

CANADA / JUDGMENT

Green v. Blackburn

(1908) 40 SCR 647

COURT

Supreme Court of Canada

DECIDED

6 October 1908

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Green v. Blackburn

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Supreme Court Judgments

Date

1908-10-06

Report

(1908) 40 SCR 647

Judges

Girouard, Désiré; Davies, Louis Henry; Idington, John; MacLennan, James; Duff, Lyman Poore

On appeal from

Quebec

Subjects

State

Decision Content

Supreme Court of Canada

Green v. Blackburn, (1908) 40 S.C.R. 647

Date: 1908-10-06

John Green and Alexander Green (Defendants) Appellants;

and

Russell Blackburn (Plaintiff) Respondent.

1908: June 12; 1908: October 6.

Present: Girouard, Davies, Idington, MacLennan and Duff JJ.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Crown lands—Holders of location ticket—Prior right to mining rights—Privilege reserved
—"Proprietor of the soil"—Construction of statute—R.S.Q. (1888), ss. 1269, 1440, 1441; 55 & 56 V. c. 20.

The expression "proprietor of the soil," in section 1441 of the Revised Statutes of Quebec, 1888, as amended by 55 & 56 Vict. ch. 20, read in connection with sec. 1269, Rev. Stat. Que., 1888, is not intended to designate the holder of a location ticket, and, consequently, persons holding Crown lands, merely as locatees, have no vested preferential rights to grants from the Crown of the mining rights therein, under secs. 1440 and 1441 of the Revised Statutes of Quebec, 1888, as amended by the "Act to amend and consolidate the Mining Law," 55 & 56 Vict. ch. 20 (Que.).

Appeal from the judgment of the Superior Court, sitting in review, at the City of Montreal, which affirmed the judgment of Mr. Justice Rochon, in the Superior Court, District of Ottawa, maintaining the plaintiff's action with costs.

The action was for the revendication of the mining rights in lot No. 18, in the Gore of the Township of Templeton, County of Ottawa, certain minerals extracted therefrom by the defendants, and to recover damages. At the trial, in the Superior Court, District SUPREME COURT OF CANADA. [VOL. XL.

of Ottawa, the plaintiff's action was maintained and the defendants were ordered to deliver up possession of the mines on the said lot of land, a quantity of mica, which had been seized under attachment issued with the action, or to pay the value thereof to the plaintiff with costs. This decision was affirmed by the judgment appealed from.

The circumstances of the case and issues raised upon this appeal are stated in the judgments now reported.

Arthur McConnell for the appellants.

Aylen K.C. for the respondent.

Girouard and Davies JJ. agreed that the appeal should be dismissed with costs for the reasons stated by Duff J.

Idington J.—One of the appellants received the following license:

Prospecting License No. 230.

John Green, Esq., of Ottawa, having paid a fee of five dollars, for sixty-nine acres of public and surveyed land, is hereby authorized to prospect for mineral for three months from the twelfth day of the month of November, 1900, on the south half of lot 18, in the Gore of the Township of Templeton, in the County of Ottawa, in the Province of Quebec.

Subject to the articles 1453 to 1456, inclusive, of the Quebec Mining Law (55 & 56 Vict. ch. 20), as well as all other regulations based on this law.

Jules Cot ,

Secretary, Department of Colonization and Mines.

Quebec, 12th November, 1900.

Both appellants on the 2nd of January, 1901, obtained the following location ticket: Crown Lands Agency,

Hull, 2nd January, 1901.

Received from A. and John Green the sum of \$75, being the first instalment of one-fifth of the purchase money of 50 acres of land contained in wood lot No. 18 in the Gore range of the Township of Templeton, P.Q., the remainder payable in four equal annual instalments, with interest from this date.

This sale if not disallowed by the Commissioner of Crown Lands, is made subject to the following conditions, viz.: "The purchaser to take possession of the land within six months from the date hereof, and from that time continue to reside on and occupy the same, either by himself or through others, for at least two years, and within four years at farthest from this date, clear, and have under crop a quantity thereof in proportion of at least ten acres for every one hundred acres, and erect thereon a habitable house of the dimensions of at least sixteen by twenty feet. No timber to be cut before the issuing of the patent, except under license, or for clearing of the land, fuel, buildings and fences; all timber cut contrary to these conditions will be dealt with as timber cut without permission on public lands. No transfer of the purchaser's right will be recognized in cases where there is default in complying with any of the conditions of sale. In no case will the patent issue before the expiration of two years of occupation of the land, or the fulfilment of the whole of the conditions, even though the land be paid for in full. Subject also, to current licenses to cut timber on the land, and the purchaser to pay for any real improvements now existing thereon, belonging to any other party. This sale is, moreover, subject to the laws and regulations concerning the public lands, wood and forests, mines and fisheries in this Province.

F. A. Gendron, Agent.

Caution.—If the Commissioner of Crown Lands is satisfied that any purchaser of public lands, or any assignee claiming under him has been guilty of any fraud or imposition, or has violated or neglected to comply with any of the conditions of sale or if any sale has been made in error or mistake, he may cancel such sale, and resume the land therein mentioned, and dispose of it as if no sale thereof has been made. Extract from 20th sec, Act 32 Vict. ch. 11.

On the 23rd May, 1903, a patent was issued to the appellants for the south part of lot No. 18 of the Gore of the Township of Templeton. In this patent there is a proviso that the grant is subject to the laws and regulations concerning public lands, mines and fisheries in the province. On the 25th of May, 1905, the appellants received from the Crown Timber Agency at Hull the following;

Crown Timber Agency.

Hull, Que., 25th May, 1905. No. 203.

Received from John and Alex. Green the sum of seventy-five dollars, being the amount of dues on the undermentioned wood goods cut during the season of 190.

S. part lot 18, Gore Templeton, mining rights.

L. T. Gendron, Agent.

This sum of \$ 75.00 was duly remitted to the Minister of Lands, Mines and Fisheries, by the agent who in doing so stated that it was a balance due on the south half of lot 18 Gore of Templeton mining lot for John and Alex. Green.

I cannot find in the case any acknowledgment of this letter until the 15th of November, 1905, and then only incidentally in replying to a letter from the agent dated 11th November, 1905, requesting a patent for the mines to be issued to John Green and referring to the lot as being in dispute between Messrs. Russell Blackburn and the said Mr. Green.

In this letter of 15th November, 1905, the Deputy Minister promises that the \$75.00 deposited by the Greens in the department will be reimbursed to them and the patent issued to the Messrs. Blackburn Bros. It is alleged in these letters that Messrs. Blackburn had bought and paid for the mining rights in the lot 18 a year before Greens had made any application. The agent at Hull thereupon on the 17th November, 1905, writes John Green that the Messrs. Blackburn Bros. had bought the mining rights on the south half of lot 18 Gore of Templeton on the 16th July, 1904, and sends him a cheque for \$75 being the amount given by Green for the same.

It appears in the case, by a letter from the agent to the department enclosing a cheque for \$375, that the department were requested on the 16th July, 1904, to issue a patent to Blackburn.

It would appear from this letter that the cheque was for the south half of lot 18 Gore of Templeton and other lands in the same township, and as if the discovery had been made by one Edward Patry who had transferred to Russell Blackburn.

It would seem from the evidence that the transaction was not closed in 1904, and it was only closed on the 12th July, 1905. The evidence on this point is interesting:

Q.—You did not buy it from Patry—Patry's permit was for lot 17? A.—17 and 18.

Q.—What part of 18? A.—The north half.

Q.—So it was under Patry's permit that you actually intended to work? A.—When we first started?

Q.—Yes. A.—Yes.

Q.—And was it not under that same permit that you were buying Patry's rights for \$375 from Mr. Gendron? A.—No; under Patry's license he had the whole of 17 and the north half of 18.

Q.—That was only a prospecting license Patry had? A.—Yes.

Q.—Didn't you pay this \$375 to secure the mining rights under the license for permission to explore which you had got transfers from Party to you? A.—To secure part of the lots he had under his license.

Q.—That was what the \$375 was for? A.—Yes.

Cross-examined by Mr. Aylen:

Q.—I see a receipt here dated July, 1905, signed Jules Cote, did you pay that money then? A.—Yes.

Q.—You got that from the secretary of the department—that receipt. A.—Yes.

Q.—Is that his signature? A.—Yes.

Q.—And what was that for? A.—That was for the payment of the balance of lot 18 in the Gore of Templeton.

Q.—And afterwards did you get from the Hon. Mr. Provost. Minister of Mines and Fisheries, Exhibit No. 2—mining concessions? A.—Yes.

Q.—Was the \$490 mentioned there paid on the 24th of February, or was it paid part on the 12th of July, 1905, and partly before, do you remember? It. says: "Balance of purchase of mining rights?" A.—Yes, we had paid for twenty-five acres and this \$490 was for the balance, and that was for lot 17, I think. That is a receipt for the balance we paid and this is what we got afterwards, a receipt for the whole thing.

Q.—But the balance of the money for lot 18 was paid on the 12th of July, 1905? A.—Yes.

It would seem as if this Blackburn application remained ungranted at the time when the agent in Hull had as above stated transmitted on behalf of the appellants \$75. It would seem moreover, as if neither of applicants had deposited enough of money to cover the price fixed by the department for the mining lands respectively sought after by each of these applicants; rightly or wrongly the appellants entertain a suspicion that they were not fairly dealt with and that in an irregular manner Blackburns were preferred over them. I cannot say for I have no right to pass upon the question at present whether the suspicion be well founded or not. It appears upon this

evidence that if the Minister had desired he could notwithstanding anything that appears before us have upon receipt of the \$75 pointed out to the Messrs. Green wherein their application failed or fell short by reason of the amount of money forwarded being less than could be received; and they might thereupon have made that good and he might also have discarded the Blackburn application founded upon a prospecting license that did not cover the south half of lot 18.

Notwithstanding all that I do not see how Messrs. Green can herein maintain that any prior right in-law had been acquired by them by reason of the Minister preferring one irregular application over another. It was entirely within his province in such a case to prefer one of two irregular applications over the other.

The case of the selection of one party over the other as referred to above might if brought about by improper means have given rise to a case of a different character when the right of the party suffering could be asserted but only by means of an application or information to set aside the patent.

It is urged, however, that quite independently of the deposit of \$75 the appellants had by virtue of the above location ticket or patent a prior right in law to acquire the mining rights and that such prior right could not be set aside without notice to the appellants.

It is said on the other hand, that in such a case if the Minister chose to disregard that preferential right the only remedy would be against the Crown by way of petition of right or possibly an application in some other way to have the patent issued to Blackburn rescinded as having been issued improvidently. It is urged that such would be the only remedy. I do not so understand the law.

If by statute there had been clearly created a mining right in the owner of the land it could be only set aside by an express enactment of the legislature, or by following the proceedings expressed in the law whereby forfeiture might be brought about of such preferential right, by notice to him, and the opportunity being given to avail himself of his privilege. No ex parte act of the Minister could invade the right created by statute and vested in another, and hence the appellants would if of the class given such a right have had a good defence. The appellants set up a claim of this kind as derived from and by virtue of the location ticket quoted above. The location ticket does not maintain such a pretension nor can I find that the statute by virtue of which the location ticket was issued justifies any such pretension existing in the holder of any location ticket.

Art. 1269 of the Revised Statutes of Quebec, 1888, is as follows:

Upon the conditions and for the price regulated and established by the Lieutenant- Governor in Council, the Crown lands agent, if there is no contestation, is bound to grant a location ticket to any person who asks to purchase a lot of public lands for colonization purposes, if the lot asked for is for sale and not already granted.

Such grant is, however, subject to the approval of the Commissioner, and shall not prejudice the right of the latter to sell the lands under the Mining Act as well as firewood lots under existing regulations and sugary lands.

By sec. 14, ch. 22 of 60 Vict of the Province of Quebec, the above article was amended as follows:

Art. 1269 of the Revised Statutes is amended by replacing of the words, after the words "right of the latter," in the second line of the second part by the words: "to sell the land as firewood lots under existing regulations and sugary lands, nor the right of the Commissioner of Colonization and Mines to sell the lots under the law respecting mines."

The article was further amended by ch. 14 of 63 Vict, by replacing the second clause thereof by the following:

Sales made by Crown lands agents if not disapproved by the Commissioner within four months thereafter take effect from the date' when they were made by such agents.

Such grant, however, shall not prejudice the right of the Commissioner to sell, under the regulations, the lands as firewood lots and as sugary lands, nor the right of the Commissioner of Colonization and Mines to sell the lots under, the laws respecting mines.

This came in force on the 23rd of March, 1900. It is under this last amendment that the location ticket in question issued. I cannot understand how under that or any of the previous statutory provisions above recited, there could ever since 1888 have existed a right in a locatee to the minerals or to any preferential right of purchase thereto.

We were referred to certain interpretation clauses that would go, when read in conjunction with art. 1441 in connection with art. 1440, to support this right, but I cannot find anything that could by any possibility give effect thereto in the manner claimed. The sections referred to evidently were intended to apply to the case of absolute dominion over the land and not to such limited rights as the locatee such as in question could claim. The only legislation had in the way of further amending art. 1269 was after this location ticket had been issued and in no way adds to the force of the foregoing so far as any right the appellants may have had by virtue of their location ticket.

Then the question is raised as to how the appellant could have acquired any such rights in minerals as he sets up by virtue of his patent. The patent itself does not confer any such right and the only reference made to the subject at all in the patent is the last paragraph thereof which reads as follows:

Provided, always, that this grant is subject to the laws and regulations concerning public lands, mines and fisheries in this province.

We have not been shewn any further enactment or regulation directly or expressly conferring any such right in a patentee. It is difficult to see how one having acquired a patent merely by virtue of complying with all the conditions of such a location ticket as the one here issued pursuant to any enactment such as art. 1269 in the Revised Statutes, 1888, or as it appeared in any

of all its modifications down to the time when the appellants obtained the location ticket in question could claim any preferential mining right such as set up here. Such rights seem to have been expressly excluded from the operation of any location ticket under art. 1269.

Then the appellants fall back upon arts. 1440 and 1441 Art. 1440 of the Revised Statutes of Quebec is as follows:

The mining rights belonging to the Crown which consist of the ownership of the property under the soil, under articles 1423 and 1424, may be acquired from the Commissioner by sale or lease or by license or permit of occupation by the proprietor of the soil, who has a preferential right to the purchase of such mining rights.

Any miner may acquire mining rights if the proprietor of the soil neglect or refuse to work the said mines, after having put the proprietor in default by notice given under articles 1483 and 1484, by paying, upon the award of arbitrators as hereinafter provided, all the damages and losses that he may cause the latter in mining or attempting to mine under such soil.

Arts. 1423 and 1424 referred to in this art. 1440 read as follows:

1423. It shall not be necessary, in any letters-patent for lands granted for agricultural purposes, to mention the reserve of mining rights, which reserve is always supposed to exist under the provisions of this section.
1424. As respects the Crown, such mining rights, so tacitly reserved, shall be property separate from the soil covering such mines and minerals comprised in such rights, and shall constitute a property under the soil which shall also be public property, independent from that of the soil which is above it, unless the proprietor of the soil has acquired it from the Crown as a mining location or otherwise, in which case both the soil and the property under the soil form but one and the same private property.
2. However, whenever a person who has become owner of the soil and of the property under the soil, under any title, before the 10th of June, 1884, sells, hypothecates, leases or affects the mining rights in. such property to- another person, under article 2099 of the Civil Code of Lower Canada, such soil and the property under the soil again become two properties perfectly distinct and independent from each other, for all lawful purposes, as they were when in the possession of the Crown, so that the sale, judicial or otherwise, of one of these properties, does not in any way affect the other.
3. It is, however, well understood that the rights acquired over such property, during the confusion in the ownership of the soil and of the property under the soil, are in no wise affected by the subsequent sale of mining rights and the division of the property in the soil and of that under the soil arising therefrom under this section; except only that the owner of the property under the soil shall be sued and made a party to the suit in the same manner as if he had purchased a part or portion of the soil.

In the Revised Statutes of Quebec, 1888, we find the following:

1425. Any person who previous to the 24th July, 1880, obtained by letters patent, for agricultural purposes but with reservation by the Government of the mining rights, any lot whatever, forming part of the public lands of the province, may, if he or his legal representative discover and wish to work a mine, purchase the mining rights so reserved by the Government, by paying in cash to the Commissioner, over and above the price already paid for said lot, a sufficient additional amount to make up the sum of two dollars per acre, if for gold or silver, and one dollar per acre, if for copper, iron, lead or other baser metal.
1426. Every proprietor of land, sold for agricultural purposes, by letters patent, but without any reservation by the Government of the mining rights, or the legal representative of such proprietor, who discovers upon such land a gold or. silver mine, may work the same, without taking out a license for that purpose, by paying to the Commissioner, over and above the price already paid for such land, a sufficient additional amount to make up the sum of two dollars per acre.

It clearly appears from these two lastly mentioned articles that, in 1888, there probably were by virtue of prior law consolidated in these articles outstanding rights of persons who, previous to the 24th July, 1888, had obtained letters patent or, later and until the law was amended, might have obtained patents and yet had preferential rights, even where the reservation had been made by the Government of the mining rights in any lot patented for agricultural purposes. This option was given to such patentees by the payment of an amount additional to that they had paid to make up the sum of \$2 per acre, if for gold or silver, or f 1 per acre if for copper, iron, lead or other baser metal.

The other class, art. 1426, does not cover the appellants' case.

Then it is set up here by the appellant that by virtue of art. 1441 as it stood at the time of their purchase when read in connection with art. 1440 above set forth that the patentees had acquired a preferential right.

Art. 1441 as it stood at the time in question by virtue of its last of many amendments up to that time being 1 Edw. VII. ch. 13, sec. 2, was as follows:

Art. 1441. The mining rights belonging to the Crown in the lands of private individuals may also be acquired in the manner indicated in the foregoing article.

We are asked to read these two articles (1440 and 1441) together and it is ingeniously suggested that the words in art. 1440, "who has a preferential right to the purchase of such mining rights" were intended to confer and did confer down to the date of the appellant's patent a preferential right such as is indicated existed in some proprietors of the soil.

I cannot read these words after considering the legislation I have set forth so fully as conferring any right upon the appellants. The words do not expressly confer any. They are an express recognition of the fact that some proprietors of the soil had acquired such preferential rights by virtue of some earlier legislation and that those who had acquired such rights by prior legislation had such control over the soil that the right could only be invaded by the express methods pointed out in the art. 1440 and also in later legislation.

Full effect is given to these words relied upon by attributing to them the cases of the operation of statutes conferring upon some of the earlier of the patentees the right to the minerals upon certain conditions. Such persons as then stood such owners and such of them as still own the property granted with that privilege are the persons who are referred to in art. 1441 by the words "who has a preferential right to the purchase of such mining rights." The appellants had not brought themselves within that class or of any of those classes who enjoyed, as appears above in regard to some of them, the statutory right above referred to. The appellants do not seem to me ever to have had any preferential right or other right to the minerals by virtue of being locatees or patentees of the land in question. If the appellant who had obtained a mining license had discovered at the proper time the mine in question and followed it up by the proper steps he might have secured the mine. He did not do so, possibly because erroneously supposing that, when he became with his brother a locatee or patentee of the land, he had no more to do than sit down and enjoy the mine by virtue of the mining license he had got before his patent. I do not find as well founded this suggestion in argument that the two joined together created any right in law to the minerals in question.

The appeal I think must be dismissed with costs.

MacLennan J. agreed in the opinion stated by Idington J. Duff J.—This appeal raises the question of the title to the mining rights under the south half of lot 18, Templeton Gore. The appellants on the 2nd of January, 1901, acquired a location ticket in respect of this land and they received a patent of it on the 23rd May, 1903. Under the law as it stood on the first mentioned of these dates, 55 and 56 Vict. sec. 1441, the mining rights in question were the property of the Crown but subject to a preferential right vested in "the proprietor of the soil" to acquire them on compliance with certain prescribed statutory conditions. On the 23rd of May, 1905, the appellants made application through the Crown lands agent at Hull for the purchase of these mining rights paying (I will assume) at the same time the price prescribed by the statute. If when this application was made, the preferential right conferred upon "the proprietor of the soil" by the enactment mentioned was vested in the appellants it is clear, in my opinion, that this application and payment (on the assumption mentioned) constituted a valid exercise of their preferential right of purchase; and, thereupon, they acquired such an interest in the rights in question as would prevent the Crown from afterwards conveying a title to them except as subject to that interest. On the other hand, if the appellants had then no such preferential right, I am unable to discover anything in the transaction between appellants and the Crown officials which could affect the title of the Crown.

The holder of a location ticket had by statute conferred upon him a conditional right to acquire a title to the lands in respect of which it was issued, subject to certain reservations. Among other things there was reserved to the Crown the power of disposing of the lands "under the mining law." Now it seems to me that, reading the provision in which this reservation is declared (R.S.Q. sec. 1269) along with sec. 1441, we must come to the conclusion that the legislature did not intend by the expression "proprietor of the soil," used in the last mentioned section, to designate the holder of a location ticket. This conclusion is fortified by the consideration that, on the appellants' construction, the holder of a mere conditional right to acquire a title to the surface had vested in him by virtue of that conditional right alone, a preferential right to acquire an indefeasible title to the minerals. Looking at the statute as a whole, I do not think that is what the legislature intended.

The appellants then, holding the land as locatees only at the time the enactment was passed, had at that moment no vested right in the mining rights in dispute—indeed no vested privilege to acquire those rights—but only a conditional right to acquire a title to the surface which, if the mining rights should not in the meantime be alienated, would confer upon them a preferential right to purchase the minerals; a mere expectation of this sort is not, I think, within the rule which requires statutes to be construed so as not to effect an existing status prejudicially in so far as they are reasonably capable of another construction. The decisions of the Judicial Committee in *Reynolds v. The Attorney-General for Nova Scotia*[1], and in *Main v. Stark*[2], illustrate the rule; and at the same time indicate the limits within which it will be applied. This case falls outside those limits. The minerals in dispute consequently came under the operation of the Act of 1901, and the appellants never had any preferential right in respect of them.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: Arthur McConnell.

Solicitors for the respondents: Aylen & Duclos.

[1] [1896] A.C.240.

[2] 15 App. Cas, 384.

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