that the defendant was absolute owner in fee of the said two town lots, and that her said certificate being subsequent to that given to the plaintiff wholly displaced and neutralised the latter unless and until the plaintiff should prove the negative or non-existence of the conditions, the existence of which as pleaded in the defendant's statement of defence could alone give to the deed executed by Kirkland to the defendant whatever

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validity, if any, it had in law; notwithstanding her defence as above pleaded the defendant absolutely refused to produce the deed from Kirkland to her, and insisted upon resting her defence upon her certificate of title of the 29th November, 1898, issued as appears nearly two months after the commencement of this action. The plaintiff thereupon gave in evidence of that deed an examined copy of the deed in the registry office and we thus find the deed to be materially different from the title as pleaded by the defendant in her statement of defence.

It is in the words and figures following:

To all to whom these presents shall come. I, E. L. Kirkland, of the District of New Westminster, in the Province of British Columbia, send greeting: Whereas by virtue of the provisions of the "Assessment Act" the assessor of the said district did on the 15th day of July, in the year of our Lord one thousand eight hundred and ninety-six, sell by public auction to Mary M. Johnson, of Skagway, in the District of Alaska, U. S. A., that certain parcel or tract of land or premises *hereinafter* mentioned at or for the price or sum of *twenty dollars and eleven cents* of lawful money of Canada on account of delinquent taxes and additions *alleged to be due thereon* up to the thirty first-day of December, in the year of our Lord one thousand eight hundred and eighty-six, together with costs.

Now know ye that I the said assessor as aforesaid, *in pursuance of such sale and the "Assessment Act" and for the consideration aforesaid* do hereby grant, bargain and sell unto the said Margaret M. Johnson, her heirs and assigns, all that certain parcel or tract of land and premises, containing—being composed of lot twenty-four (24), block eight (8), and lot twenty (20), block thirteen (13), in the west eighty-five (85) acres of one hundred and ninety-six (196), group one (1) for taxes due to thirty-first December eighteen hundred and eighty-six (1886), *also west half* ($\frac{1}{2}$), *block thirteen* (13), *in the north-west quarter* ($\frac{1}{4}$), *lot three hundred and thirty-six* (336), *group one* (1), *for taxes due to thirty-first December eighteen hundred and eighty-six* (1886), *New Westminster District.*

The instrument is then dated 20th July, 1898, and is signed with the name

E. L. KIRKLAND,
Assessor.

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The amount of taxes *so alleged* to have been due amounted in so far as the same was claimed to affect the said two town lots, the property of the plaintiff, was the small sum of twenty-two cents in respect of each of the said lots, which together were proved to be of the value of upwards of six thousand dollars, or say $3,000 each.

The learned trial judge rendered judgment for the plaintiff. His judgment has been confirmed by the Supreme Court of British Columbia. From the judgment of the latter court the present appeal is taken, and in the argument before us it was rested wholly upon the contention that the defendant's certificate of title of November, 1898, is *primâ facie* evidence of the absolute title in fee being in the defendant in displacement of the plaintiff's title by deeds as relied upon by her, and of her certificate of title of August, 1894, unless and until, (as was contended at the trial), the plaintiff shall prove the non-existence of conditions, the existence of which could alone give to the deed from Kirkland to the defendant whatever validity, if any, it ever had.

The sole foundation upon which this contention is rested is contained in secs. 13, 19 and 23 of ch. 111 of the Revised Statutes of British Columbia which are but a transcript of secs. 13, 17 and 18 of ch. 67 of the Consolidated Acts of 1888. The Land Registry office, as the 3rd section of "The Land Registry Act" shews, was established "for the record of instruments and the registration of titles," and it is apparent, I think, that the person placed in chief charge of the office under the title of "Registrar General of Titles" was intended to be a judicial officer, for in the discharge of the duties of his office he is required to exercise judicial functions. He is constituted both a judicial and a ministerial officer. Then by section 5 the like duties and powers,

both judicial and ministerial, are imposed upon and vested in district registrars.

Section 13 then purports to show how these respective functions are to be exercised. It enacts that:

Every person claiming to be the legal owner in fee simple of real estate may apply to the registrar for registration thereof in the form marked A in the first schedule hereunto annexed, *and the registrar shall upon being satisfied after examination of the title deeds produced* that a *primâ facie* title has been established by the applicant register *the title* of such applicant in a book to be called "the register of absolute fees" in the form B, in the said first schedule, *and shall also transcribe in another book* to be called the absolute fees parcels book, a description of the lands to which *the title* relates.

Now when a person claims the right to be registered in the absolute fee book as owner of the absolute fee in land, the title to which he claims in virtue of a deed in fee simple executed to him by a person already registered in the absolute fee book as the owner in fee, such a person may, under section 13, well be accepted by the registrar and be registered in the absolute fee book as *primâ facie* owner of such land. It was, I think, in view of, and for the purpose of providing for such a case that section 13 was enacted. But where, as in the present case, the defendant was not claiming title in virtue of a deed executed by the plaintiff who was the last person appearing to have been registered in the absolute fee book as owner of the *absolute fee* (which term by the 2nd section of the Act is interpreted to mean the *legal ownership* of an estate in fee simple) it was impossible for the registrar, by mere examination of a deed which had no validity whatever in law unless the conditions precedent required by law to give it any validity had been fulfilled, to be judicially satisfied that the defendant had any right to be registered even as *primâ facie* owner of the land mentioned in the deed from Kirkland to her. Kirkland appears in the transaction

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solely in the character of a person assuming to have a power vested in him, as assessor of the district of New Westminster, to realise by the sale of lot 24, block 8, the property of the plaintiff, the sum of twenty-two cents, alleged by Kirkland to have been in arrear and unpaid upon and ever since the 31st day of December, 1886, for a tax in respect of the said lot alleged to have been (but when is not stated), assessed upon and due by the then owner of the said lot, who now appears to have been one John Callister, and for securing payment of which sum with interest and costs the said Kirkland claims that a charge or lien upon the said lot became in 1886, and has ever since been until the alleged sale in 1896, vested in Her Majesty, and also to realise by sale of said lot 20, block 13, also the property of the plaintiff, payment of the like sum of twenty-two cents, also alleged by Kirkland to have been in arrear and unpaid upon and ever since the 31st day of December, 1886, for a tax in respect of the last mentioned lot alleged to have been (but when is not stated), assessed upon the then owner thereof who now appears to have been one Southam A. Cash, and for securing payment of which sum, interest and costs, the said Kirkland claims that a charge or lien upon the said last mentioned lot was vested in Her Majesty.

Now the deed under which the defendant claims title contains nothing whatever to establish that there were such liens or charges upon the said respective lots of land vested in Her Majesty at the time of the alleged sale in 1896, or if there were, that Kirkland had any authority to realise such charges by sale of the lands.

At the time of the passing of the 43 Vict. ch. 36, on the 8th of May, 1880, sec. 66 of the Act of 1876, as amended by sec. 15, of the Assessment Amendment

Act of 1878, was and continued to be in full force, and it enacted that:

If any of the taxes mentioned in the collector's roll in each year shall remain unpaid, and the collector be not able to collect the same he shall deliver to the officer in charge of the treasury an account of all the taxes remaining due on the roll and in such account the collector shall show opposite to each assessment the reason why he could not collect the same by inserting in each case the words "non-resident" or "not sufficient property to destrain" as the case may be.

Then by sec. 14 of the Act of 1878 it was enacted that

the assessor or collector shall pay over monthly to the officer in charge of the treasury the monies from time to time received by him and shall forward to the officer in charge of the treasury on or before such day in the year 1878 as the Lieutenant-Governor in Council may appoint, and on or before the 30th day of November or such other day as may be appointed by the Lieutenant-Governor in Council in each subsequent year, *his roll together with a list of all arrears of taxes due, and in cases of taxes chargeable against land, with a description of the parcels, sections or lots and the amounts chargeable against the same.*

Then the Act of 1880 makes *the person assessed* not only personally liable for the taxes imposed both in respect of real and personal estate but also all his lands situate within the province and prescribes the proceedings to be taken *in each year* by the assessor or collector to levy the taxes.

Sec. 8 by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession wherever the same may be found within the province, or of any goods and chattels found on the premises the property of, or in the possession of, any other occupant of the premises.

And it is enacted in sec. 13:

In default of sufficient distress or in case the collector shall deem it advisable to proceed for the recovery of the taxes due by levying the same in the first instance *against the lands of the person owing such taxes* he may levy the same together with all costs and charges including the costs of distress against goods and chattels, if any, *by sale of so much of the lands of such person* situate in his district as may be sufficient to pay the same.

And by sec. 19:

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In case the collector fails or omits to collect the taxes or any portion thereof the Lieutenant-Governor in Council may authorise the collector or some other person in his stead to continue the levy and collection of the unpaid taxes in the manner and with the powers provided by law for the general levy and collection of taxes, *but no such authority shall alter or affect the duty of the collector to return his roll.*

Upon the return o the roll provision is made by the 21st section which enacts:

If any tax and additions remain unpaid after the return of the roll by the collector to the said officer in charge of the treasury, interest shall continue to attach thereon after the rate of twelve per cent per annum, and such tax, interest, and the cost of registration may on the application of the officer in charge of the treasury, *be registered as a* charge against the said land in respect of which such tax is payable, and the registrar general of titles is hereby required to register the same accordingly.

Then sec. 23 prescribes the amount leviable as *this land* tax to be

one half of one per cent on the assessed value of real estate provided that the collector *in lieu of the above rate shall* receive *one-third of one per cent* on the assessed value of real estate if paid on or before the 30th day of June in each year.

Then by sec. 40 of 42 Vict. ch. 36, A.D. 1878, as amended by the 22nd sec. of 43rd Vict. ch. 26, A.D. 1880, it was enacted that

on and after the 1st day of January, 1879, the provisions of "the Assessment Act, 1876," as regards the tax on real estate shall not apply to, nor shall any taxes on real estate be assessed, *levied or collected thereunder in any municipality.*

Now upon the 6th of April, 1886, the Act 49 Vict. ch. 32, to incorporate the City of Vancouver was passed, whereupon the above section of the Act of 1878 as amended by the Act of 1880 came into immediate operation, whereby the "Assessment Act of 1876" ceased to have any operation and which declared that no taxes should be collected or levied under it within the municipality, without any reservation whatever as to taxes if any there were due in virtue of any

assessment made prior to the incorporation of the municipality; but in point of fact there were not on the 6th of April, 1886, any taxes due in respect of assessments upon the lots in the City of Vancouver under consideration in the present case for by 42nd Vic. ch. 35, A.D. 1879, no taxes if any were assessed upon either of the lots in question in 1886 became delinquent until the 30th of June of that year. It is needless further to add that if any tax had been in arrear upon these lots respectively upon the 31st December, 1886, the collecting and levying of the same, if they could be collected and levied in despite of the 40th sec. of the Act of 1878 as amended by the 22nd sec. of the Act of 1880, could only be effected by order of the Lieutenant-Governor in Council after the return of the collector's roll of 1886 to the officer in charge of the treasury.

But it is useless to endeavour to enumerate all the objections to the validity of the sale attempted to have been made of the respondent's property by a person not appearing to have had any authority whatever to interfere in the premises, but who has presumed to interfere not only in a matter in which he does not appear to have had any concern, but to have acted in direct defiance of the statute law governing the case. There is, however, one point which should be mentioned as absolutely fatal to the deed under which the applicant claims, if no other objection existed. One of the lots as already shown was professed to be liable to be sold for taxes alleged to have been due in December, 1886, by one John Callister, the then owner of the lot, and the other was professed to be liable to be sold for taxes alleged to have been due in December, 1886, by one Southam A. Cash, the then owner of this lot; but we must take it from the deed, of which proof was made as aforesaid,

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that the two lots and a third lot of whom somebody else was the owner in fee and which was in like manner alleged to be liable to be sold for taxes, but for what amount is not named, alleged to have been also due in December, 1886, by some person, (but who is not known) the then owner of, and assessed for this lot. Now the union of these three lots in one block and the sale of them as one, as appears by the deed executed by Mr. Kirkland to have been professed to be done for the sum of twenty dollars and eleven cents, was not authorised by any law and such a sale and the deed given thereon would be absolutely null and void even if no other objection to it existed. In fine the whole proceeding in the present case presents so many features of the utter absence of *bona fides* as to remove all *primâ facie* evidence of title which the certificate given by the registrar afforded if it afforded any. The evidence which has appeared in the case is abundantly sufficient (by reference to the statutes bearing upon the subject) to call for a judgment pronouncing the deed under which the appellant claims and the registration thereof in the absolute fee book and the certificate of such registration to be absolutely null and void, and we are of opinion that to the judgment of the court below of the 11th of May, 1896, should be added a direction that the entries in the said registrar's department in relation to the said pretended sale and conveyance of the said lots to the appellant be expunged from the records in the said registrar's department. With this variation made in the judgment of the court below the appeal is dismissed with costs.

It is to be regretted that Mr. Kirkland is not before us in this appeal that he might be made responsible to the respondent for the costs of her action instituted to maintain her rights so wantonly and vexatiously

interfered with by the defendant Kirkland in a matter in which he does not appear to have had any concern and wholly unauthorised in law.

Appeal dismissed with costs.

Solicitors for the appellant: *Russell & Russell.*

Solicitor for the respondent: *S. Lucas Hunt.*