1901

*Oct. 29, 30.

*Nov. 16.

PETER SCHMIDT AND DIEDRICH FROESE (DEFENDANTS)..... } APPELLANTS;

AND

HENRY RITZ AND EUGENE WIDMEYER (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Statute—Amending Act—Retroaction—Sale of lands—Judgments and orders.

Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular and in the following session the legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment."

Held, Sedgewick J. dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments and not to orders and judgments of the County Courts.

Held further, reversing the judgment of the King's Bench (13 Man. L. R. 419) Davies J. dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force but not from the date on which they were made.

Held, per Sedgewick J., that the clause had no retroactive operation at all.

APPEAL from a decision of the Court of King's Bench for Manitoba (1) affirming the judgment at the trial in favour of the plaintiffs.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard and Davies JJ.

(1) 13 Man. L. R. 419.

1901

SCHMIDT v. RITZ.

The only question to be decided on this appeal was whether or not the Act of the Manitoba Legislature, 60 Vict. ch. 4, set out in the head-note, made valid an order for sale of lands under a judgment of a County Court and proceedings thereunder, made and done before the Act came into force. The facts are fully stated in the opinions published herewith.

Aylesworth K.C. and *Phillips* for the appellants.

J. Stewart Tupper K.C. for the respondent.

The CHIEF JUSTICE:—The appellant Peter Schmidt being seized in fee of the lands for the recovery of which this action was brought, sold and conveyed the same for valuable consideration to the appellant Diedrich Froese. Subsequently one Russell having recovered a judgment in the county court against Schmidt it was registered and afterwards an order was summarily made and entered in the Court of Queen's Bench for the sale of the land in satisfaction of the judgment and it was sold accordingly and purchased by the respondents who, having obtained a vesting order, brought this action.

It having been held by the Court of Queen's Bench in Manitoba that it was not within the jurisdiction of that court to make an order for sale of lands founded on a county court judgment the legislature altered the law by passing the following amendment to the existing law:—

> In the case of a county court judgment an application may be made under rule 803 or 804 as the case may be. This amendment shall apply to orders and judgments heretofore made or entered except in cases where such orders or judgments have been attacked before the passing of the amendment.

This enactment came into force on the 30th of March, 1897, after the completion of the sale to the respondents.

1901

SCHMIDT v. RITZ.

The Chief Justice.

The question which has been raised by the appeal is whether the amendment has a retrospective operation sufficient to make valid not only the order of the Queen's Bench upon which the sale proceedings were founded but also all the subsequent proceedings upon the order including the sale.

The Court of King's Bench have attributed such a retrospective effect to the statute and have held that it covers all objections on this head to the respondents' title.

I agree with the Court of King's Bench and with my brother Davies in the opinion that the words "orders and judgments" in the amending clause refer not to county court orders and judgments but to orders and judgments of the Court of Queen's Bench made summarily or by plenary proceedings for the sale of lands in satisfaction of county court judgments, the word "orders" referring to summary proceedings and "judgments" to formal judgments for sale obtained as the result of proceedings in the Queen's Bench based on recoveries in the inferior tribunal. I need not repeat the reasoning upon which I reach that conclusion as it is the same as that of the Chief Justice of Manitoba in his judgment in the court below, and of my brother Davies in this court.

The question is however how far does the statute when thus interpreted have a retroactive effect? I am constrained upon this point to differ from the court below. I do not think the amendment has any retrospective effect except in so far that from the date at which the Act came into force, the 30th March, 1897, any orders for sale previously made by the Queen's Bench founded on county court judgments, were from that date to be held valid. If it had been intended to make such orders valid *ab initio*, that is from the dates at which they were made, the language of the

legislature should have been in explicit terms, namely, such orders should have been declared to have been valid from the time at which they were made, which is certainly not the import of the words in which the new law is actually expressed. Further, even if the legislature had shewn an intent to go beyond the limited retrospective operation I have indicated and had declared that the orders should be taken to have been valid from the date at which they were actually made and entered, that would not, in my opinion, have been sufficient to confirm previous sales under orders made without jurisdiction.

The well known rule that retrospective statutes, especially such as divest vested rights, are to receive a restrictive construction is too well established to permit any larger interpretation than that which I attribute to the words according to their strict grammatical construction.

That the legislature had demonstrated an intention to enact retrospectively to a certain extent is not sufficient to warrant a retroactive operation carried beyond the meaning of the terms used strictly construed.

That the presumption against retroactive operation is to be applied so as to confine language to some extent expressly retroactive to the case indicated, appears from the judgment of Bowen L. J. in the case of *Reid* v. *Reid* (1) when he says:

> Now the particular rule of construction which has been referred to but which is valuable only when the words of an Act of Parliament are not plain is enbodied in the well known trite maxim *omnis nova constitutio futuris forman imponere debet non præteritis;* that is that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to be a certain extent retrospective and in construing a section which is to be to a certain extent retrospective we ought nevertheless to bear in mind that maxim as applicable whenever

(1) 31 Ch. D. 402.

1901

SCHMIDT v. RITZ.

The Chief Justice.

we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant.

It is said that to restrict the latter part of the amending clause to legalising orders for sale previously made and entered only from the date of the Act coming into force is to attribute to it a very insignificant modicum of relief; the answer must be that that is the very intent of this rule of interpretation, designed to prevent injustice resulting from interference with rights of property except in cases where the unmistakable language of the legislature demands an *ex post facto* construction.

The appeal must, in my opinion, be allowed and the action dismissed with costs to appellants here and also in the court below.

TASCHEREAU and GIROUARD JJ. concurred.

SEDGEWICK J.—I am of opinion that this appeal should be allowed. As I go further than some of my brothers as to the construction of the amendment in question, it is proper that I should shortly give expression to the grounds of my judgment.

I am willing to admit that the framers of the enactment intended that it should have a retroactive effect and work out as the Court of King's Bench has found, but there has been an extraordinary failure to give expression to that intention.

While courts are bound to give effect to legislation, no matter how flagitious or confiscatory it may be, when its purpose is apparent and the legislature, whether explicitly or by necessary implication, has given expression to that purpose, it is not their privilege or function to claim the law-making power or

1901

SCHMIDT v. RITZ.

Sedgewick J.

by conjecture or guess to give effect to even an admitted intention, not actually declared in the enactment itself. That condition has arisen here.

The Queen's Bench Act, 1895, contains six sections or rules creating a summary method of procedure for the realization of Queen's Bench registered judgments and orders for the payment of money. Rules 803 and 804 authorise the making of the application by or on behalf of the judgment creditor or other party entitled and nothing more. The three remaining rules specify the procedure to be followed and expressly give jurisdiction to the court and judges to adjudicate upon the application and, if a case is made out, to make an order for sale of the lands charged by the registered judgment or order.

Now, the amendment in question, so far as this point is concerned, while, of course, relating to the Act as a whole, does not purport to be an amendment to rules 803 and 804. They remain unchanged. But it is made to form a new rule, (807a), "In the case of a County Court Judgment" it says:

> An application may be made under rule 803 or 804 as the case may be

and there it stops. It absolutely fails to indicate what is to be done upon the application or to give the court jurisdiction to deal with the application by making an order for sale. In other words, it has not made the jurisdictional clauses a part of it. Had it amended rules 803 and 804 by inserting, after the word "order" in the second line of both, the words, "of the Court of Queen's Bench or County Court," or if it had proceeded to add words to the effect that "upon such application such proceedings shall be had and orders made as specified in rules 805, 806 and 807," then there would have been such a sufficient expression, a state-

1901

CHMIDT v. RITZ.

Sedgewick J.

ment of the legislative intent, as to make the amendment capable of being applied.

How can a court supply or read into the amendment these or similarly effective expressions? That, I think, would be legislation and not interpretation.

And there does not appear to be much excuse for this "ill expressed" and "slovenly" legislation, (the adjectives are those of the court below). For the very Act amended contains numerous instances of how legislation of this character should be drafted. There is the creation of the litigants' rights, the jurisdiction of the judicial tribunal, and the machinery requisite for the enforcement of its judgments; (see rules 5, 86, 317, 318, 643, 754-758 and these six sections themselves).

I do not propose to cite authorities to shew that in this case this amendment cannot have any effect. It is perfectly clear that a distinct and unequivocal enactment is required for the purpose of either adding to or taking away from the jurisdiction of a superior court of law and the amendment, not complying with this elementary principle, is wholly inoperative.

I proceed to my second ground.

Assuming that I am wrong about my first proposition, I think there is error in the judgment below in the meaning it places upon the word "orders". It does not mean orders for sale made in the Superior Court, but orders for the payment of money made in the County Court.

The learned Chief Justice of the court below wholly based his argument in support of the other construction, upon the alleged fact that there was no statutory provision for the registration of an order of the County Court. I say it with all deference, but it seems to me quite clear that there is such provision, which I demonstrate as follows: Section 96 of the County Courts Act (R.S.M. ch. 33), provides that "any party

1901

SCHMIDT v. RITZ.

Sedgewick J.

who has obtained a judgment in any County Court for a sum exceeding $40, may, at any time, obtain a certificate from the clerk of such court * * * which certificate shall, on the request of the party obtaining the same, be registered under the 'Registry Act' in any Registry Office * * * and such registration shall bind all interest or estate of the defendant or defendants in lands and hereditaments situate within the registration district * * * in which such office is situate * * * the same as though the defendant or defendants had in writing under his or their hand or hands and seal or seals charged the said lands and hereditaments with the amount of the said judgment," the proceeding thereafter being a suit in equity for the purpose of realizing the amount of the judgment by the sale of the lands so charged. Then the Judgments Act (Ch. 80, R.S.M.), section 3, enacts that

> decrees and orders in equity and rules and orders at law, whether of a court or a judge for the payment of money, costs, charges or expenses, shall constitute judgments and shall have all the force and effect of judgments at law, * * * and the expression 'judgment,' when used in this or *any other* Act, unless the context shows otherwise, shall include any such decree, judgment or order.
>
> Sec. 4. It shall not be necessary in any case to make a judge's order for the payment of money a rule of court before issuing execution thereon, but upon filing the order it shall constitute a judgment, and executions and certificates of judgments may thereon issue as on a regular judgment obtained in the ordinary way.

This Act is, I think, applicable to County Courts and upon general principles the interpretation clause, as well as the clauses just set out, may be read into the County Courts Act.

I do not overlook sections five and six of the Act which only apply to the Court of Queen's Bench judgments and orders. There is there provision made for the registration of such judgments and orders, but it

1901

SCHMIDT v. RITZ.

Sedgewick J.

is only doing for such judgments and orders what the County Courts Act as supplemented by the general provisions of the Judgments Act, has done for the County Court judgments and orders.

I take it, therefore, to be reasonably clear that County Court orders for the payment of money may be registered so as to bind lands in the same way as similar Queen's Bench orders may be registered.

Returning to the amendment here, and, having in view the fact that, at the time of its passing, County Court orders were subjected to registration as being statutory judgments, we are able to give it a natural and reasonable meaning. The object was to put County Court judgments (including orders for the payment of money), in the same position as regards their summary enforcement as similar Queen's Bench judgments and orders, the word "orders" being inserted in the retroactive and enlarging clause of the amendment, in the same way as they were inserted (several times), in the clauses which were the subject of the amendment merely *ex abundanti cautela.*

The court below gave a construction to the word "order," thinking, under the statute law, it was capable of that construction only. Had they thought that County Court orders were capable of registration, as I think they were, they would have doubtless adopted what I submit is the proper view.

Finally, if I am wrong on this branch of the case, I adopt the reasoning of the learned Chief Justice as to the limited retroactivity of the amendment, accepting as authority and as applicable here, the judgment of Lindley J., in *Lauri* v. *Renad* (1).

The action in my view should be dismissed with costs in all the courts.

(1) [1892] 3 Ch. 402, 421.

DAVIES J. (dissenting).—This is an appeal from the judgment of the Supreme Court of Manitoba in favour of the respondents in an action brought by them for the recovery of possession of land. The questions raised upon the appeal involved the proper construction to be placed upon a statute of the Manitoba Legislature, 60 Vict. ch. 4, purporting to extend the rules 803 and 804 of "The Queen's Bench Act, 1895", of that province, so as to cover County Court judgments and applying the amendment to orders previously made.

The amendment in question is one of a number of amendments made to the Act of 1895, and reads as follows:

> Rule 807. By inserting the following rule after rule 807. Rule 807 (*a*). In the case of a County Court judgment an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment.

This enactment came into force on 30th March, 1897, after the completion of all the proceedings upon which the respondents rely for title.

The questions raised and argued before us on the appeal were: First. Whether the amendment applied to orders made previously to its passing on County Court judgments under sections 803 and 804; and, secondly: Assuming that it did, whether it was broad and comprehensive enough to cover the proceedings including the sale which followed the orders.

I am of the opinion that the amendment does apply to orders previously made by the Court of Queen's Bench, on applications to sell lands on judgments obtained in the county court.

The reasoning of the learned Chief Justice and Mr. Justice Bain, who delivered the judgment of the court below, appear to me on this point conclusive. In

1901

SCHMIDT v. RITZ.

Davies J.

point of fact, every judge of the Court of Queen's Bench for Manitoba, before whom the question has come, including the late Chief Justice Taylor, reached the same conclusion.

The history of the amendment may well be referred to in placing a construction upon it. It appears that the court had for some time assumed that they had jurisdiction to make orders under the rules in question on County Court judgments, for the sales of lands, and these orders were treated as valid until an objection to the jurisdiction of the court to make them was sustained in *Proctor* v. *Parker* (1). It seems clear that the amendment in question was passed in consequence of that decision and was intended to remove all doubts as to the power of the court to have made or to make orders for sales on County Court judgments.

The question is: Has the legislature clearly expressed its intention?

It was argued by Mr. Aylesworth that the word "orders" in the amendment must have reference to orders of the County Court for the payment of money and not to orders under the rules embodied in the Queen's Bench Act, 1895, which were being amended, but, as is pointed out by Chief Justice Killam, this cannot be so because the rules which are amended only give power to proceed upon *registered* judgments and orders and there was no provision for the registration of County Court orders. Besides, the latter part of the section, exempting orders or judgments which had been "attacked," from its operation clearly shewed that what the legislature must have referred to were such orders as had been made by the Court of Queen's Bench in the past on County Court judgments and against the validity or legality of which proceedings had been taken. By no reasonable construction could

(1) 11 Man. L. R. 485.

such language be applied to orders in the County Court for the payment of money. In my opinion the true construction of the amendment, which is admittedly obscurely worded and badly drawn, is to extend the jurisdiction of the Court of Queen's Bench under rules 803 and 804 to County Court judgments and further to confirm past proceedings under such rules on County Court judgments taken when it was supposed jurisdiction existed.

The first part of the section relates to future applications to be made, and extends as well to existing as to future County Court judgments. The latter part relates to previous applications made and was doubtless intended to have a retroactive affect and to confirm them It is argued, however, that while the latter part of the section has a retroactive effect so as to confirm these disputed orders for sale, it does not confirm the proceedings taken upon and subsequent to the orders. But this part of the amendment does not pretend simply to validate any particular order or proceeding. It applies the first part of the amendment which extends the jurisdiction of the court to County Court judgments to orders theretofore made and by doing so declares the court to have had jurisdiction to hear the applications and make the orders in the past which the court had held it did not possess.

It is in my opinion a declaratory enactment so far as its latter part is concerned making its first part, which gave the Court of Queen's Bench jurisdiction to make orders for sale of land on County Court judgments, apply retroactively to orders already made under such rules on such judgments.

A proper provision was made exempting from the operation of this retroactive legislation such orders as had been "attacked" before the passing of the amendment. The effect of this declaratory legislation

1901

SCHMIDT v. RITZ.

Davies J.

was not only to validate the orders themselves but all proceedings taken under or in pursuance of them. Any other construction would defeat what I hold to be the declared intention of the Legislature.

If in the case now before us the Court of Queen's Bench had power and jurisdiction under the amendment to hear the application and make the order for the sale of the land in question, then the necessary proceedings directed by the order or the rules to be taken to give it effect must also be held to be confirmed.

Once it had full jurisdiction given to it, or had its jurisdiction declared and confirmed, over the subject matter, than all the provisions of the rules became applicable to enable the court to carry out its order.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellants: *Cameron & Phillips.*

Solicitors for the respondents: *Tupper, Phippen & Tupper.*