

JAMES FLANAGAN AND JOHANNA } APPELLANTS;
 FLANAGAN HIS WIFE (DEFENDANTS) }

1886

AND

* Feb'y. 20.

JOHN DOE ON THE DEMISE OF GIL- }
 BERT R. ELLIOTT AND ISA- }
 BELLA HIS WIFE, CYRUS }
 LOWELL AND LYDE L. HIS WIFE, } RESPONDENTS.
 JOHN T. GAMBLE, TERESA }
 GAMBLE AND LILLIE GAMBLE }
 (PLAINTIFFS)..... }

* May. 17.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Assessment on real estate—In name of occupier—Description as to persons and property—Cons. Stats. (N.B.) ch. 100 sec. 16—Several assessments in one warrant—One illegal assessment—Warrant vitiated by.

Sec. 16 of ch. 100 Cons. Stats. of New Brunswick relating to rates and taxes, provides that "real estate, where the assessors cannot obtain the names of any of the owners, shall be rated in the name of the occupier or person having ostensible control, but under such description as to persons and property * * * as shall be sufficient to indicate the property assessed, and the character in which the person is assessed."

T. G., owner of real estate in Westmoreland County, N.B., died leaving a widow who administered to his estate and resided on the property. The property was assessed for several years in the name of the estate of T. G., and in 1878 it was assessed in the name of "Widow G."

Held, affirming the judgment of the court below, that the last named assessment was illegal, as not comprising such description of persons and property as would be sufficient to indicate the property assessed, and the character in which the person was assessed.

Where a warrant for the collection of a single sum for rates for several years, included the amount of an assessment which did not appear to be either against the owner or the occupier of the property.

Held, affirming the judgment of the court below, that the inclusion of such assessment would vitiate the warrant.

* PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Gwynne JJ.

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APPEAL from a judgment of the Supreme Court of New Brunswick refusing to set aside a verdict for the plaintiff and order a non-suit to be entered.

The following facts appear from the printed case filed on the appeal to this court :—

This is an action of ejectment tried at the Circuit Court for the county of Westmoreland in July, 1883.

The lessors of the plaintiff claim the land as heirs of Thomas Gamble; the defendant Johanna Flanagan claims it under a deed to her from the sheriff of the county as purchaser at a sale under a warrant issued by the chairman of the town council of the town of Moncton, commanding the sheriff to seize and sell the real estate named in said warrant (being the *locus in quo*) or so much thereof as in his judgment may be sufficient to pay the sum of \$45.72 and 17 cents for advertising, together with all his charges and expenses, "the said sum of \$45.72 being taxes assessed by town of Moncton for the years 1875, 1876, 1877 and 1878, against the estate of Thomas Gamble, deceased, in respect of such real estate."

The sheriff's deed to the female defendant bears date 4th March, 1880.

In 1868, Thomas Gamble conveyed his real estate, of which the *locus in quo* was a part, to three trustees for benefit of his creditors, which deed was duly registered in July, 1868. These trustees, on the 3rd November, 1873, reconveyed the property to Gamble by deed, but the deed was not acknowledged or registered until the 3rd October, 1881.

Gamble died 29th December, 1875, after the assessment for 1875 had been made.

The lands were assessed in '75, '76, '77, in no other way than as "the estate of Thomas Gamble," and in 1878 than as "Widow Gamble."

Gamble was in possession and actual occupation of

the land from the year 1859 to the time of his death in December, 1875, and his widow and family occupied it until the sale by the sheriff, and from his death to the time of the sheriffs' sale it was undivided.

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Before the sheriff's sale the plaintiffs' lessors knew in fact that such sale was to be made and they did not forbid it or protest against it, but requested one Martin Dowling to attend at the sale and bid the property in ; but there was no evidence that Dowling did attend the sale or bid at it at all.

They did not appeal to the town council of the town of Moncton from any of the assessments at any time.

The plaintiffs obtained a verdict at the trial, the learned judge who presided refusing to non suit, holding that the sheriff's sale was illegal in consequence of the assessment on the property being defective, and that the title was in the lessors of the plaintiffs as heirs of Thomas Gamble. A motion was made before the Supreme Court of New Brunswick to have this verdict set aside, and a non-suit entered, which motion was dismissed. The defendants then appealed to the Supreme Court of Canada.

*Borden* for the appellants.

The assessments were properly made, and the sale was lawful. The assessors had jurisdiction to make the assessments, and their proceedings must stand until quashed. See 38 Vic. ch. 40 (Moncton Incorporation Act) and Cons. Stats. ch. 100 sec. 16.

The action of the chairman of the town council can only be attacked by proceeding against the assessment itself.

The assessment was made against the estate of Thomas Gamble. It was so entered on the roll, and was made before the Incorporation Act came into force.

The respondents have been guilty of negligence in not

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making their claim known and moving to have the assessments quashed. They are estopped as well by their own acts as by the judgment of the assessors.

R. Barry Smith for the respondents.

I contend that the assessments were all bad, because made when Gamble was dead, and the provisions of ch. 100 Cons. Stats. in regard to assessments on estates of deceased persons not being complied with. But, at all events, the assessment for 1878 is invalid and that would vitiate the warrant. The assessment for 1878 is against "Widow Gamble." That certainly does not show on its face the property assessed and the character of the person. Cons. Stats. ch. 100 sec. 16. There is nothing in the term "widow" to show any particular relation to the property.

Then, if this assessment is bad the whole warrant is bad, and the sale under it void. There is no statutory provision authorizing a sale where some of the assessments are good and the others bad.

My learned friend says we are estopped. I submit that we cannot be estopped by silence.

Borden in reply.

As to the assessment of 1878, I submit the widow Gamble was in possession of the property, and administratrix of the estate of the owner, which is sufficient. Where the law has been specifically carried out the technicalities should not be considered.

Sir W. J. RITCHIE C. J.—This was an action of ejectment brought to recover :

All that lot of land situate in the town of Moncton, in the parish of Moncton, in the county of Westmoreland, situate, lying and being in the north-west corner of King and Cross streets, thence running westerly one hundred and thirty feet or to Edward McCarthy's line, thence north along said Edward McCarthy's line sixty-five feet or till it strikes Captain Atkinson's line, thence easterly along said line till it strikes the line of King street, thence southerly along King street to the place of beginning.

The proceedings, and admissions at the trial, were as follows :

Mr. Smith opened the plaintiff's case.

Action of Ejectment.

Mr. Smith offered in evidence a certified copy of a deed from Thomas Gamble to Stephen W. Palmer, Joshua Breau and Edward V. Tait, dated 21st July, 1868, registered 22nd July, 1868. *Locus in quo inter alia.* Read.

Also a certified copy of a deed from Stephen W. Palmer, Joshua Breau and Edward V. Tait to Thomas Gamble, dated 3rd November, 1873, acknowledged 3rd October, 1881, registered 3rd October, 1881.

Re-conveyance of same property. Read.

Agreement of counsel as follows : Read.

SUPREME COURT.

JOHN DOE on the demise of GILBERT R. ELLIOTT, and ISABELLA

his wife, CYRUS LOWELL, and LYDE L. his wife, JOHN T.

GAMBLE, TERESA GAMBLE and LILLIE GAMBLE, *Plaintiffs.*

AND

JAMES FLANAGAN and JOHANNA FLANAGAN, his wife, *Defendants.*

The plaintiff admits,—

That the assessments for 1875, '76, '77, '78, were on real estate at one time the property of Thomas Gamble, of which the *locus in quo* is a part.

That the existence of the trust deed to Messrs. Breau, Palmer and Tait was in fact unknown to the assessors during said years.

That the widow of Thomas Gamble and family occupied the *locus in quo* from the time of the death of Thomas Gamble up to time of sale.

That the preliminaries set forth in cap. 82, secs. 2, 3 and 4, acts of 1878 (except as to personal property) were performed, and that the assessments were made on a correct valuation.

That the real estate of the said Thomas Gamble was in trustees under deed at the time of assessment, and was undivided and is still undivided.

That the lessors of the plaintiff in fact knew of sale and did not forbid it or protest against it, and that they requested one Martin Dowling to attend at sale and bid it in.

That the plaintiff's lessors did not, nor did the trustees or either of them, appeal to the town council from any assessment on the *locus in quo* at any time.

That the sheriff's deed to defendant, Johanna Flanagan, is founded on assessments actually made by assessors on "the estate of Thomas

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(Signed), R. BARRY SMITH,

Attorney for plaintiffs and lessors.

The defendants admit,—

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That the property now in question is that described in the trust deed to Breau, Palmer and Tait as the third lot.

That it was assessed in 1875, 1876, 1877 in no other way than as the "estate of Thomas Gamble" and in 1878 than as "Widow Gamble."

That the lessors of the plaintiff are the heirs of Thomas Gamble referred to in deed from Breau, Palmer and Tait, 3rd October, 1881.

That the lot in question was held by Thomas Gamble in actual possession since 1859 till the trust deed.

That Gamble died in December, 1875, and that his widow administered.

That trustees lived at the time in Dorchester, Westmoreland Co.

(Signed,) BORDEN & ATKINSON,

Defendant's attorneys.

Both parties agree that all deeds may be proved by production of registry books containing them, or copies of them, without objection on that ground.

The plaintiffs were, consequently, entitled to recover unless the defendant could show that their claim to the land had been extinguished. This they attempted to do by producing a deed from the sheriff of Westmoreland to Johanna Flangan, dated the 4th of March, 1880, of the *locus in quo*, made in pursuance of a sale under a warrant authorizing him to sell the said lands for non-payment of rates in the town of Moncton.

The plaintiff objected at the trial:

First—That the assessment was bad because not assessed upon the trustees, Palmer, Breau and Tait.

Secondly—That the town had no power to sell land, at all events, not to sell for taxes in arrears.

Thirdly—That if they had power to sell there were no arrears, consequently, no power to sell.

Fourthly—That under the act of 1878 ch. 82, Moncton Assessment Act, secs. 2, 3 and 4, and under the Incorporation Act of Moncton, the real estate of defaulting ratepayers cannot in any case be sold for taxes until the personal property is exhausted. The defendant contended that the trustees, Palmer, Breau and Tait, had no power to assign or re-convey to the lessors of the plaintiff, and

that the lessors are estopped on the ground of acquiescence.

The plaintiffs made out their *prima facie* case, and, in my opinion, the purchasers under the sheriff's deed have no *locus standi* to attack the trust deed or the re-conveyance. It is contended by the plaintiffs that the assessments for 1875 and 1878 are bad. It is admitted that the property was assessed for 1875, 1876 and 1877, in no other way than as the "estate of Thomas Gamble"; and in 1878 as "Widow Gamble." It is contended that if the assessors could not obtain the names of any of the owners, but sought to rate in the name of the occupier or person having the ostensible control, then there was "no such description as to persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed."

I agree with Judge King that a description of person and property sufficient to indicate the property assessed, and the character in which the person was assessed, is essential to make an assessment against a mere occupier a binding assessment upon the estate of the real owner, and that the same is the case where an undivided estate is assessed in the name of one of the owners; therefore I agree with the learned judge that this last assessment, as it appears on the assessment list, was bad in form and substance, and was not a binding assessment against the estate of Thomas Gamble.

I also agree with the learned judge, that where a warrant is for the collection of a single sum for rates for several years, the inclusion in it of the amount of an assessment which does not appear to be either against the owner or the occupier of his property vitiates the warrant, and therefore the inclusion of the assessment of 1878, whatever may be said of the assessment of 1875, would vitiate the warrant in this case.

The owners, in this case, were not assessed; the estate of Thomas Gamble was not assessed; "the

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widow Gamble" was assessed but without any specification of the property on which she was assessed, or any indication of the capacity or character, whether as owner or or mere occupier, in which she was assessed. The owner of property cannot be bound by an assessment in which neither he nor his land is named; and there is, consequently, nothing to show that his land has been assessed, or that another has been assessed in respect of his land or liable to be assessed for it. Without such information appearing on the assessment roll, how is it possible that the provisions of sections 3 and 4 of chapter 82 of the acts of 1878 can be complied with? What then does all that was done in this case amount to but that there was no valid or binding assessment on this property? If so, how can the acts of the collector and chairman validate and make good an assessment that never existed, either against the owners of the property or against the property itself; and how could they, by an *ex parte* proceeding, sell so much of the real estate of such person, namely, the person assessed on real estate whether such person is owner or occupier thereof, for an assessment which never had a legal existence? To give the collector and chairman any authority or jurisdiction in the matter there must be, in my opinion, a legal assessment capable of being enforced, which there was not in this case for the year 1878; there being, in fact, no assessment, there could be no collection; therefore, as regards the assessment of 1878, the proceedings of the collector and chairman were simply *coram non judice*. There being no assessment to authorize a sale of any interest of the present lessors, the combined action of the collector and chairman could not legalize and give effect to a sale unauthorized by law. There was no assessment, in point of fact, as set out in the warrant, for the year 1878. In the warrant the taxes for 1878 were

stated to be against the estate of Thomas Gamble deceased. There was no such assessment; the actual assessment in 1878 was against "Widow Gamble," without reference to Thomas Gamble or his heirs or estate.

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As to the estoppel claimed I do not think the mere fact of the lessors knowing of the sale, and not forbidding, or protesting against it, would estop them from contesting its validity, nor the mere fact of the plaintiff's requesting Dowling to attend the sale and bid the property in. It does not, however, appear, Judge King says, that Dowling bid, nor that defendants knew that he was present, or was present as agent for the lessors of the plaintiff, nor indeed, that Dowling was present at all; nor does it appear that the lessors of the plaintiff knew, at the time of the sale, of the illegality of the warrant or of the facts upon which that illegality is now sought to be maintained, nor that the defendant was at all influenced by what the lessors of the plaintiff did or omitted. So far as the defendant is concerned there is no representation made to her at all, and certainly none made with the intent that it should be acted upon by her. The plaintiffs did not, by words or conduct, wilfully cause defendant to believe in a certain state of things, and thereby induce her to act on that belief or to alter her previous position, and could not have meant their representations or acts to be acted on, and they could not have been acted on. In other words, the defendants were never deceived, or induced to alter their position by any statement or act of the plaintiffs. All the admission amounts to is, that plaintiffs knew of the sale and did not forbid it or protest against it. This, in my opinion, they were not bound to do; there was no duty to speak. Then the admission says they requested one Martin Dowling to attend at the sale and bid it in. I have already stated what

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Judge King says on this point, and Judge Fraser says, "it does not appear that the female defendant, when she purchased, was aware that Dowling was present acting for the lessors, nor was the knowledge of the lessors that a sale was about to take place, such conduct on their part as could have influenced the purchaser."

Therefore, in this case, the two great ingredients mentioned in *Freeman v. Cook* (1), referred to in *Howard v. Hudson* (2) are wanting, namely, that the plaintiff intended that the defendant should act on the faith of his act or representation, nor that the defendant did so act, nor does it come within any of the following cases.

In the *Duchess of Kingston's Case* (3) the principle is thus laid down :

And in *Cairncross v. Lorimer* (4), Lord Campbell (chancellor) stated the general rules as to estoppels of this class, when the legality of the act assented to is in question, in the following words :

The doctrine is found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudices of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.

And again (5) :

Lastly in *Carr v. London and North Western Railway Co.* (6), the following are laid down by Brett L. J. (delivering the judgment of the Court of Common Pleas) as "recognized propositions of an estoppel in pais. One such proposition," says his lordship, "is, if a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did

(1) 2 Ex. 654.

(2) 2 E. & B. 1.

(3) Smith's L. C. Vol. 2, 807.

(4) 3 Macq. H. L. Cas. 829.

(5) At p. 898.

(6) L. R. 10 C. P. 307.

not in fact exist."

Another recognized proposition seems to be, that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

And another proposition is, that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

There is yet another proposition as to estoppel. If in the transaction itself which is in dispute one has lead another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist.

To the above may be added the rule enunciated by James L.J. in *ex parte Adamson*, *In re Collie* (1).

Nobody, says his lordship, ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words, or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do some thing, or to abstain from doing something by reason of what he had said or done, or omitted to say or do.

Clarke & Chapman v. Hart (2).

Lord Chelmsford:—

In the case of *Freeman v. Cooke*, Mr. Baron Parke, in delivering the judgment of the Court of Exchequer, qualified that proposition by saying: "In most cases the doctrine in *Pickard v. Sears* (3) is not to be applied, unless the representation is such as to amount to the contract or license of the party making it." So that I apprehend, where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement or

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(1) 8 Ch. D. 817.

(2) 6 H. L. Cas. 656.

(3) 6 A. & E. 469.

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I think, therefore, that the appeal should be dismissed.

STRONG J.—I am of opinion that the sale was illegal and void, and that there was no estoppel. My judgment is based on the grounds stated by Mr. Justice King in the court below.

FOURNIER J.—Concurred.

HENRY J.—I entirely concur in the views expressed that the sale was totally illegal. It was a sale under warrant for taxes assessed on an estate, and the whole sale was void. There is no evidence of concurrence in the sale, for the alleged agent did not bid and it does not clearly appear that he was even present.

I think the appeal should be dismissed.

GWYNNE J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Borden & Atkinson.*

Solicitor for respondents: *R. Barry Smith.*
