

BETWEEN:

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA,

1913
Nov. 18.

PLAINTIFF;

AND

FRANK ROSS, AND THE QUEBEC HARBOUR COMMISSIONERS.

DEFENDANTS;

Expropriation—Immovable property—Sheriff's Deed—Error—Conveyance of larger estate than that possessed by judgment-debtor—Failure of Title there; under—Prescription—Art. 2251 C.C.P.Q.—Costs.

Under the Code of Procedure of the Province of Quebec, a deed from the sheriff of immovable property after seizure and sale only conveys the rights and title of the judgment-debtor at the time of the adjudication; and if, through clerical error or otherwise, the deed purports to convey a parcel of land not in the possession of the judgment-debtor at such time, the title to that parcel does not pass by the deed.

2. In such a case the prescription of ten years mentioned in Art. 2251 C.C.P.Q. cannot be invoked. *Meloche v. Simpson*, 29 S.C.R. at p. 375 referred to.
3. Where the party succeeding on the issue as to title under the Sheriff's deed had previously stood by without attacking the deed, such party was not allowed the costs of that issue in the expropriation proceedings.

THIS was an information exhibited by the Attorney-General of Canada for the expropriation of certain lands in the Province of Quebec for the purposes of the National Transcontinental Railway.

The facts of the case are stated in the reasons for judgment.

October 27th and 28th, 1913.

The case was heard before the Honourable Mr. Justice Audette at Quebec.

E. Belleau, K.C., and *E. J. Flynn*, K.C., for the plaintiff.

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G. G. Stuart, K.C., for the defendant Frank Ross.
 A. C. Dobell for the defendant The Quebec Harbour Commissioners.

AUDETTE, J. now (November 18th, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands were taken and expropriated, under the authority of 3 Ed. VII, ch. 71, for the purposes of the National Transcontinental Railway, by depositing plans and descriptions on the 12th September, 1912, and 14th February, 1913, with the Registrar of Deeds for the City of Quebec, in the Province of Quebec.

The actual quantity of land taken was *in limine* the subject of controversy, but became finally adjusted, both parties admitting the figures given by the Surveyor Addie as correct and governing in the present case. The figures are as follows:

The total area of the four lots, down to the Harbour Commissioners' line, contains 2,392,932 square feet, which is equal to 54 934-1000 acres.

The total area between low water mark and the Harbour Commissioners' line is.....	461,601
and the area of the six water lots being.....	49,643

there remains a total of.....	411,958
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claimed by the Harbour Commissioners as belonging to them and not to the defendant Ross herein. If the Harbour Commissioners' claim is well founded it will leave a total area expropriated from the defendant Ross of 1,980,974 square feet.

The plaintiff tenders, by the information, the sum of \$79,700.00 and the defendant Ross claims the sum of \$250.00.

As is usual in actions of expropriation the evidence adduced by both parties is of a very conflicting nature.

In view, however, of the documentary evidence of record it has become unnecessary to review at any length the evidence of valuation. Sufficient is it to say that the valuation of the witnesses on both sides varied from five to twelve cents a square foot,—with some valuations as low as two cents for the contested part lying between low water line and the Quebec Harbour Commissioners' line.

The conflict in the valuation is somewhat great, considering the large area in question, and would be somewhat difficult to reconcile but for the correspondence exchanged between the defendant Ross and the Dorchester Electric Company, which is filed as exhibits 5-a and 5-b and "G". Indeed by Exhibits 5-a and 5-b, the Dorchester Electric Company, of its own accord, offered for the property in question the sum of \$130,000 payable in the manner therein set forth. And it may be noticed that the area then in contemplation was 2,300,000 square feet, or 92,932 less than the total area in question herein. It is, however, true that the figures of 2,300,000 are followed by the usual words "more or less," but the margin is large.

By Exhibit "G" the defendant expresses in clear terms and language his willingness to accept that amount. The transaction did not go through for reasons unnecessary to recite here, but it is the best expression of opinion as to the value of the property in question in March, 1911. It is an ordinary every day transaction whereby two parties, one the owner and the other a prospective purchaser, come to an agreement, *de gré à gré*, one to buy and the other to sell at a figure agreed upon.

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The Court will accept this figure, the sum of \$130,000 as the real market price of the property in March, 1911, to which will be added ten per cent. as representing (a) the increased value of the property between March, 1911, and the date of the expropriation—and further (b) a certain amount usually allowed for the compulsory taking against the wish of the owner,—
 To wit, the sum of.....\$ 130,000
 to which ten per cent. is added..... 13,000

Making the total sum of.....\$ 143,000
 equal to about six cents per foot for the total area.

However, this sum of \$143,000 will be subject to the deduction hereafter mentioned.

Now, some controversy has arisen as to the contents and the ownership of part lot 232, one of the four lots mentioned in the information herein.

The defendant Ross claims under a Sheriff's deed of sale of the 8th August, 1895, whereby, among others, lot 232, under its Cadastre number, without any description by metes and bounds, is sold and assigned to him. It may be well to mention here further that the Sheriff's deed recites Article 780 of the C.C.P. whereby "*the adjudication is always without any warranty as to the contents of the immovable.*"

The cadastral description, as shown in Exhibit "D," gives the southern boundary of lot 232 down to the Quebec Harbour Commissioners' line.

In Exhibit "Z-1," the conveyance of the property in question by Gilmour et. al. to John Roche, on the 15th October, 1868, the boundary is described down to low-water mark only. And further by Exhibit "Z-4" a deed of sale, of the 2nd August, 1880, between the said Roche and J. G. Ross (the *auteur* of the present defendant) the boundary of the said lot is also given down to *low-water mark*.

The last deed of the 2nd August, 1880, is relied upon and recited in the declaration in the case *Ross v. Geggie*, wherein the said property was sold and wherein the said title has been given by the Sheriff under its cadastral number only.

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The Cadastre which became in force in 1872 was not therefore in force at the time of the deed of 1868 wherein it is described by metes and bounds. Then the Cadastre does not constitute a title, but is merely a description; and it may be said and it is in evidence, that it is very often erroneous in its descriptions.

Be that as it may, the question now to be decided is whether by the Sheriff's sale that part, between low water and the Harbour Commissioners' line, not occupied by the six water lots—over which there is no dispute—did pass, and whether, notwithstanding the title to the same held by the Quebec Harbour Commissioners, the ownership of the said space passed to the defendant herein under the Sheriff's sale.

The total area affected by this controversy is 411,958 square feet.

This area, under 22 Vict. ch. 22, secs. 1, 2 and 3, assented to the 24th July, 1858, (1) became vested in the Quebec Harbour Commissioners, in trust for the purposes of the Act, with the right to dispose of the same.

Now it is contended on behalf of the defendant, notwithstanding the above facts, that the Sheriff's sale carried title to him.

Under Article 699, C.P.C. the seizure of immovables can only be made against the judgment-debtor, and he must be, or reputed to be, in possession of the same *animo domini*. Under Art. 779, the purchaser takes the immovable in the condition in which it is at

(1) See p. 27 of Supplement to Revised Statutes of 1886.

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the time of the adjudication; and under Art. 780, the adjudication is always without warranty as to the contents of the immovable. The conditions of sale have not been put in evidence.

A very important fact must be borne in mind and it is that it was the plaintiff in the case of *Ross v. Geggie*—the case in which the Sheriff's deed was given—who became the purchaser of the immovable in question. There is no question of a third party being the purchaser and where the latter might have to be put on his enquiry. Ross bought the very property described in the deed referred to in his declaration. He is not taken by surprise, he knows that the boundary, according to that deed, runs down to low-water mark and not to the line of the Quebec Harbour Commissioners, as contended for by him, because, and because only, the Sheriff's title mentions only the Cadastral number, and that the cadastral line runs down to the Quebec Harbour Commissioners.

It is obvious that, even to the knowledge of Ross, the seizure of these 411,958 square feet was made *super non domino et non possedente* and that therefore there was no transfer of property. The Sheriff's seizure and sale were made contrary to the provisions of Art. 699, C.P.C., above referred to. The adjudication only transferred the rights possessed by the person upon whom the immovable was seized.

Furthermore, the prescription of ten years cannot be invoked. (1)

If the Sheriff, through clerical error or otherwise, in making his judicial title included in such title a piece of land which he did not sell or sell *super non domino et non possedente*, the title to such parcel of land did not pass.

(1) *Meloche v. Simpson*, 29 S.C.R. 375.

For the purposes of this case, it will be found that the said 411,958 square feet did not pass under the Sheriff's title and that they belong, under the statute, to the Quebec Harbour Commissioners. (1)

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The value of these 411,958 square feet must therefore be deducted from the said sum of \$143,000. What is the value of this piece of land? It is obvious that even if the defendant is not the owner thereof he has in respect of the same all the rights appertaining both to the public and to a riparian owner, as defined in *Lyons v. The Warden, &c., of the Fishmongers*. (2)

This piece of land has been, by some witnesses, valued at two cents. That value will be accepted. Therefore from the sum of.....\$ 143,000.00 there will be deducted the sum of..... 8,239.16 as representing the price of these 411,958 square feet, at two cents, leaving a balance of.....\$ 134,760.84

The question of interest cannot under the evidence be settled on a satisfactory basis, as it does not show what part was actually taken on the 12th September, 1912, and the 14th February, 1913, respectively, and where each piece of land lay. However, during the whole of the trial the expropriation was always mentioned as of September, 1912, and the Court will fix the date from which such interest will run from the 12th September, 1912—unless, under leave hereby given, within twenty days from the date hereof, an application is made upon affidavits showing that some other date should be fixed.

Coming now to the plea of the Quebec Harbour Commissioners, little will be said about it in view of

(1) *Dufresne v. Dixon*, 16 S.C.R. 598; 32 L.C.J. 80; *Meloche v. Simson*, 29 S.C.R. 375; *Canada Investment & Agency Co. v. McGregor*, Q.R. 1 Q.B. 197, 21 S.C.R. 499; and *Caron v. Houle*, Q.B. 2 S.C. 186.

(2) L.R., 1 A.C. 662.

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the declaration of Mr. Dobell, of counsel for the said Quebec Harbour Commissioners, to the effect that the Crown and the Commissioners are practically one and the same party in the present instance, and that if they are—and they have been—declared the owners of the 411,958 square feet in question, it will be adjusted between themselves.

Dealing with the question of costs upon this issue the first consideration that suggests itself is, why did the Commissioners allow the sheriff's title to stand, in opposition to their own title for so many years? The title could have been ratified under proper procedure before the provincial courts. If this conflict has arisen today it is partly the Commissioners' fault as they could easily have been more diligent, having already filed an opposition *afin de charge*, the case was not unknown to them, and therefore this apparent flaw could have been removed from their title. There will be no costs to any one of the parties upon this issue.

There will be judgment, as follows:

(a) The lands expropriated herein are declared to be vested in the Crown from the date of the expropriation.

(b) The compensation to be paid herein for the lands so taken and for all damages whatsoever resulting from the said expropriation is fixed at the sum of \$134,760.84 with interest thereon at the rate of five per centum per annum from the 12th day of September, A.D. 1912, to the date hereof. The Quebec Harbour Commissioners are entitled to recover out of the said compensation money the capital of the rent, with interest, for the six water lots, and the said defendant Ross is entitled to be paid and receive, from His Majesty the King, the balance of the said compensa-

tion so fixed with interest as above mentioned, upon giving to the Crown a good and sufficient title to the lands so expropriated.

(c) The defendant Ross is further entitled to his costs of action. And there will be no costs to any of the parties on the defence raised by the Quebec Harbour Commissioners.

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Judgment accordingly.

Solicitor for the plaintiff: *E. Belleau.*

Solicitors for defendant Frank Ross: *Pentland Stewart; Thompson & Gravel.*

Solicitor for defendant The Quebec Harbour Commissioners: *A. C. Dobell.*
