1917
Nov. 6.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

THOMAS BERRY, JOHN BERRY AND MARGARET BERRY, ELIZABETH MIRIAM BERRY, ADAM AIKENS, AND WINCESLAS LA RUE, REPRESENTATIVE OF THE HEIRS AND NEXT OF KIN OF EDWARD J. HALL AND C. H. LLOYD,

DEFENDANTS.

Expropriation—Compensation—Title—Community property—Will—Agreement of sale—Mortgage—Prescription.

In an expropriation of land by the Crown for training camp purposes, held that land acquired by a testator during his married life being community property could only be disposed of by him to the extent of his interest therein, and those claiming under the will were entitled to compensation therefor to no greater extent; that the testator's wife having died intestate, half of the community went to her children, who were entitled to compensation accordingly. A purchaser of such land, who has resold them to the Crown, is only entitled to compensation according to the terms of the agreement of sale, but not to damages for the compulsory taking; nor will compensation be allowed for mortgages or hypothecs which have become prescribed. The amount of recovery being greater than the amount offered, interest was allowed from the date of expropriation.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, October 6, 1917.

W. Amyot, for plaintiff.

Arthur Fitzpatrick, K.C., for defendants.

AUDETTE, J. (November 6, 1917) delivered judgment.

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This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands belonging to the defendants were taken and expropriated, under the provisions of the *Expropriation Act*,[1] for the purposes of a public work of Canada, namely, the "Valcartier Training Camp", by depositing plans and descriptions of such lands, on September 15th, 1913, and on August 31st, 1914, in the office of the Registrar of Deeds for the County or Registration Division of Quebec.

The lands so expropriated are composed of the western half of lot No. 67, of lot No. 65, lot No. 64 and lot No. 35, with farm buildings erected on lot No. 67.

The Crown, by the information, offers the sum of $2,600.

The defendants, who severed in their defence, claim the sum of $10,000 for the immovables so expropriated, while some of them claim, in addition thereto, the further sum of $1,500 for damages resulting from the expropriation.

Dealing first with the question of title, it appears that one Thomas Berry, the father of the defendants Berry, was in his lifetime the owner in his name of lots 67, 65 and 35. He married without marriage contract, and during his married life lot No. 64 was acquired and fell in the community.

It is further in evidence that, at the time Thomas Berry, the father, made his will, his wife was *non compos mentis*, and that she died demented, being unable to testate, and the family notary further testified that it is not to his knowledge she ever made a will.

[1] R.S.C. (1906) ch. 143.

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On September 4th, 1904, Thomas Berry, the father, by his will, bequeathed and devised to his son, James Berry, all his movable and immovable properties, and constituted him his universal legatee.

On November 21st, 1909, the said James Berry, by his will of that date, bequeathed and devised to his brother, Thomas Berry, all his movable and immovable properties and constituted him his universal legatee. The said James Berry has since departed this life.

On May 6th, 1913, the said Thomas Berry (the son) sold (Ex. "C") to his brother-in-law, Adam Aikens, the lands described in the deed of sale as the two half-lots 65 and 67, lot No. 64 and lot No. 35, for the sum of $1,700, to be paid by instalments, in the manner mentioned in the said deed of sale.

From the above mentioned chain of title it will therefore appear that Thomas Berry, the father, could only fully dispose of lots 65, 67 and 35, together with the half only of lot 64. The other half of 64 having fallen into the community and becoming the property of his wife. When he bequeathed and devised his properties to his son James he could only dispose of half of lot 64, and in like manner James, by his will, in favour of his brother Thomas, could dispose of no more under the title acquired from his brother's will.

The mother having died intestate, the half of lot 64 became the property of her children, Thomas, John, Margaret and Elizabeth Miriam,—each being the owner of one-eighth of lot No. 64.

However, under the deed of sale of May 6th, 1913, it must be found that Thomas Berry, the son, conveyed to Adam Aikens, all the rights he had in the lands in question, making, therefore, Adam Aikens

the owner of lots 65, 67 and 35, as well as one-half of 64, together with the eighth which came to Thomas Berry, the son, from his mother.

Then John, Margaret and Elizabeth Miriam Berry were each the owner of one-eighth of lot 64 at the date of the expropriation, and are entitled to the compensation therefor, while Adam Aikens is entitled to compensation for the balance.

Now, on September 10th, 1913, assuming the full ownership of the four lots, Adam Aikens entered into an agreement with the plaintiff's representative (Ex. No. 3) whereby he sold this property for $2,600, when $50 were paid him on account and in part payment of the price of such sale. This agreement was entered into between Aikens and Captain Arthur E. McBain, who was duly authorized by his brother, Colonel W. McBain, the latter being in full charge on behalf of the Crown of the expropriation for the Valcartier Camp. The sale had to be completed by January 15th, 1914, and as it was not, the agreement lapsed and the $50 were forfeited in favour of Adam Aikens.

Then on September 17th, 1914, Aikens having gone to Colonel William McBain, they both entered into the agreement of that date, whereby Aikens agreed to sell his farm for $3,050, he receiving the sum of $100 on account, "the balance of $2,950 to "be paid over as soon as deeds are executed," and the purchaser was to have immediate possession.

The original of the latter agreement, having been used before the Public Account Committee of the House of Commons, could not be found, but both parties thereto spoke to the agreement when a copy was produced. Aikens admitted entering into the agreement, signing the same and receiving $100 on

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account, but he said he understood he was to be paid the balance at once; and Colonel William McBain states the balance was to be paid upon Aikens giving good title—the latter construction of the agreement being the only reasonable one. Now it appears clearly from what has already been said with respect to the question of title that Aikens could not give good title for all the lots, and the notary charged with the preparation of the deed, as appears from the evidence, so reported to Colonel William McBain.

I, therefore, find that the compensation to which defendant Aikens is entitled for the property in question is, on the basis of the sum of $3,050 as agreed upon by him. But from that sum should be deducted the sum of $100 already paid to him on account, and which he never returned, but retained, together with the further sum of $458.62, representing the value of the 3/8 of lot No. 64 reckoned under the basis of $3,050 for the whole farm.

That is to say $3,050.00
From which should be deducted.... $100.00
and the further sum of..... 458.62
558.62

leaving the sum of $2,491.38

While I find that defendant Aikens is bound by his agreement, it is obvious that the other defendants are at large and are not affected by that sale, beyond conveying implicitly that if Aikens accepted that amount for the farm, he being the one most interested, it would give a very good idea of the value of the same.

However, the defendants have adduced evidence in respect of the value of the farm as a whole, and

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as to lot 64 in particular. That evidence has practically remained uncontroverted, the Crown, relying on the agreement (Ex. No. 4), did not adduce any evidence on the question of value.

I will, therefore, assess the value of each eighth of lot 64, under the basis of $20 an acre, as established by the evidence adduced, making the sum of $675 as representing the three-eighths coming to the defendants John, Margaret, and Elizabeth Miriam Berry—the defendant Thomas Berry (the son) having disposed of his eighth of lot 64 by the deed to Aikens of May 6th, 1913. In the result John Berry will receive ..... $ 225.00
Margaret " " " 225.00
Elizabeth Miriam " " 225.00

$675.00

As the defendants recover more than the amount offered by the information, they will be entitled to interest from the date of the expropriation.

Dealing with the question of damages, I find that the defendants Aikens, Elizabeth Miriam Berry, and Thomas Berry make a claim for $1,500 as set out in their plea. I have already found that Thomas Berry had not, at the time of the expropriation, any interest in the lands in question, he having conveyed all such interest therein to defendant Aikens in May, 1913. We must, therefore, ascertain what damages Aikens and his wife can have suffered.

This property was expropriated in September, 1913, but Aikens and his wife remained in possession of the lands at the sufferance of the Crown. They were still in possession in September, 1914, when Aikens entered into the agreement of the 17th of that month—and it would appear from the evi-

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dence that he and his wife did not abandon the possession until some time in January, 1915, although by the agreement of September 17th, 1914, he was to give immediate possession. If Aikens and his wife suffered damage, the evidence does not disclose any tangible loss. It is true Aikens and his family had to leave and vacate the house, some time in the autumn of 1914, during artillery practice, and that it had to be done perhaps at very trying times; but they were in possession by sufferance—and what is referable to the grace and bounty of the Crown cannot be construed as an acknowledgment of a right of action for damages, if any were suffered. Especially is this true when damages, including those to crop and for stolen goods, appear to have already been paid by the Crown to the defendant Aikens. I fail to see how, under the evidence, I could with any degree of exactness name any amount. But in view of the fact that I cannot allow Aikens any amount for compulsory taking when I have accepted as a basis of compensation the amount he was willing to sell for in September, 1914, I will, by way of damages—although he remained in occupation up to January, 1915—allow interest from the date of the expropriation to this day, this interest to cover the damages to his mill and all trouble or damage not already compensated, resulting from the expropriation. This accrued interest will amount to slightly over $500.

The two mortagages or hypothecs, mentioned in paragraphs 6, 7 and 8 of the information, in favour of Hall & Lloyd, are declared prescribed, and the heirs at law or next of kin of the said parties are not therefore entitled to recover in respect of the same.

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Coming to the question of costs, I find that the defendants, who were represented by the same solicitors and counsel, severed their defence into two sets of pleadings. Each part of the plea with respect to the claim made for the lands taken is absolutely identical; but one set of pleading claims, in addition thereto, the damages above referred to. Under the circumstances of the case I feel unable to allow full costs on each issue, but I will treat the two defences as one and will allow the defendants costs against the Crown, which I will fix at the sum of $275—the amount to cover all witness fees, disbursements, etc.

Therefore, there will be judgment as follows, to wit:

1st. The lands expropriated herein are declared vested in the Crown as of September 15th, 1913.

2nd. The compensation for the lands taken and for all damages resulting from the expropriation is hereby fixed at the total sum of $3,266.38. The said compensation being composed of the aggregate sums of $2,591.38 and $675.00 as above mentioned, with interest from the date of the expropriation.

3rd. The defendant, Adam Aikens, is entitled to be paid the said sum of $3,050.00
after deducting therefrom the sum
of $100.00
already paid on account; and the
further sum of 458.62
——— 558.62

leaving the net sum of $2,491.38
with interest thereon from September 15th, 1913. The said defendants, John Berry, Margaret Berry, and Elizabeth Miriam Berry, are also entitled to be paid the total sum of $675 in the proportion of $225

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each, with interest thereon as above mentioned. All of the said defendants being thus entitled to be paid the sums above mentioned in full satisfaction for the lands so taken and for all damages whatsoever resulting from the said expropriation, and upon giving to the Crown a good and satisfactory title free from all mortgages, hypothecs and encumbrances whatsoever upon the said property, including the release or discharge of the *bailleur de fonds* claim mentioned in the deed of May 6th, 1913 (Ex. "C").

4th. The mortgage creditors, Hall and Lloyd, or their heirs and assigns or next of kin, as mentioned in the information herein, are not entitled to recover in respect of the mortgages or hypothecs therein mentioned.

5th. The defendants who appeared at trial and filed written pleadings are entitled to their costs in the manner above set forth, which said costs are hereby fixed and allowed at the total sum of $275.

Judgment accordingly.

Solicitors for plaintiff. *Drouin & Amyot.*

Solicitors for defendant: *Fitzpatrick, Dupré & Gagnon.*