STAMP. 30 Cents.

In the Supreme Court of British Columbia.

In Chambers.

~~BETWEEN~~

Kum Shoong

Suppliant

v. s

Plaintiff

~~AND~~

The Queen

~~Defendant~~

Let all ~~the~~ parties, ~~their Solicitors or Agent~~ concerned, attend the Judge in Chambers at the Law Courts, Victoria, on Mon day the 25th day of April 189 2, at 10.30 o'clock in the fore noon, upon an application on the part of ~~the~~ Henry Slye Mason for liberty to demur and plead over to the Suppliant's Petition of right, and, in the event of the demurrer being over-ruled, that he do have ten days further time within which to deliver his statement of defence to the said Petition.

"M. W. T. Drake J."

Dated the 21st day of April 189 2.

This summons was taken out by ~~Charles Wilson~~ Edward Ernest Woolton, of Broughton Street, Victoria, Solicitor for the above named Henry Slye Mason

To H. Dallas Helmcken

Solicitor for the above named Suppliant and ~~to~~ the Honourable the Attorney General for British Columbia.

With liberty to read the hearing of this application, upon the hearing of the Petition of Right filed by the Suppliant.

SUPREME COURT.

7/92

Kum Shoong

vs.

The Queen

SUMMONS.

Recd:
21/4/92
a.g.s.

E. E. Wootton of the firm of
CHARLES WILSON,
H. Phillips Wootton & Barnard
Broughton Street,
VICTORIA, B. C.

Let right be done
"Hugh Nelson"
Lieutenant-Governor

IN THE SUPREME COURT OF BRITISH COLUMBIA.

To the QUEEN'S MOST EXCELENT MAJESTY,

Province of British Columbia,)
City of Victoria)
To Wit:-)

The Humble Petition of Kum Shoong of the City of Victoria and Province of British Columbia, by his Solicitor, Harry Dallas Helmcken of the same place, Sheweth that:-

1. Your Suppliant is a Chinese Merchant, carrying on business on Cormorant Street, in the City of Victoria.

2. At a sale of lands belonging to the Province of British Columbia by Public Auction held in the City of Victoria on the 30th day of September A.D.1873, your suppliant became the purchaser of Section 12, Block 4, North Range 6, New Westminster District and at the time of the said purchase paid $53.33 on account of same, and entered into the following contract:- "I, Kum Shoong hereby acknowledge "that at the sale of Government lands in New Westminster District, "by Public Auction held in Victoria this 30th day of September A.D. "1873, that I was the highest bidder of Catalogue Lot No.56, and "known as Block 4, Range VI, W. Section 12, and was declared the "purchaser thereof for the sum of One Dollar $1.00, subject to "conditions read at time of sale, and that I have paid the sum of "$53.33. Dollars by way of deposit and part payment of said purchase "money and complete the purchase according to the conditions".

"Kum Shoong".

"As Agent for the Vendors I ratify this sale."

3. Your Suppliant's name was entered in the books of the Land Department as the purchaser of the said land. and the said entry

so remained until on or about the 10th day of April A.D.1889, when the name of Kwong Lee was ~~wrongfully~~ *in error*, and without notice to your Suppliant, substituted for that of your Suppliant.

4. That payment of the balance due under the said contract was never demanded of your suppliant who always has been, and still is, ready and willing to complete the same upon payment of the amount justly due thereunder.

5. The said land has been assessed in your suppliant's name on the Assessment Roll of Richmond Municipality since the year 1873 up to the date hereinafter mentioned.

6. Your Suppliant has paid all taxes assessed against the said property up to, and including the year 1888.

7. On the 12th day of April 1889, a Crown Grant for the said property was issued to James Charles Prevost, Receiver of the Estate of Kwong Lee & Co.

8. The said sale was completed by the said Receiver, the said J.C. Prevost in pursuance of said contract set out in paragraph 2 hereof by payment of the balance due thereunder.

9. On the 9th day of August 1889, the said James Charles Prevost, by deed, conveyed the said property to one Henry Slye Mason, who is now the registered owner thereof.

10. Your Suppliant had no notice whatever of the issuance of the said Crown Grant, or that application had been made therefor or that the entry in the books of the Land Department had been altered from that of your suppliant, to that of Kwong Lee.

11. Your Suppliant states that the firm of Kwong Lee & Co., never had any interest in the said property, and never treated the same as an asset of the said firm.

12. Your Suppliant charges the fact to be, and the fact is, that the said H.S.Mason took the conveyance of the said land with knowledge of all the facts as herein mentioned, more particularly of the said

contract set out in paragraph 2 hereof.

Your Suppliant therefore humbly prays:-

1. That it may be declared that the said Crown Grant was issued improvidently, in error and in ignorance of your suppliant's right in the premises.
2. That the said Crown Grant may be declared to be void.
3. That the said Crown Grant may be delivered up to be cancelled.

Dated the 1st day of April A.D.1892.

"H.Dallas Helmcken".
Solicitor for Kum Shoong.

Supreme Court

6/92

Petition of Right

of

Kum Shoong

The Suppliant prays for a Statement of Defence on behalf of Her Majesty, within twenty eight days after the date hereof, or otherwise that the Petition may be taken as confessed

Recd 13/2/92 W.J.S.

Baake Jackson & Helmcken
Sols for Suppliant

IN THE SUPREME COURT OF BRITISH COLUMBIA.

Before the Hon.Mr Justice Crease.

BETWEEN

KUM SHOONG PLAINTIFF,

and

HENRY SLYE MASON DEFENDANT.

JUDGMENT.

Crease,J.

This action is brought to obtain a declaration from the Court that the Defendant is a trustee for the Plaintiff of Section 12, Block 4, North, Range 6 West, Lulu Island, New Westminster District, and that Defendant may be ordered to convey that land to the plaintiff.

It is at present registered as an absolute fee in the Land Registry Office in the name of the Defendant.

The facts out of which this claim arose, though running over a long period, are in themselves simple enough.

Some 18 years ago, on the 30 Septr 1873, by order of the Government, a public sale of a large number of 160 acre lots in Lulu Island took place in Victoria.

It was conducted by J. P. Davies & Co, well known Auctioneers in good practice and repute, and in the presence of Mr Joshua Davies, a witness in this case, who acted as his father's secretary throughout, and in whose handwriting all the entries in the account sales on the occasion were made.

He identified and proved the book produced in Court

in which the sales were recorded.

The conditions of sale were:- one-third of the price bid in cash on the fall of the hammer; one-third to be paid in one year after the sale; and the balance two years after the sale; the two latter payments to carry 8 % interest per annum.

These were the conditions read at the sale upon the due fulfilment of which the paper writing signed by Kum Shoong admits everything was made to depend. Section 12 was publicly knocked down to Kwong Lee, for 160 dollars, ($1 per acre), payable at the times and in the manner described.

It is a matter of common notoriety that Quong Lee, which translated means "The Happy Success" (at that time and for years before and after, accounted one of the richest and most substantial firms in the country), was only known by that emblem or title, until they fell into litigation and difficulties among themselves, when the names of the two brothers who composed the firm Loo Chuck Fan and Loo Chu Fan, were first publicly disclosed. Before these events they sued and were sued as appears by the records of this Court as "Quong Lee" sometimes by the misnomer of "Quong Lee & Co"

At the time of the sale, 1873, Kum Shoong, the present plaintiff, who had for some time been their manager and cashier, was considered as the representative of "Quong Lee" He testified that he was sent by both the partners, Loo Chuck Fan and Loo Chu Fan, to attend the sale. His instructions may be gathered from the result; which was, that Section 12 was bought in at the upset price of $1 per acre, and

knocked down, at the bidding of Kum Shoong, to Quong Lee, and he paid the first instalment out of the monies of Quong Lee.

The fact is admitted by the plaintiff, but he says it was charged against his salary, which must have appeared on the books of Quong Lee, but he now stateas that the purchase was for himself.

But no book of account of Quong Lee containing such an entry was produced, nor does the plaintiff beyond the above, and a statement, that he did not keep the accounts, in any way refer to these books, or shew that he had made any effort to obtain them.

He relies solely on his memory, but not implicitly on that, for the particulars of what occurred 18 years ago; and he called no other witness though Loo Chu Fan, one of the partners who sent him down to the sale, is still in the country. The entry in the original account sales on which the records of the Land Registry Office are founded,is only in the name of Quong Lee.

Kum Shoong then brings forward as the basis of his claim, a paper writing signed only by himself, which in his pleading he calls 'a contract' but on examination, this definition of its contents is scarcely supported by the facts. It is of such a peculiar character that I produce it 'in extenso'

'I,Kum Shoong hereby acknowledge that at the sale of 'Government Lands in New Westminster District, by public 'auction held in Victoria this 30th day of September 1873, 'that I was the highest bidder of Catalogue Lot No 58, and 'known as Block 4 North, Range VI West, Section 12, and was

'declared the purchaser thereof for the sum of $1 dollar
'per acre,subject to the condition read at the time of sale
'and that I have paid the sum of $53.33 dollars by way of
'deposit and part payment of the said purchase, and I under-
'take to complete the purchase according to the conditions.

Signed in English Characters. 'Kum Shoong'

'As Agent for Vendors I ratify this sale'

(Not signed by any one)

This he says was given to him after the sale, he cannot say how long after or by whom. He says Mr Davies gave him some paper, but he does not say it was this. It is not in Joshua Davies' handwriting; he knows nothing about it.

The 'onus probandi' is on him who claims, and so far is on Kum Shoong.

If this document dated on the day of the sale was intended as a receipt, of which it shows no sign, one would think that it could nothing have been given to the Lands & Works in whose possession it now is, without his exchanging for it some document in the nature of a receipt whether in his own name or that of Quong Lee.

If that were the fact, it was Kum Shoong's duty to have produced it. If such a receipt were exchanged and deposited among the Quong Lee papers as the property of Quong Lee, it should have been searched for, and, if possible, produced, or satisfactory evidence given of its contents. But this has not been done, and, as it is now before me, the document signed by Kum Shoong stands alone and incomplete. So far there is nothing inconsistent in this document with the

purchase of the lot by Quong Lee by Kum Shoong, their manager, cashier, and (as we now see) their Agent.

Sometime in February 1874 an account of the aforegoing sales was made by the Auctioneers, as Agents for the Vendors, the Government.

It is entitled ' Account of Sales, by order of Hon. R. Beaven, C.C.L & W. for account of Government' It was dated back 'nunc pro tunc' to the 30th Sep 1873, at the conclusion of it Joshua Davies certifies that,

'The above is a true copy of page 76 of the original 'sales book, kept at the time of sale, and being the record 'from which the account sales were prepared and rendered to 'the Chief Commissioner of Lands & Works'

It so chanced that in the first Account sales in the Auctioneer's official book I observed 2 lots were knocked down to William Fisher, whom I employed to bid for me. On being -so- knocked down, Mr Fisher gave up my name as the real purchaser; and it was instantly entered in Joshua Davies' handwriting in the account sales, after his name, thus:- 'W.Fisher' - 'H.P.P.Crease')('W.Fisher' - 'H.P.P.Crease' When catalogue lots 54 and 55, were knocked down to George Janes; he gave up the names of Herring & Burnaby for Lot 54, and of Pung, Pagden and Allsop for Lot 55; whereupon their names were then and there similarly inserted after Janes' own. No such change took place in Quong Lee's purchase of Section 12.

In the return sent in to Mr Beaven in 1874, these intending purchasers appear to have backed out of the sale and the name of John Janes is retained in the return for both the Catalogue lots 54 and 55,- and for Section 12 the

firm name of the House "Quong Lee" is retained with the addition of the name of "Chum Shoong" in inverted commas.

Mr Joshua Davies, who gave his evidence very frankly but with proper care, for, as he says, it all took place 18 years ago, is almost positive that he saw Kum Shoong at the sale. If so that would account for his name being added after Quong Lee, the purchaser, as the agent for that firm; his name being the only one in inverted commas. He was then known as their confidential manager and cashier, and probably the only one who spoke English. And so his name became in English eyes the equivalent of Quong Lee, and this mis-apprehension is probably the origin of the whole subsequent claim.

The following is an exact copy of the entry relating to this land in the original account sales book in Joshua Davies' handwriting and sworn to by him,

Catalogue Lot.	Block	Range	Section	Acres	Purchaser	$ per acre.	Total.
58	4N.	VI W	12	160	Quong Lee	$1	160

and this Joshua Davies certifies under his own hand to have been 'the record from which the account sales were prepared 'and rendered to the The Chief Commissioner of Lands and 'Works'

Subjoined also is an exact copy of the entry by Capt. Vintner, a temporary Clerk in the Lands and Works about the time of the sale, made in red ink, the same as was used in the case of the other sales on that day, with the alterations in black ink and pencil, (made apparently at a later

date by the Department in exact accordance with the account sales, which were not sent in until February 1874, and with their subsequent dealings with Section 12).

This I have thought best to reproduce in fac simile, as that is how it appears in a book of purchaser's prices and instalments and other particulars of Lots and country lands sold by the Government on that day, and throws light on the subsequent dealings with Section 12 :-

53, Block 44, Page 6 West, Section 12, Country Lands, New Westminster District. Gazetted as surveyed, advertised by Auction.

Date 53.

Name.	How acquired	Price per acre $ c.	Terms of Payment and Date when payable	Date when Payment made	Receipt No.	Amount Paid	Re-conveyed Book No.	Certificate of Improvement No.	Crown Grant No. & Date	Total	Lot when delivered
1873 15th Sept 30 Sept Herring & Co Herring & Co Pauce $160 [illegible]	Purchased at auction	1 00	⅓ cash ⅓ 30 Sept 74 ⅓ 30 Sept 75 Int. commenced to be charged 8% per annum	1873 30 Sept	15 D	53.33			402 12 Oct 1875	53	
				1879 16/4/79	1559 11196	106.67 132.53					

Certified correct W. Gore Com: R.W. Dep. 19/8/91

(-7-)

The omission in November 1873 of the recorded name of Quong Lee with that of Kum Shoong was probably not discovered until the next real estate transaction in the land took place. The repetition of Vintner's omission of Quong Lee's name in the New Westminster District or Richmond Municipal Assessment Roll (if it should appear, they were not produced) would at once be accounted for.

It would only require the recent rise in the price of land of which the learned Counsel spoke, accompanied by the usual enquiries by speculators of the persons whose names they see on the list of unpaid instalments, and the helpless bankruptcy of his former employers, to suggest at once to Kum Shoong all that has since taken place. The payment of taxes by itself is no proof of title. There come not unfrequently before the Court cases where a man,- having paid taxes on a vacant lot, perhaps for a friend or acquaintance of whom he has lost sight of for a number of years, erroneously fancies he has a title to it by possession. And here there is this to be said with regard to the payment of taxes in this case. Two letters of J. C. Hughes, (now dead) the Government Collector of Taxes in New Westminster District, (before the formation of the Richmond Municipality, which took place in 1880) are produced in which he calls on Kum Shoong for $17.60 arrears of taxes 'on his land in New Westminster District' There is nothing to connect this with Section 12, and the amount is different from that which obtained for the same lot in that municipality at that period, and during 5 consecutive years commencing with 1880, where the tax is set at $9.20 per annum. The figures even as a multiple or subdivision do not agree. This therefore

is of no value as evidence.

Here we have the Claimant, Kum Shoong, taking so little interest in this Section 12, which he now alleges he purchased for himself, that for years he neglected to pay taxes upon it.

And for 9 consecutive years, assuming (his name to have been on the list) presumably, receiving assessment notices and tax papers all the time (for after taxes all Municipalities are keen), yet from 1880 to 1888, he pays not a single tax until the land had become valuable and until the dissolution and collapse of Quong Lee, and up to the eve of the issue of the Crown Grant,when alarmed by a threat of legal proceedings, he gets Messrs Drake, Jackson & Helmcken to forward the payments of the arrears of taxes for him, so that it arrived only one day before the Crown Grant was issued under ~~a~~ Order of Court to Prevost.

And this brings me in natural sequence to see what notice, supposing for argument's sake, that Kum Shoong's claim had been correct, he must necessarily be expected to have received of what was going on with reference to section 12. Mr Prevost was by order of Court, known to the profession and public generally, and advertised in Victoria day after day for months, indeed, everywhere in the Province, even in Cariboo,- as having been appointed the Receiver of the Quong Lee estate.

By the general order of Court of the 1st December 1886 in which Quong Lee were represented, (Plaintiff's Solicitors acting for Loo Chuck Fan,one of the partners and Mr A.E.B. Davie, for Loo Chu Fan), Prevost, as such Receiver was empowered to sell, inter alia, Section 12 by Public Auction.

In pursuance and part fulfilment of which authority, on Wednesday the 12th June 1889, Section 12 was put up to Public Auction by Mr Joshua Davies at the City of New Westminster and in open sale purchased by Mr H. S. Mason for $3,120.

For 2 weeks previous thereto notice of the sale was advertised in the Daily Colonist in Victoria, where plaintiff then resided and was doing business. Besides this Davies caused printed circulars containing particulars and conditions of sale, accompanied by a plan of the property, to be distributed freely in New Westminster, Vancouver, Nanaimo and Victoria Cities. Yet Kum Shoong makes no sign.

On the 23rd July 1889 Loo Chuck Fan being represented by Plaintiff's Solicitors and Loo Chu Fan, the other partners being duly notified, but not appearing, or making any objection, the sale to Mason was confirmed; and the Receiver Prevost was ordered to convey the property in fee to Mason, which was accordingly done. And here I may remark, by parenthesis, that Loo Chuck Fan and Loo Chu Fan must have known why they sent Kum Shoong to the sale, and that they were the purchasers and owners of Section 12; or they would have declared it was not theirs but Kum Shoong's.

They could have had no interest in doing otherwise, had this claim been good, for none of the $3,120 could possibly come into their pockets; for after it was paid, they would still be owing to the Defendant, some $40,000, a debt which they had no means of discharging.

The Crown Grant dated 10th April 1889 in the name of Prevost had been previously obtained under another order of Court. Between the time that Kum Shoong instructed his

Solicitors to pay the arrears of taxes and the issue of the Crown Grant on the 22nd May 1889, there was ample time to have arrested that issue. And a fortiori between that time and the sale, confirmation and conveyance to Defendant on the 9th August 1889.

The fact of the sudden payment of those taxes points in the direction of an undisclosed anticipation of some steps being taken with regard to this land, which should have called for prompt action, and I note that although the complaint was made on 12th April 1889, and the conveyance to Mason made on 9th August 1889, five months after plaintiff's Solicitors paid the 9 years' taxes; the writ of summons the first direct intimation to defendant of plaintiff's claim, was not issued until the 12th September 1889, over 6 months after Plaintiff's Solicitors paid the 9 years' taxes.

A jury (and I have the same right) would be entitled to ask what was the conduct of Kum Shoong with regard to this Section from 1873 down to the present time? Was it that of a man who thought he had such a right as he now claims? The evidence shews that if he did anything he carefully abstained from enquiry. He does not state, nor does it appear in anywise in the evidence, that from 1873 to 1888 he ever voluntarily asked a single question of any of the public officers belonging to the Land Office whose duty it would have been to give authoritative answers to his queries. More than that, their attention would have been thereby directed, to the rectification of Vintner's omission.

We don't know when that was discovered; it could not have been before 1874, possibly like many, and indeed I may

say most conveyancing mistakes, this was not revealed until enquiries into title were instituted, or until a change of possession and dealing with the land was in contemplation, and that the mistake went on, unobserved because not enquired into, from list to list, one copying from the other,- no payment either of tax or instalment being made in the interim to fix attention upon it - until something arose which made it necessary to go to the root of the title, the original sale and record thereof to Quong Lee.

The next thing one is tempted to enquire is:- Why Kum Shoong did not take advantage of the safeguards of the Land Registry Act? Why did he not register the documenthis pleadings now call a contract? Why did he not register the document whatever it was, which presumably he received from the Land Office, when he gave up the incomplete paper writing on which he now bases his claim.

It is hardly conceivable that as an experienced man of business he did not receive something in writing by way of receipt in exchange for the paper writing in which he nominally binds himself to two years payment to the Government.

If he did not, it is to that extent a confirmation of the title of Quong Lee; for Plaintiff must have thought it was unnecessary in that it was knocked down on his own bidding to Quong Lee; and then and there publicly placed on record in the official account of the sales, which effectually bound the Government without any further interference on his part on behalf of Quong Lee.

His Solicitors may not unfairly be considered to have thought so too; for by the payment in one lump of 9 years

taxes they must be taken to have known whether heclaimed the land for himself, or to preserve it for Quong Lee's estate. They do not appear as protesting on behalf of Kum Shoong against the sale to defendant, and raising an issue in that behalf, but as assenting to the sale and to the confirmation of it for Quong Lee. It was the duty of the Receiver, having no personal interest in the matter, and he seems to have discharged it faithfully, to gather in every outstanding equity and the legal estate into one in order to complete the title before the sale.

Thus much as to the general facts of the case.

Into these Defendant's Counsel only cursorily entered. He didnt even put his client in the witness box,- an omission on which Mr Helmcken commented at the close of the case. While producing all the documentary evidence and merely outlining the facts I have given he placed reliance on the extended public advertisements given of the sale under an order of Court, in New Westminster, Nanaimo, Victoria and Vancouver; on the open, fair and candid manner in which it was conducted; on the fact of the Crown Grant having been granted,(after all usual precautions and notices),to Prevost, as Receiver; and on the conveyance and confirmation by the Court to Mason as a purchaser for value from a public officer, without notice of any adverse claim; that if anything was to be attacked, it should be the Crown Grant; and that the only way in which this should be done, was, not by a side wind, not even by a mandamus, but by a petition of right; and that plaintiff by this action had mistaken his remedy, if he had any.

Scire facias

That no fraud was pleaded and none charged.

That Mason was a purchaser from a registered holder for value; and that even had there been notice of an otherwise valid equitable claim, but unregistered, he would not then under the Land Registry Act which he had pleaded, have been affected by it.

Now as to its being a purchase from a registered holder I am not sure that Mr Wilson's position in that particular is so strong as he imagines. For the Crown Grant was not registered (at least, I am not aware that it was) before the sale was effected - if the purchase at auction constituted the sale - Consequently in that view Mr ~~Wilson~~ -Mason- did not purchase from a 'registered' holder. The Act does not speak of a purchase from an owner who shall afterwards have his deed registered before the purchaser's deed - though that is the natural sequence of registration under the Act when the purchaser's title is submitted for registry.

First in order of registration comes the Crown Grant, then the Conveyance; and this appears from the Certificate of Title.

This Certificate of Title, which, although put in evidence, plaintiff's Counsel had not seen during the trial, besides giving the order of this registration, served a purpose in defendant's favour; inasmuch as it answers by anticipation the plaintiff's objection:- That Prevost had not proved the signature and execution of his deed. Because by the last part of Section 17 of the Land Registry Act, it is declared, that " every certificate of title shall be " " received as prima facie evidence in all Courts of Jus- " " tice in the Province of the particulars therein set " " forth."- so that this Certificate of Title is prima facie

evidence, (1) of the power to sell under the order of Court, (2) of the due acknowledgement, execution and registration of the Crown Grant, (3) of the order to sell and convey Section 12 to Mason, and (4) of the due execution, acknowledgement and registration of the Conveyance from Prevost to Mason.

And when we consider that all these steps were duly and persistently advertised as the prelude to sales on behalf of Quong Lee, and that Kum Shoong could have contested registration at any stage of the process,- could have registered what the pleadings call his contract, or the receipt for it, as a charge, which would have effectually barred registration until it had been cancelled, or that he could have entered a Caveat, and put his claim in issue in a short, speedy and inexpensive manner,- we must conclude that he had ample opportunityes of bringing forward and maintaining his claim.

And as to the notice, it seems to me, that any one examining the papers and books in the Land Office in conjunction with the account sales, and the rectification of a manifest error, and considering himself bound by what he sees, would have some difficulty in persuading himself that Kum Shoong bought for himself in the name of Quong Lee, (for that is the only alternative); especially when he sees that the Government have considered and decided that Quong Lee and Quong Lee alone (or, their representative under the order of Court, Prevost) was entitled to the Crown Grant.

But with this the defendant really had nothing to do. And this probably was the reason why the defendant was not put into the witness box, a fact on which plaintiff's

Counsel commented, when he put Defendant's examination before the trial in evidence instead.

The utmost which that evidence discloses is,- that defendant thought that sometime in the summer of 1889 he made a search in the Land Office and that he saw the so-called certificate (in the statement of claim called "contract") and that he certainly saw the original account sales, where the property was knocked down to Quong Lee.

On being asked if he had given any notice to Kum Shoong that he was about to purchase this property, he replied, "No: I bought it at auction"; implying, in answer to the meaning rather than the wording of the question,- that there was no necessity for giving Kum Shoong any notice at all.

It does not appear from this limited evidence that the defendant saw any book-entry containing Kum Shoong's name with or without that of Quong Lee.

But if he did see all these particulars in the view I take of the purchase I cannot see how he could have been affected by it.

It was the Government and that alone which could issue the Crown Grant. That was the Act of the Crown. If it is wrongly done, or issued unadvisedly, there is the way prescribed by law for its rectification; and if, too late, for rectification, (though I express no opinion to that effect), possibly for compensation where there is a real claim.

The Plaintiff must see that he can have no claim on the Defendant, except on account of the Crown Grant having been wrongly granted to the Receiver; and if that were the case, then the application should have been made in the

proper quarter to set that right.

This the plaintiff has not even attempted, although he has had abundant opportunity of doing so.

Moreover the purchase of Section 12 in open market, cost the defendant $3210. I do not see any suggestion from Kum Shoong to repay him that sum; or even to re-imburse the Receiver (or the Defendant) the amount of instalments and interest without the payment of which the Receiver for Quong Lee could not have secured the Crown Grant,- conduct which is in direct violation of the principle that he who comes for equity should do equity.

The absence of any such offer is not a bad measure of plaintiff's belief in the goodness of his own claim.

Plaintiff's counsel argued, or rather assumed the position, - for there was no direct statement of the fact, or any argument whatever on either side, on the cases produced on plaintiff's behalf,- that if there was an alleged equitable claim in any one to the land before registration, that could follow down through the title, and render subsequent purchasers and holders who had ever heard of or were likely to hear of it,insecure.

That is neither the spirit nor the object of the Land Registry Act, which alone governs us.

That Statute gives every opportunity for the assertion of every equitable claim up to a certain point. To those who use common diligence it offers every protection; but it will not condone long years of deliberate laches against a duly registered title, even in the assertion of a well founded equitable right and allow such wilful neglect (I do not speak of cases of fraud, or disability) to stain a title

in indefinite devolution.

Our Land Registry Act is not like the (Ontario) U.C. Registry Act of 1865 - a Registration of Deeds, which can be followed in certain cases by outstanding equitable claims through various transfers, and obliges purchasers to go out of the record to search for adverse equities, which may or may not exist,- clouding a title with uncertainties from the outset, and materially depreciating its market value.

When challenged by the opposite Counsel to produce precedents to support his view, plaintiff's Counsel was unable to cite a single English or British Columbian case in aid of his contention, for the very sufficient reason that there are none.

He mentioned however without argument or explanation the following old Ontario cases (1870) :-

1st. Peterkin v McFarlane (Appeal) 9 Ont: Rep: 429 to p. 475.

2nd Forrester v Campbell, 17 Grant's Chan: Rep:380.

3rd McLennan v Macdonald, 18 Grant Ch: R: 502.

4th Weigle v Setternington, 19 Grant Chy: 512.

and I can only gather from reading them, in what way the learned Counsel wished them to apply to his case. The first and third were cases, the decisions on which were based on fraud and therefore do not apply here. Fraud is not pleaded or charged, or even insinuated, here; nor do I see anywhere a suspicion of it, or of any attempt at concealment, or of that kind of secrecy which is said to be a badge of fraud.

The second and fourth are under old Ontario (U.C.) Registry Act of 1866, of which I shall treat later on. Neither of them touches the claim now at issue. It is a

dangerous thing to apply precedents arising in one jurisdiction under one system of land laws to circumstances arising in a different jurisdiction under a very different system of land laws. Although the general principles of law may be the same throughout, but differently applicable according to the difference in legislation.

These Ontario (U.C.) cases arise under a very different system of Registration from that which obtains in B.C. It is a Registration of Deeds, with all the defects of insecurity of title and expense which accompany that kind of registration; the very objects which our Act - by Registration, by Title, to the freehold (all lesser estates and interests in real estate and charges being registered as 'Charges') - is intended to prewent.

The Canadian (Upper Canada) Act of 1865, although it gives a priority to registered over unregistered instruments otherwise of equal value, has been construed by the Ontario Courts to have recognized certain outstanding unregistered equitable claims as affecting actual registrations. For sec. 64 of the 29 Vict. cap 24,1865, (Upper Canada) which rules the cases cited allows 'the registry of any instrument and ' its registry in equity is to constitute notice of such ' instrument to all persons claiming any interest in such ' lands subsequent to such registry.'

Section 66 (of the same U.C.Act) declares, that ' no ' equitable lien, charge or interest affecting land shall ' be deemed valid in any Court in this province ' (then Upper Canada) ' after this Act shall come into operation ' as against a registered instrument executed by the same ' party, his heirs or assigns ' &c.

While Section 65 (which I have purposely quoted last) enacting that " Priority of registration shall in all cases " " prevail," proceeds to nullify the complete effect of its language by adding, " unless before such prior registration " " there shall have been actual notice of the prior instru- " " ment by the party claiming under the prior registration. "

And this serious qualification the Court in Ontario after some hesitation swaying backwards and forwards have at last extended to apply and qualify the otherwise distinct wording and enactment of Sections 64 and 66.

The rault is that there - (at least in the case of foreign law here cited) as laid down by Mowat,V.C. in Forrester v Campbell,p.385," It being quite certain that some equitable " interests are not avoided or intended to be avoided against " registered instruments with notice,- the 66th Section must " be limited in that way as to all equitable interests."

Consequently instead of keeping the old doctrine of notice,the learned Judge who decided in that case,practically determined that an Act intended to give greater security to registered instruments actually had the effect of " giving " a more extensive effect to notice than the Courts of Canada " (and I will add there, of Great Britain), " had previously " given."

" The effect which the Court had previously given," was at the time of the passing of the 1865 Act, " to require " proof of actual notice (5 Gr.258.- 8 Gr.37.- 9 Gr.340.- 11 " Gr.303, and many others) before the completion of the " transaction; and notice after that time and before regis- " tration would not have been sufficient to postpone the " instrument first executed."

And this in the face of a general movement among jurists and legislators in the direction of establishing the principle of the non-admittance of notice in any case against a registered title - a principle which since 1865, a quarter of a century.ago, has found practical expression in the Torrens Act, our own Acts and the Acts now in force in the Dominion, for registration by Title.

By its registry of all instruments whether conveying an equitable interest or a fee simple on an equal footing, its memorials and abstracts, the registration by deeds, the U.C.Act of 1865 is in several important respects defective as compared with our Act.

And judging by the extension of the Torrens Act, based on the same principle as our own, to the Western portions of old Canada where it meets with much acceptance, the general tendency of Canadian legislation on the registration of titles to real estate would seem to be forward, in the direction of extending the principle of Registration by Title as far as practicable over the Dominion.

The B. C. Land Registry Act (very briefly stated) by Section 13, provides, ' that every person claiming to be ' ' the legal owner in fee simple of real estate ' by application under a form given in the Act, and after production of his title deeds and satisfying the Registrar that a prima facie title has been established by the Applicant, the Registrar may register the title of such applicant in a Book to be called ' Register of Absolute Fees ' &c.

By Section 18,

The registered owner of an absolute fee shall be deemed to be the owner of the land (on the register) for such a

freehold as he legally possesses therein, subject only to such registered charges as appear existing thereon and to the rights of the Crown.

Equitable rights and lesser estates than a freehold though subordinated to the legal fee are preserved by registration under Section 19, which provides that :-

' Every person claiming any other or less estate than the ' absolute fee, or any mortgage or other incumbrance upon ' or any equitable interest whatever in real estate (other ' than a Judgment Crown debt or leasehold interest in ' possession for a term not exceeding 3 years) may apply to ' the Registrar for registration thereof in the form ' &c; and the Registrar after examination of the title deeds and being satisfied as to his having a prima facie title ' may ' register the title of such applicant in a Book to be ' called the Register of Charges, '&c.

And (Sec. 24) this whether a present and vested or future and contingent interest.

By Sec.25, no equitable mortgage or lien by deposit of title deeds and memorandum is registrable.

By Sec.29, a lis pendens is registrable as a charge against any real estate, which is the subject of an action.

By Sec.32, The Registration of a Charge is notice to every person dealing with the real estate against which such charge has been registered of the estate or interest in respect of which such charge has been registered.

This is followed by the summary Section 35, enacting, That ' no purchaser for valuable consideration of any ' registered real estate or registered interest in real ' estate shall be affected by any notice expressed, implied

' or constructive of any unregistered title, interest or
' disposition affecting such real estate, other than a
' leasehold interest in possession for a term not exceeding
' three years, any rule of law or equity to the contrary
' notwithstanding.'

From even this cursory examination it will be gathered that the present application with the cases cited constitutes an indirect attack on the leading principle of the B.C.Land Registry Act, which warrants me in saying, that the principle of registration as shewn in the Upper Canada Acts was considered many years ago, when framing the present B. C. Land Registry Act, and set aside in favor of our Act. Also that more than a quarter of a century's experience of the working of the B. C. Act, has shewn that for cheapness, simplic. ity, effectiveness, gradual improvement of title and marketable value, Registration by Title has the advantage over all other systems for the registration of titles to real estate.

Summing up all these considerations I am clearly of opinion that what Kum Shoong did, when he acted voluntarily at all, was from the first as Agent for Quong Lee and not for himself.

There would have been an absurdity in Loo Chuck Fan and Loo Choo Fan sending him to the sale to buy for himself.

He had then, we cannot but consider, authority to go to the sale, and purchase as he did Section 12 for Quong Lee.

His own claim, was, I have little doubt, an afterthought, almost forced on him (I can even believe, at the first,

unwillingly), by the mistake of Vintner and its propagation by copying into the Provincial and Municipal Assessment Rolls, and their application to him for payment of, really, Quong Lee's taxes.

The Lands and Works discovered this before they could make out the Crown Grant and rectified it by reference to the root of the title, the official account sales, which recorded the sale to Quong Lee through the medium of Kum Shoong, for a considerable time previous to 1873, their alter ego. Then we have the absence of all claim or even enquiry by Kum Shoong from 1873 to the commencement of this action, the long delayed payment of taxes, and total non-payment of instalments. Then we have the omission by Vintner made in September before the official account sales came in five months later, but were probably not gone over until later on.

All these considerations point to the same conclusion.

The fall of Quong Lee (no longer 'The Happy Success'), and the rise in the value of the Land on Lulu Island, and the consequent enquiries of speculators from nominal owners in default, must have had their effect on a Chinaman's mind, and may have led him to think that there was a sort of reversionary right after the fall of the house, in himself,, or at all events he could build on the mistake to derive some collateral benefit from maintaining it. Unfortunately for him the sale to Quong Lee was too clear to admit of a doubt with Loo Chu Fan here to-day, (uncalled) to confirm it, and all plaintiff's acts were charged with this fiduciary character.

The order of Court of the 22nd May 1885 appointing Prevost Receiver of the Quong Lee Estate, of which Plaintiff

could not have been ignorant. The duty of the Receiver to call in all outstanding equities and merge them in the fee.

The order of Court of the 1st Dec 1886, authorizing the sale.

The order of Court under which Prevost, who as Receiver, received the Crown Grant.

The open publicity and advertisement of every dealing with the land.

The concurrence of Plaintiff's Solicitors and Quong Lee (who authorized the purchase) in the Crown Grant and subsequent sale and confirmation, make it in my opinion an irresistible conclusion that Kum Shoong had no title ~~to~~ whatever to the land.

Thus, much is patent to me on the merits.

But were it otherwise; were there in fact in him an outstanding equity for so many years unasserted, I think ~~the~~ plaintiff, by his laches and by the provisions of the Land Land Registry Acts, would be excluded from taking advantage of it, as against Mason.

And that if the Crown Grant had been improperly or unadvisedly granted to the Receiver the remedy of the Plaintiff, under the Judgment of the late Mr Justice Gray in

Clark &))
) v Regina
Matthews)

and Jacques v Regina,

lay in the direction of a Petition of Right, and not by the present action against the defendant.

" For all these reasons therefore it is considered that "
" judgment should be given, and it is hereby given for the "

' Defendant, and with the usual accompaniment of costs.'

'Henry P.Pellew Crease'
'J'

Registrars, &c, Upper Canada.

Extracts.

29 Vict.)
Cap.24.) 1865

Sec 64. The registry of any instrument under this Act, or any former Act shall in equity constitute notice of such instrument to all persons claiming any interest in such lands subsequent to such registry.

Sec 65. Priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument by the party claiming under the prior registration.

Sec 66. No equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall not be allowed to prevail in any case against the provisions of this Act.

Supreme Court.

Kum Shoong

vs

Henry Slye Mason.

Judgment

Drake J.

1892

Crease, J.:—

This action is brought to obtain a declaration from the Court that the Defendant is a trustee for the Plaintiff of section 12, Block 4, North, Range 6 West, Nelson Island, New Westminster District and that defendant may be ordered to convey that land to the Plaintiff.

It is at present registered as an absolute fee in the Land Registry Office in the name of the Defendant.

The facts out of which this claim arose, though running over a long period, are in themselves simple enough.

Some 18 years ago on the 30th Sept. 1873, by order of the Government, a public sale of a large number of 160 acre lots in Nelson Island took place in Victoria.

It was conducted by T. P. Davis & Co well known auctioneers in good practice and repute, and in the presence of Mr. Joshua Davis a witness in this case who acted as his fathers secretary throughout, and in whose hand writing all the entries in the account Sales on this occasion were made.

He identified and proved the book produced in Court.

in which the sales were recorded.

The conditions of sale were:- one-third of the price bid in cash on the fall of the hammer; one-third to be paid in one year after the sale; and the balance two years after the sale; the two latter payments to carry 8 % interest per annum.

These were the conditions read at the sale upon the due fulfilment of which the paper writing signed by Kum Shoong admits everything was made to depend. Section 12 was publicly knocked down to Kwong Lee, for 160 dollars, ($1 per acre), payable at the times and in the manner described.

It is a matter of common notoriety that Quong Lee, which translated means "The Happy Success" (at that time and for years before and after, accounted one of the richest and most substantial firms in the country), was only known by that emblem or title, until they fell into litigation and difficulties among themselves, when the names of the two brothers who composed the firm Loo Chuck Fan and Loo Chu Fan, were first publicly disclosed. Before these events they sued and were sued as appears by the records of this Court as "Quong Lee" sometimes by the misnomer of "Quong Lee & Co"

At the time of the sale, 1873, Kum Shoong, the present plaintiff, who had for some time been their manager and cashier, was considered as the representative of "Quong Lee" He testified that he was sent by both the partners, Loo Chuck Fan and Loo Chu Fan, to attend the sale. His instructions may be gathered from the result; which was, that Section 12 was bought in at the upset price of $1 per acre, and

knocked down, at the bidding of Kum Shoong, to Quong Lee, and he paid the first instalment out of the monies of Quong Lee.

The fact is admitted by the plaintiff, but he says it was charged against his salary, which must have appeared on the books of Quong Lee, but he now stateas that the purchase was for himself.

But no book of account of Quong Lee containing such an entry was produced, nor does the plaintiff beyond the above, and a statement, that he did not keep the accounts, in any way refer to these books, or shew that he had made any effort to obtain them.

He relies solely on his memory, but not implicitly on that, for the particulars of what occurred 18 years ago; and he called no other witness though Loo Chu Fan, one of the partners who sent him down to the sale, is still in the country. The entry in the original account sales on which the records of the Land Registry Office are founded,is only in the name of Quong Lee.

Kum Shoong then brings forward as the basis of his claim, a paper writing signed only by himself, which in his pleading he calls "a contract; but on examination, this definition of its contents is scarcely supported by the facts. It is of such a peculiar character that I produce it "in extenso!

"I,Kum Shoong hereby acknowledge that at the sale of "Government Lands in New Westminster District, by public "auction held in Victoria this 30th day of September 1873, "that I was the highest bidder of Catalogue Lot No 58, and "known as Block 4 North, Range VI West, Section 12, and was

"declared the purchaser thereof for the sum of $1 dollar "per acre,subject to the condition read at the time of sale "and that I have paid the sum of $53.33 dollars by way of "deposit and part payment of the said purchase, and I under- "take to complete the purchase according to the conditions.

Signed in English Characters. "Kum Shoong"

"As Agent for Vendors I ratify this sale"

(Not signed by any one)

This he says was given to him after the sale, he cannot say how long after or by whom. He says Mr Davies gave him some paper, but he does not say it was this. It is not in Joshua Davies' handwriting; he knows nothing about it.

The "onus probandi" is on him who claims, and so far is on Kum Shoong.

If this document dated on the day of the sale was intended as a receipt, of which it shows no sign, one would think that it could nothing have been given to the Lands & Works in whose possession it now is, without his exchanging for it some document in the nature of a receipt whether in his own name or that of Quong Lee.

If that were the fact, it was Kum Shoong's duty to have produced it. If such a receipt were exchanged and deposited among the Quong Lee papers as the property of Quong Lee, it should have been searched for, and, if possible, produced, or satisfactory evidence given of its contents. But this has not been done, and, as it is now before me, the document signed by Kum Shoong stands alone and incomplete. So far there is nothing inconsistent in this document with the

purchase of the lot by Quong Lee by Kum Shoong, their manager, cashier, and (as we now see) their Agent.

Sometime in February 1874 an account of the aforegoing sales was made by the Auctioneers, as Agents for the Vendors, the Government.

It is entitled " Account of Sales, by order of Hon. R. Beaven, C.C.L & W. for account of Government" It was dated back "nunc pro tunc" to the 30th Sep 1873, at the conclusion of it Joshua Davies certifies that,

"The above is a true copy of page 76 of the original "sales book, kept at the time of sale, and being the record "from which the account sales were prepared and rendered to "the Chief Commissioner of Lands & Works"

It so chanced that in the first Account sales in the Auctioneer's official book I observed 2 lots were knocked down to William Fisher, whom I employed to bid for me. On being knocked down, Mr Fisher gave up my name as the real purchaser; and it was instantly entered in Joshua Davies' handwriting in the account sales, after his name, thus:- "W.Fisher" - "H.P.P.Crease")("W.Fisher" - "H.P.P.Crease" When catalogue lots 54 and 55, were knocked down to George Janes; he gave up the names of Herring & Burnaby for Lot 54, and of Pung, Pagden and Allsop for Lot 55; whereupon their names were then and there similarly inserted after Janes' own. No such change took place in Quong Lee's purchase of Section 12.

In the return sent in to Mr Beaven in 1874, these intending purchasers appear to have backed out of the sale and the name of John Janes is retained in the return for both the Catalogue lots 54 and 55,- and for Section 12 the

firm name of the House "Quong Lee" is retained with the addition of the name of "Chum Shoong" in inverted commas.

Mr Joshua Davies, who gave his evidence very frankly but with proper care, for, as he says, it all took place 18 years ago, is almost positive that he saw Kum Shoong at the sale. If so that would account for his name being added after Quong Lee, the purchaser, as the agent for that firm; his name being the only one in inverted commas. He was then known as their confidential manager and cashier, and probably the only one who spoke English. And so his name became in English eyes the equivalent of Quong Lee, and this mis-apprehension is probably the origin of the whose subsequent claim.

The following is an exact copy of the entry relating to this land in the original account sales book in Joshua Davies' handwriting and sworn to by him,

Catalogue Lot.	Block	Range	Section	Acres	Purchaser	$ per acre.	Total.
58	4N.	VI W	12	160	Quong Lee	$1	160

and this Joshua Davies certifies under his own hand to have been "the record from which the account sales were prepared "and rendered to the The Chief Commissioner of Lands and "Works"

Subjoined also is an exact copy of the entry by Capt. Vintner, a temporary Clerk in the Lands and Works about the time of the sale, made in red ink, the same as was used in the case of the other sales on that day, with the alterations in black ink and pencil, (made apparently at a later

date by the Department in exact accordance with the account sales, which were not sent in until February 1874, and with their subsequent dealings with Section 12).

This I have thought best to reproduce in fac simile, as that is how it appears in a book of purchaser's prices and instalments and other particulars of Lots and country lands sold by the Government on that day, and throws light on the subsequent dealings with Section 12 :-

Date. 53.

53, Block 4 N, Range 6 West, Section 12, Country Lands, New Westminster District.
Gazetted as surveyed, advertised by auction

Date	Name	How acquired	Acreage	Price per acre $ ¢	Terms of payment and date when payable	Date when paid	Certificate of Payment No.	Amount paid $ ¢	Pre-emption Record No.	Certificate of Improvement No.	Crown Grant No. Date	Total	To whom delivered
1873 30 Sept (1873 30 Sept)	[illegible] (Quong Lee) Price $160	Purchased at Auction	160	1 —	1/3 cash; 1/3 30 Sept 1874; 1/3 30 Sept 1875; Int. on unpaid principal @ 8% per annum	1873 30 Sept; 1889 10th April Interest 4/4/89	15 D; 1889 10th April 1196 Victoria	53.33; 106.67; 132.53			4082 12 April 1889	292.53	

Crown Grant issued to James Charles Prevost Receiver of all the estate & effects of Quong Lee by order of the Supreme Court dated 21 May 1885
O.F.

Certified Correct.
W. S. Gore.
Dep. Com. L. & W.
19/8/91

H.P.P.G.

The omission in November 1873 of the recorded name of Quong Lee with that of Kum Shoong was probably not discovered until the next real estate transaction in the land took place. The repetition of Vintner's omission of Quong Lee's name in the New Westminster District or Richmond Municipal Assessment Roll (if it should appear, they were not produced) would at once be accounted for.

It would only require the recent rise in the price of land of which the learned Counsel spoke, accompanied by the usual enquiries by speculators of the persons whose names they see on the list of unpaid instalments, and the helpless bankruptcy of his former employers, to suggest at once to Kum Shoong all that has since taken place. The payment of taxes by itself is no proof of title. There come not unfrequently before the Court cases where a man,- having paid taxes on a vacant lot, perhaps for a friend or acquaintance of whom he has lost sight of for a number of years, erroneously fancies he has a title to it by possession. And here there is this to be said with regard to the payment of taxes in this case. Two letters of J. C. Hughes, (now dead) the Government Collector of Taxes in New Westminster District, (before the formation of the Richmond Municipality, which took place in 1880) are produced in which he calls on Kum Shoong for $17.60 arrears of taxes "on his land in New Westminster District" There is nothing to connect this with Section 12, and the amount is different from that which obtained for the same lot in that municipality at that period, and during 5 consecutive years commencing with 1880, where the tax is set at $9.20 per annum. The figures even as a multiple or subdivision do not agree. This therefore

is of no value as evidence.

Here we have the Claimant, Kum Shoong, taking so little interest in this Section 12, which he now alleges he purchased for himself, that for years he neglected to pay taxes upon it.

And for 9 consecutive years, assuming (his name to have been on the list) presumably, receiving assessment notices and tax papers all the time (for after taxes all Municipalities are keen), yet from 1880 to 1888, he pays not a single tax until the land had become valuable and until the dissolution and collapse of Quong Lee, and up to the eve of the issue of the Crown Grant,when alarmed by a threat of legal proceedings, he gets Messrs Drake, Jackson & Helmcken to forward the payments of the arrears of taxes for him, so that it arrived only one day before the Crown Grant was issued under an Order of Court to Prevost.

And this brings me in natural sequence to see what notice, supposing for argument's sake, that Kum Shoong's claim had been correct, he must necessarily be expected to have received of what was going on with reference to section 12. Mr Prevost was by order of Court, known to the profession and public generally, and advertised in Victoria day after day for months, indeed, everywhere in the Province, even in Cariboo,- as having been appointed the Receiver of the Quong Lee estate.

By the general order of Court of the 1st December 1886 in which Quong Lee were represented, (Plaintiff's Solicitors acting for Loo Chuck Fan,one of the partners and Mr A.E.B. Davie, for Loo Chu Fan), Prevost, as such Receiver was empowered to sell, inter alia, Section 12 by Public Auction.

In pursuance and part fulfilment of which authority, on Wednesday the 12th June 1889, Section 12 was put up to Public Auction by Mr Joshua Davies at the City of New Westminster and in open sale purchased by Mr H. S. Mason for $3,120.

For 2 weeks previous thereto notice of the sale was advertised in the Daily Colonist in Victoria, where plaintiff then resided and was doing business. Besides this Davies caused printed circulars containing particulars and conditions of sale, accompanied by a plan of the property, to be distributed freely in New Westminster, Vancouver, Nanaimo and Victoria Cities. Yet Kum Shoong makes no sign.

On the 23rd July 1889 Loo Chuck Fan being represented by Plaintiff's Solicitors and Loo Chu Fan, the other partners being duly notified, but not appearing, or making any objection, the sale to Mason was confirmed; and the Receiver Prevost was ordered to convey the property in fee to Mason, which was accordingly done. And here I may remark, by parenthesis, that Loo Chuck Fan and Loo Chu Fan must have known why they sent Kum Shoong to the sale, and that they were the purchasers and owners of Section 12; or they would have declared it was not theirs but Kum Shoong's.

They could have had no interest in doing otherwise, had this claim been good, for none of the $3,120 could possibly come into their pockets; for after it was paid, they would still be owing to the Defendant, some $40,000, a debt which they had no means of discharging.

The Crown Grant dated 10th April 1889 in the name of Prevost had been previously obtained under another order of Court. Between the time that Kum Shoong instructed his

Solicitors to pay the arrears of taxes and the issue of the Crown Grant on the 22nd May 1889, there was ample time to have arrested that issue. And a fortiori between that time and the sale, confirmation and conveyance to Defendant on the 9th August 1889.

The fact of the sudden payment of those taxes points in the direction of an undisclosed anticipation of some steps being taken with regard to this land, which should have called for prompt action, and I note that although the complaint was made on 12th April 1889, and the conveyance to Mason made on 9th August 1889, five months after plaintiff's Solicitors paid the 9 years' taxes; the writ of summons the first direct intimation to defendant of plaintiff's claim, was not until the 12th September 1889, over 6 months after Plaintiff's Solicitors paid the 9 years' taxes.

A jury (and I have the same right) would be entitled to ask what was the conduct of Kum Shoong with regard to this Section from 1873 down to the present time? Was it that of a man who thought he had such a right as he now claims? The evidence shews that if he did anything he carefully abstained from enquiry. He does not state, nor does it appear in anywise in the evidence, that from 1873 to 1888 he ever voluntarily asked a single question of any of the public officers belonging to the Land Office whose duty it would have been to give authoritative answers to his queries. More than that, their attention would have been thereby directed, to the rectification of Vintner's omission.

We don't know when that was discovered; it could not have been before 1874, possibly like many, and indeed I may

say most conveyancing mistakes, this was not revealed until enquiries into title were instituted, or until a change of possession and dealing with the land was in contemplation, and that the mistake went on, unobserved because not enquired into, from list to list, one copying from the other,- no payment either of tax or instalment being made in the interim to fix attention upon it - until something arose which made it necessary to go to the root of the title, the original sale and record thereof to Quong Lee.

The next thing one is tempted to enquire is:- Why Kum Shoong did not take advantage of the safeguards of the Land Registry Act? Why did he not register the documenthis pleadings now call a contract? Why did he not register the document whatever it was, which presumably he received from the Land Office, when he gave up the incomplete paper writing on which he now bases his claim.

It is hardly conceivable that as an experienced man of business he did not receive something in writing by way of receipt in exchange for the paper writing in which he nominally binds himself to two years payment to the Government.

If he did not, it is to that extent a confirmation of the title of Quong Lee; for Plaintiff must have thought it was unnecessary in that it was knocked down on his own bidding to Quong Lee; and then and there publicly placed on record in the official account of the sales, which effectually bound the Government without any further interference on his part on behalf of Quong Lee.

His Solicitors may not unfairly be considered to have thought so too; for by the payment in one lump of 9 years

taxes they must be taken to have known whether heclaimed the land for himself, or to preserve it for Quong Lee's estate. They do not appear as protesting on behalf of Kum Shoong against the sale to defendant, and raising an issue in that behalf, but as assenting to the sale and to the confirmation of it for Quong Lee. It was the duty of the Receiver, having no personal interest in the matter, and he seems to have discharged it faithfully, to gather in every outstanding equity and the legal estate into one in order to complete the title before the sale.

Thus much as to the general facts of the case.

Into these Defendant's Counsel only cursorily entered. He didnt even put his client in the witness box,- an omission on which Mr Helmcken commented at the close of the case. While producing all the documentary evidence and merely outlining the facts I have given he placed reliance on the extended public advertisements given of the sale under an order of Court, in New Westminster, Nanaimo, Victoria and Vancouver; on the open, fair and candid manner in which it was conducted; on the fact of the Crown Grant having been granted,(after all usual precautions and notices),to Prevost, as Receiver; and on the conveyance and confirmation by the Court to Mason as a purchaser for value from a public officer, without notice of any adverse claim; that if anything was to be attacked, it should be the Crown Grant; and that the only way in which this should be done, was, not by a side wind, not even by a mandamus, but by a petition of right; and that plaintiff by this action had mistaken his remedy, if he had any.

That no fraud was pleaded and none charged.

That Mason was a purchaser from a registered holder for value; and that even had there been notice of an otherwise valid equitable claim, but unregistered, he would not then under the Land Registry Act which he had pleaded, have been affected by it.

Now as to its being a purchase from a registered holder I am not sure that Mr Wilson's position in that particular is so strong as he imagines. For the Crown Grant was not registered (at least, I am not aware that it was) before the sale was effected - if the purchase at auction constituted the sale - Consequently in that view Mr ~~Wilson~~ Mason did not purchase from a "registered" holder. The Act does not speak of a purchase from an owner who shall afterwards have his deed registered before the purchaser's deed - though that is the natural sequence of registration under the Act when the purchaser's title is submitted for registry.

First in order of registration comes the Crown Grant, then the Conveyance; and this appears from the Certificate of Title.

This Certificate of Title, which, although put in evidence, plaintiff's Counsel had not seen during the trial, besides giving the order of this registration, served a purpose in defendant's favour; inasmuch as it answers by anticipation the plaintiff's objection:- That Prevost had not proved the signature and execution of his deed. Because by the last part of Section 17 of the Land Registry Act, it is declared, that " every certificate of title shall be " " received as prima facie evidence in all Courts of Jus- " " tice in the Province of the particulars therein set " " forth."- so that this Certificate of Title is prima facie

evidence, (1) of the power to sell under the order of Court, (2) of the due acknowledgement, execution and registration of the Crown Grant, (3) of the order to sell and convey Section 12 to Mason, and (4) of the due execution, acknowledgement and registration of the Conveyance from Prevost to Mason.

And when we consider that all these steps were duly and persistently advertised as the prelude to sales on behalf of Quong Lee, and that Kum Shoong could have contested registration at any stage of the process,- could have registered what the pleadings call his contract, or the receipt for it, as a charge, which would have effectually barred registration until it had been cancelled, or that he could have entered a Caveat, and put his claim in issue in a short, speedy and inexpensive manner,- we must conclude that he had ample opportunities of bringing forward and maintaining his claim.

And as to the notice, it seems to me, that any one examining the papers and books in the Land Office in conjunction with the account sales, and the rectification of a manifest error, and considering himself bound by what he sees, would have some difficulty in persuading himself that Kum Shoong bought for himself in the name of Quong Lee,(for that is the only alternative); especially when he sees that the Government have considered and decided that Quong Lee and Quong Lee alone (or, their representative under the order of Court, Prevost) was entitled to the Crown Grant.

But with this the defendant really had nothing to do. And this probably was the reason why the defendant was not put into the witness box, a fact on which plaintiff's

Counsel commented, when he put Defendant's examination before the trial in evidence instead.

The utmost which that evidence discloses is,- that defendant thought that sometime in the summer of 1889 he made a search in the Land Office and that he saw the so-called certificate (in the statement of claim called "contract") and that he certainly saw the original account sales, where the property was knocked down to Quong Lee.

On being asked if he had given any notice to Kum Shoong that he was about to purchase this property, he replied, "No: I bought it at auction" implying, in answer to the meaning rather than the wording of the question,- that there was no necessity for giving Kum Shoong any notice at all.

It does not appear from this limited evidence that the defendant saw any book-entry containing Kum Shoong's name with or without that of Quong Lee.

But if he did see all these particulars in the view I take of the purchase I cannot see how he could have been affected by it.

It was the Government and that alone which could issue the Crown Grant. That was the Act of the Crown. If it is wrongly done, or issued unadvisedly, there is the way prescribed by law for its rectification; and if, too late, for rectification, (though I express no opinion to that effect), possibly for compensation where there is a real claim.

The Plaintiff must see that he can have no claim on the Defendant, except on account of the Crown Grant having been wrongly granted to the Receiver; and if that were the case, then the application should have been made in the

proper quarter to set that right.

This the plaintiff has not even attempted, although he has had abundant opportunity of doing so.

Moreover the purchase of Section 12 in open market, cost the defendant $3210. I do not see any suggestion from Kun Shoong to repay him that sum; or even to re-imburse the Receiver (or the Defendant) the amount of instalments and interest without the payment of which the Receiver for Quong Lee could not have secured the Crown Grant,- conduct which is in direct violation of the principle that he who comes for equity should do equity.

The absence of any such offer is not a bad measure of plaintiff's belief in the goodness of his own claim.

Plaintiff's counsel argued, or rather assumed the position, - for there was no direct statement of the fact, or any argument whatever on either side, on the cases produced on plaintiff's behalf,- that if there was an alleged equitable claim in any one to the land before registration, that could follow down through the title, and render subsequent purchasers and holders who had ever heard of or were likely to hear of it.insecure.

That is neither the spirit nor the object of the Land Registry Act, which alone governs us.

That Statute gives every opportunity for the assertion of every equitable claim up to a certain point. To those who use common diligence it offers every protection; but it will not condone long years of deliberate laches against a duly registered title, even in the assertion of a well founded equitable right and allow such wilful neglect (I do not speak of cases of fraud, or disability) to stain a title

in indefinite devolution.

Our Land Registry Act is not like the (Ontario) U.C. Registry Act of 1865 - a Registration of Deeds, which can be followed in certain cases by outstanding equitable claims through various transfers, and obliges purchasers to go out of the record to search for adverse equities, which may or may not exist,- clouding a title with uncertainties from the outset, and materially depreciating its market value.

When challenged by the opposite Counsel to produce precedents to support his view, plaintiff's Counsel was unable to cite a single English or British Columbian case in aid of his contention, for the very sufficient reason that there are none.

He mentioned however without argument or explanation the following old Ontario cases (1870) :-

1st. Peterkin v McFarlane (Appeal) 9 Ont: Rep: 429 to p. 475.

2nd Forrester v Campbell, 17 Grant's Chan: Rep:380.

3rd McLennan v Macdonald, 18 Grant Ch: R: 502.

4th Weigle v Setterington, 19 Grant Chy: 512.

and I can only gather from reading them, in what way the learned Counsel wished them to apply to his case. The first and third were cases, the decisions on which were based on fraud and therefore do not apply here. Fraud is not pleaded or charged, or even insinuated, here; nor do I see anywhere a suspicion of it, or of any attempt at concealment, or of that kind of secrecy which is said to be a badge of fraud.

The second and fourth are under old Ontario (U.C.) Registry Act of 1866, of which I shall treat later on. Neither of them touches the claim now at issue. It is a

dangerous thing to apply precedents arising in one jurisdiction under one system of land laws to circumstances arising in a different jurisdiction under a very different system of land laws. Although the general principles of law may be the same throughout, but differently applicable according to the difference in legislation.

These Ontario (U.C.) cases arise under a very different system of Registration from that which obtains in B.C. It is a Registration of Deeds, with all the defects of insecurity of title and expense which accompany that kind of registration; the very objects which our Act - by Registration, by Title, to the freehold (all lesser estates and interests in real estate and charges being registered as "Charges") - is intended to prevent.

The Canadian (Upper Canada) Act of 1865, although it gives a priority to registered over unregistered instruments otherwise of equal value, has been construed by the Ontario Courts to have recognized certain outstanding unregistered equitable claims as affecting actual registrations. For sec. 64 of the 29 Vict. cap 24,1865, (Upper Canada) which rules the cases cited allows "the registry of any instrument and " its registry in equity is to constitute notice of such " instrument to all persons claiming any interest in such " lands subsequent to such registry."

Section 66 (of the same U.C.Act) declares, that " no " equitable lien, charge or interest affecting land shall " be deemed valid in any Court in this province " (then Upper Canada) " after this Act shall come into operation " as against a registered instrument executed by the same " party, his heirs or assigns " &c.

While Section 65 (which I have purposely quoted last) enacting that " Priority of registration shall in all cases " " prevail," proceeds to nullify the complete effect of its language by adding, " unless before such prior registration " " there shall have been actual notice of the prior instru- " " ment by the party claiming under the prior registration. "

And this serious qualification the Court in Ontario after some hesitation swaying backwards and forwards have at last extended to apply and qualify the otherwise distinct wording and enactment of Sections 64 and 66.

The result is that there - (at least in the case of foreign law here cited) as laid down by Mowat,V.C. in Forrester v Campbell,p.385," It being quite certain that some equitable " interests are not avoided or intended to be avoided against " registered instruments with notice,- the 66th Section must " be limited in that way as to all equitable interests."

Consequently instead of keeping the old doctrine of notice,the learned Judge who decided in that case,practically determined that an Act intended to give greater security to registered instruments actually had the effect of " giving " a more extensive effect to notice than the Courts of Canada " (and I will add there, of Great Britain), " had previously " given."

" The effect which the Court had previously given," was at the time of the passing of the 1865 Act, " to require " proof of actual notice (5 Gr.258.- 8 Gr.37.- 9 Gr.340.- 11 " Gr.303, and many others) before the completion of the " transaction; and notice after that time and before regis- " tration would not have been sufficient to postpone the " instrument first executed."

And this in the face of a general movement among jurists and legislators in the direction of establishing the principle of the non-admittance of notice in any case against a registered title - a principle which since 1865, a quarter of a century.ago, has found practical expression in the Torrens Act, our own Acts and the Acts now in force in the Dominion, for registration by Title.

By its registry of all instruments whether conveying an equitable interest or a fee simple on an equal footing, its memorials and abstracts, the registration by deeds, the U.C.Act of 1865 is in several important respects defective as compared with our Act.

And judging by the extension of the Torrens Act, based on the same principle as our own, to the Western portions of old Canada where it meets with much acceptance, the general tendency of Canadian legislation on the registration of titles to real estate would seem to be forward, in the direction of extending the principle of Registration by Title as far as practicable over the Dominion.

The B. C. Land Registry Act (very briefly stated) by Section 13, provides, " that every person claiming to be " " the legal owner in fee simple of real estate " by application under a form given in the Act, and after production of his title deeds and satisfying the Registrar that a prima facie title has been established by the Applicant, the Registrar may register the title of such applicant in a Book to be called " Register of Absolute Fees " &c.

By Section 18,

The registered owner of an absolute fee shall be deemed to be the owner of the land (on the register) for such a

freehold as he legally possesses therein, subject only to such registered charges as appear existing thereon and to the rights of the Crown.

Equitable rights and lesser estates than a freehold though subordinated to the legal fee are preserved by registration under Section 19, which provides that :-

" Every person claiming any other or less estate than the " absolute fee, or any mortgage or other incumbrance upon " or any equitable interest whatever in real estate (other " than a Judgment Crown debt or leasehold interest in " possession for a term not exceeding 3 years) may apply to " the Registrar for registration thereof in the form " &c; and the Registrar after examination of the title deeds and being satisfied as to his having a prima facie title " may " register the title of such applicant in a Book to be " called the Register of Charges, "&c.

And (Sec. 24) this whether a present and vested or future and contingent interest.

By Sec. 25, no equitable mortgage or lien by deposit of title deeds and memorandum is registrable.

By Sec. 29, a lis pendens is registrable as a charge against any real estate, which is the subject of an action.

By Sec. 32, The Registration of a Charge is notice to every person dealing with the real estate against which such charge has been registered of the estate or interest in respect of which such charge has been registered.

This is followed by the summary Section 35, enacting, That " no purchaser for valuable consideration of any " registered real estate or registered interest in real " estate shall be affected by any notice expressed, implied

" or constructive of any unregistered title, interest or " disposition affecting such real estate, other than a " leasehold interest in possession for a term not exceeding " three years, any rule of law or equity to the contrary " notwithstanding."

From even this cursory examination it will be gathered that the present application with the cases cited constitutes an indirect attack on the leading principle of the B.C.Land Registry Act, which warrants me in saying, that the principle of registration as shewn in the Upper Canada Acts was considered many years ago, when framing the present B. C. Land Registry Act, and set aside in favor of our Act. Also that more than a quarter of a century's experience of the working of the B. C. Act, has shewn that for cheapness, simplic ity, effectiveness, gradual improvement of title and market-able value, Registration by Title has the advantage over all other systems for the registration of titles to real estate.

Summing up all these considerations I am clearly of opinion that what Kum Shoong did, when he acted voluntarily at all, was from the first as Agent for Quong Lee and not for himself.

There would have been an absurdity in Loo Chuck Fan and Loo Choo Fan sending him to the sale to buy for himself.

He had then, we cannot but consider, authority to go to the sale, and purchase as he did Section 12 for Quong Lee.

His own claim, was, I have little doubt, an afterthought, almost forced on him (I can even believe, at the first,

unwillingly), by the mistake of Vintner and its propagation by copying into the Provincial and Municipal Assessment Rolls, and their application to him for payment of, really, Quong Lee's taxes.

The Lands and Works discovered this before they could make out the Crown Grant and rectified it by reference to the root of the title, the official account sales, which recorded the sale to Quong Lee through the medium of Kum Shoong, for a considerable time previous to 1873, their alter ego. Then we have the absence of all claim or even enquiry by Kum Shoong from 1873 to the commencement of this action, the long delayed payment of taxes, and total non-payment of instalments. Then we have the omission by Vintner made in September before the official account sales came in five months later, but were probably not gone over until later on.

All these considerations point to the same conclusion.

The fall of Quong Lee (no longer "The Happy Success"), and the rise in the value of the Land on Lulu Island, and the consequent enquiries of speculators from nominal owners in default, must have had their effect on a Chinaman's mind, and may have led him to think that there was a sort of reversionary right after the fall of the house, in himself,, or at all events he could build on the mistake to derive some collateral benefit from maintaining it. Unfortunately for him the sale to Quong Lee was too clear to admit of a doubt with Loo Chu Fan here to-day, (uncalled) to confirm it, and all plaintiff's acts were charged with this fiduciary character.

The order of Court of the 22nd May 1885 appointing Prevost Receiver of the Quong Lee Estate, of which Plaintiff

could not have been ignorant. The duty of the Receiver to call in all outstanding equities and merge them in the fee.

The order of Court of the 1st Dec 1886, authorizing the sale.

The order of Court under which Prevost, who as Receiver, received the Crown Grant.

The open publicity and advertisement of every dealing with the land.

The concurrence of Plaintiff's Solicitors and Quong Lee (who authorized the purchase) in the Crown Grant and subsequent sale and confirmation, make it in my opinion an irresistible conclusion that Kum Shoong had no title ~~to~~ whatever to the land.

Thus, much is patent to me on the merits.

But were it otherwise; were there in fact in him an outstanding equity for so many years unasserted, I think the plaintiff, by his laches and by the provisions of the Land Registry Acts, would be excluded from taking advantage of it, as against Mason.

And that if the Crown Grant had been improperly or unadvisedly granted to the Receiver the remedy of the Plaintiff, under the Judgment of the late Mr Justice Gray in

Clark &))
) v Regina
Matthews)

and Jacques v Regina,

lay in the direction of a Petition of Right, and not by the present action against the defendant.

" For all these reasons therefore it is considered that "
" judgment should be given, and it is hereby given for the "

" Defendant, and with the usual accompaniment of costs."

"Henry P.Pellew Crease"
"J"

Registrars, &c, Upper Canada.

Extracts.

29 Vict.)
Cap.24.) 1865

Sec 64. The registry of any instrument under this Act, or any former Act shall in equity constitute notice of such instrument to all persons claiming any interest in such lands subsequent to such registry.

Sec 65. Priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument by the party claiming under the prior registration.

Sec 66. No equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall not be allowed to prevail in any case against the provisions of this Act.

Supreme Court.

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Kum Shoong

vs

Henry Slye Mason.

Judgment

Cause.