

IN THE MATTER OF THE PETITION OF RIGHT OF

1910
 Nov. 19.

JOHN L. GARLAND, EDITH GARLAND, EMMA MARIA GARLAND, EXECUTORS AND TRUSTEES } SUPPLIANTS;
 OF THE ESTATE OF JOHN MUTCHMOR GARLAND, AND NICHOLAS GARLAND..... }

AND

HIS MAJESTY THE KING..... RESPONDENT.

Rideau Canal lands—Agreement to convey—Action to enforce parol Agreement—Acquiescence by Crown's Servants—Specific Performance—Damages—Title to Canal Lands delimited prior to Confederation under C.S.C. 1859, Cap. 24.

The suppliants sought to obtain a declaration by the court that they were entitled to a grant from the Crown, represented by the Dominion of Canada, of a certain parcel of land being part of several parcels conveyed by *J. M.*, (of whom suppliants were the legal representatives) to the late Colonel By for the purposes of the Rideau Canal. There was no written agreement to sell and convey, but the suppliants based their right to the grant upon the acquiescence of certain officials of the Crown in the validity of their claim. The facts in evidence however, disclosed that the parties were negotiating with a mistaken view of their rights.

Held, that the suppliants had shewn no valid agreement on the part of the Crown to convey; and that if the suppliants were otherwise entitled to specific performance, or damages in lieu thereof, the mutual mistake of the parties as to their rights would afford a sufficient defence thereto.

Quære,—If the fact were that in 1862 the Ordnance Department prepared a plan delimiting and laying off certain land (including the parcel in controversy) as required for canal purposes to the extent of a chain in width on each side of the canal, whether, under the provisions of C.S.C., 1859, cap. 24, sec. 1, the lands in dispute had, upon such delimitation, not become vested in the Province of Canada, so as to pass at Confederation to the Province of Ontario instead of to the Dominion? *Commissioners Queen Victoria Niagara Falls Park v. Howard* (23 O.A.R. at pp. 360, 361) referred to.

THIS was a petition of right for the recovery of certain lands in the possession of the Crown.

The facts are stated in the reasons for judgment.

November 3rd, 1910.

The case was now argued at Ottawa.

N. A. Belcourt, K.C., for the suppliants, argued that while there was no written contract by the Crown to grant the suppliants letters-patent, the evidence clearly shewed that the Crown officers assumed there was such a contract and acted upon that view in their dealings with Mutchmor. It is a case where, as between subject and subject, a decree for specific performance would undoubtedly be made. In 1868, when Mutchmor paid in his \$30, he was entitled to get back all land which the Crown did not need for canal purposes. (Cites R.S., 1906, c. 58, secs. 2 and 3.)

There was an implied agreement entered into concurrently with our going into possession. This agreement was never questioned, and the Crown would be estopped from denying it after its officers acted upon it for so long a period. (Cites *Magee v. The Queen* (1); *Tylee v. The Queen* (2); *Qu'Appelle, &c. Ry. Company v. The King* (3); *McQueen v. The Queen* (4); *Henry v. The King* (5).)

F. H. Chrysler, K.C. The Crown purchased lands, including the parcel in question, from the suppliants' predecessor in title, and leased back to him what was not required for the canal. There was no agreement at all to reconvey the piece in dispute. No money passed in respect of this particular lot, and there is no ground for specific performance even between subject and subject.

[CASSELS, J. Is the statute of frauds open to you as a defence?] Yes; we have set it up in the defence.

(1) 3 Ex. C. R. 304.

(2) 7 S. C. R. 651.

(3) 7 Ex. C. R. at p. 117.

(4) 16 S. C. R. 1.

(5) 9 Ex. C. R. 417.

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CASSELS, J., now (November 19th, 1910) delivered judgment.

This is a petition of right filed on the part of the representatives of one John Mutchmor, deceased, claiming a declaration that they are entitled to have a certain piece of land (described in the petition) granted to them by the Crown.

By consent, leave was granted to the suppliants to amend their petition by properly describing the land.

The land in question forms part of the lands granted by one John Mutchmor to Colonel By on behalf of His Majesty King George IV by deed bearing date the 15th June, 1830.

By the conveyance of the 15th June, 1830, in consideration of £5 of lawful money of Upper Canada, John Mutchmor conveyed several parcels of land comprising about 20 acres to Colonel By.

The lands, the subject-matter of the present action, are shown on the plan marked Suppliants' Exhibit No. 1. They are situated to the west of the Exhibition Building, and immediately adjoining on the east the allowance for road between Concessions B and C. They comprise four and one-half acres, more or less.

There is no dispute as to that portion of the four and one-half acres coloured green on the plan in question, being the northerly part of the triangular piece. The dispute is as to the portion of the four and one-half acres coloured pink.

The contention on the part of the Crown is that this piece coloured pink, having a depth of 200 feet from the canal, is required for canal purposes, and that the Crown never agreed to convey any portion of this piece.

The suppliants on the other hand contend that they are entitled to have conveyed to them all of the piece

coloured pink, except such portion thereof as would be included in a depth of one chain from the canal. The suppliants base their case on an alleged agreement whereby the Crown agreed to convey to them all the lands conveyed by Mutchmor in 1830, except such portions as were required for canal purposes, and the contention is that a depth of 66 feet is all that is required, and that they are entitled to a conveyance of the balance.

In 1898 a grant was executed by the Crown conveying the portion of other parts of the 20 acres not required for canal purposes. These lands so conveyed comprise all the lands referred to in the correspondence, with the exception of the piece in question.

A reference to *Magee v. The Queen* (1); *Tylee v. The Queen* (2); *McQueen v. The Queen* (3), will show the statutes relating to the construction of the canal. It is not necessary to consider these authorities in dealing with the case before me.

The case as presented by the petition is as follows:—

“1. That on or about the 15th day of June, 1830, John Mutchmor, farmer, of the township of Nepean, in the County of Carleton and Province of Ontario, now deceased, who was then the owner in fee simple of all the lands hereinafter referred to, at the request of His late Majesty King George IV, and for the purpose of building part of the Rideau Canal, conveyed by deed before witnesses to His Majesty certain parts or portions of Lot 1 in Concession Letter ‘(C)’, Rideau Front, in the said township of Nepean in said deed described more particularly for and in consideration of the sum of Twenty dollars.

“2. That concurrently with the conveyance in the last paragraph recited to wit: On or about the said

(1) 3 Ex. C. R. 304.

(2) 7 S. C. R. 651.

(3) 16 S. C. R. 1.

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15th day of June, 1830, His late Majesty King George IV granted unto the said late John Mutchmor a lease of all the lands above described at a yearly rental of one dollar for the term of thirty years from the said date, with the right to a renewal thereof at the expiration of said thirty years at an increased rental of one fourth upon the purchase money, the said Mutchmor agreeing to pay all taxes, assessments and other charges on said lands; and in and by the said lease the said Mutchmor released His Majesty from all claims to damages by reason of the building of the said canal.

“3. That under and by virtue of the said lease His Majesty reserved to himself the right to cut and take from the said lands trees, stone and other material necessary for the construction of the said canal and also to take such parts of said lands as might be considered necessary for military works or for the completion of the Rideau Canal aforesaid, or for repairs or for additions after the completion of the same. The said Mutchmor to be entitled to have reconveyed to him such portions of said lands as should not be required for the purposes above named upon re-payment by said Mutchmor of the purchase money aforesaid, namely, the sum of Twenty dollars”.

The words in paragraph 3: “ The said Mutchmor to ‘ be entitled to have reconveyed to him such portions ‘ of said lands as should not be required for the pur- ‘ poses above named upon repayment by said Mutch- ‘ mor of the purchase money aforesaid, namely, the ‘ sum of Twenty dollars ” are not to be found in the lease, and there is no foundation for any such alleged agreement so far as the evidence before me discloses.

Also it is material to consider the terms of the lease. The lease is for the term of thirty years from 15th June,

1830; the annual rent 5 shillingsp (5 per cent.) interest on the purchase money).

An option to renew the lease at the expiration of thirty years at an increased rental is given to the lessee.

It is admitted that Mutchmor, or his representatives, have always had possession of the lands leased, with the exception of the piece of land colored pink. Mutchmor, or his representatives were in possession of this piece down to the year 1903, when the Crown leased the portion colored pink, having a depth of 200 feet, to the Ottawa Improvement Commission for driveway purposes, subject to the proviso that at any time if the land were required for canal purposes the Improvement Commission would vacate the premises.

Another important fact is admitted, namely, that one Lascelles, a tenant of Mutchmor, was in occupation of the portion of colored pink at the time of the lease to the Improvement Commission, and was paid \$100 by the Commissioners and given the right to remove his house.

To entitle the suppliants to relief, in whatever form a judgment might issue, they must prove a contract capable of enforcement. The suppliants in their petition state their case as follows:—

“ 5. That in the year 1868 the legal representatives of the said Mutchmor applied to Her late Majesty Queen Victoria for re-conveyance to them of those portions of the said lands which were not required for the purposes of the said canal, and Her late Majesty, represented by the then Under-Secretary of State for Canada, to wit: on the 18th day of December, 1868, notified the said applicants in writing that upon payment of the twenty dollars paid to said Mutchmor by His late Majesty King George IV on or about the said 15th day of June, 1830, and subject to certain condi-

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tions in said letter mentioned, a grant by way of Letters Patent would be issued to the legal representatives of the said late John Mutchmor.

“6. That subsequently, to wit: On the 16th February, 1869, the legal representatives of the said Mutchmor were notified by the then Under-Secretary of State that unless an immediate settlement were made with, and the said sum of Twenty dollars paid to, the proper authority in that behalf the lands in question would be included in the scheme which was then pending for the purpose of disposing of the said lands and other lands.

“7. That in pursuance of the said agreement and of their application for a reconveyance of the said lands and in conformity and in compliance with the said notices the legal representatives of the said Mutchmor, on the 25th day of June, 1869, paid to Her late Majesty, represented by the proper officer in that behalf, the said sum of Twenty dollars and on the 30th June, 1869, a receipt was made and given to the legal representatives of the said Mutchmor by the proper officer in that behalf, namely, W. F. Coffin, being the officer then having charge of this matter, for the sum of Twenty dollars, being the consideration in full for the reconveyance of the said lands, subject, however, to the condition that the legal representatives of the said Mutchmor would hold Her Majesty harmless from any and all damages arising from the flooding of the said lands or any other damage at any time.

“8. That the said John Mutchmor and his representatives have always been and are now entitled to have and receive from the Respondent a conveyance of the portions of the said lands not actually required for the purposes of the said Rideau Canal.”

The letter of 24th July, 1868, written by Mr. Scott to the Honourable H. L. Langevin, C.B., (Exhibit No. 13) is as follows:—

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‘ OTTAWA, 24th July, 1868.

‘The Hon. H. L. Langevin, C.B.

Sir,—On behalf of Mr. Mutchmor, I have the honour to request that the lease of certain property in Nepean, granted by Col. By and held in perpetuity, may be converted into a freehold. The rental being nominal, only \$1.25 per year, it would be convenient to Mr. Mutchmor to hold an absolute deed subject if considered necessary, to such conditions as are contained in the lease. The property originally belonged to the Mutchmor family and forms a part of that taken for the Rideau Canal. The twenty acres mentioned in the lease, having been returned, Col. By considering it would not be required for canal purposes, and the experience of the last forty years fully confirms that view.

I have the honour to be,

Your Obedt. Servant,

(Sgd.) R. W. SCOTT. ”

On the 10th December, 1868, Mr. Parent, Under-Secretary of State, writes Mr. Scott as follows:— (Exhibit No. 14):—

“ Dept. of Sect. of State,
Ottawa, 10th Dec. 1868.

“ Sir,—I am directed to address you the present communication on the application preferred by you on behalf of Mr. Alex. Mutchmor of Ottawa in Nepean, dated 24th July last. Mr. Mutchmor applies by two letters dated 24th July, 1868, 1st, that the tenure of 3 pieces of land forming part of Lot Letter “I” Con. C, Nepean, be changed from leasehold to freehold. The

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said lease is renewable at the option of the said Mutchmor at the end of each and every thirty years. The first piece lies at the southwest angle of said lot Letter I, Con. C, and in the lease is stated to contain four and a half acres, more or less. There is no objection to his resuming so much of the land as lies outside to the north of the 200 feet required for canal purposes.

The second is a triangular piece as shewn on the plan stated to contain six and three quarter acres and lies between the Ordnance Boundary stones 30, 31, 32 on the said lot Letter I. There is no objection to the resumption by Mr. Mutchmor of the whole of this piece of land.

The third piece of land lies on the east and west banks of the Rideau Canal on the said lot Letter I between the Ordnance Boundary stones 14, 15, 33, 34, containing as stated eight and a half acres of land. There is no objection to the resumption of this piece of land, with the exception of one chain wide on each side of the canal required for canal purposes. On payment to the Department of the sum of \$20 originally paid for the land, and provided always that the said Mutchmor holds the Department harmless from the consequences of any flooding and from any damage from this or any other cause at any time hereafter.

2nd. Mr. Mutchmor requests to be allowed to buy two pieces of land shown on a plan produced by him, but more clearly described on a plan by Thistle, P.L.S. certified by Andrew Russell, Asst. Commr. of Crown Lands, Quebec, 16th January, 1862, and known thereon as sub-lots 31, 32, 33, contents one acre and one-fifth of an acre, and reserving always two hundred feet in front of the said lots for the use of the canal. Mr. Mutchmor might be allowed to buy the said

sub-lots at the rate of \$150 per acre or for sub-lots 31, 32, 33 the sum of \$225, and for said sub-lots 40, 41, 42 the sum of \$180, or \$405 for the whole. On payment therefor of \$425, letters-patent might issue which would contain the proviso guaranteeing the Department against all damages or claim for damages.

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I have the honour to be, Sir,
Your obedt. servant,
(Sgd.) E. PARENT,

Under-Secy.

To R. W. Scott, Esq."

Both in the letter of the 24th July and in the answer of 10th December, there seems to be a misapprehension as to the rights of the lessee. It seems to be assumed that the lessee is entitled to a renewal at the end of each and every thirty years.

This letter of 10th December expressly states, dealing with the land in dispute, that there is no objection to his resuming so much of this land as the outside to the north of the two hundred feet required for canal purposes.

A second letter, 18th December, 1868, from Parent to Scott (Exhibit 15) is as follows:—

"Department of Secretary of State,
Ottawa, 18th December, 1868.

Sir: I am directed to address you the present communication on the application preferred by you on behalf of Mr. Alex. Mutchmor of Ottawa in Nepean, dated 24th July last.

Mr. Mutchmor applies by two letters dated 24th July 1868, 1st, that the tenure of 3 pieces of land forming part of Lot Letter 'I' Concession 'C' Nepean be changed from leasehold to freehold. The

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said lease is renewable at the option of the said Mutchmor at the end of each and every thirty years. The first piece lies at the southwest angle of said lot Letter 'I,' Con. 'C,' and in the lease is stated to contain four and a half acres more or less. There is no objection to his resuming so much of this land as the outside to the north of the 200 feet required for canal purposes. The second is a triangular piece as shown on the plan stated to contain six and three quarter acres and lies between the Ordnance Boundary stones 30, 31, 32 on the said Lot Letter 'I.' There is no objection to the resumption by Mr. Mutchmor of the whole of this piece of land. The third piece of land lies on the east and west banks of the Rideau Canal on the said Lot Letter 'I' between the Ordnance boundary stones 14, 15, 33, 34, containing as stated eight and a half acres of land. There is no objection to the resumption of this piece of land with the exception of one chain wide on each side of the canal required for canal purposes, on payment to the Department of the sum of \$20 originally paid for the land and provided always that the said Mutchmor holds the Department harmless from the consequences of any flooding and from any damage from this or any other cause at any time hereafter.

I have the honour to be, Sir,
 Your obedient servant,

(Sgd.) E. PARENT,
 Under-Sec'y.

To R. W. Scott, Esq."

This letter is in effect the same as that of the 10th December.

On the 16th February, 1869, Mr. Parent wrote as follows (Exhibit No. 16):—

“ Department of the Secretary of State,
Ordnance Lands,
Ottawa, 16th February, 1869.

Sir,—On the 10th December last past, a letter was addressed to R. W. Scott, Esq., M.P.P., acting on your behalf, and informing you through him of the price and terms of a proposed sale to you of parts of Lot I, Con. C, Nepean, and have to request an immediate settlement or the piece of land in question will be included in a scheme of sale now preparing.

I am, Sir,
Your obedient servant,
(Sgd.) E. PARENT,
Under-Secretary of State.

A. Mutchmor, Esq.,
Ottawa.

The contract rests on these letters of the 24th July, 1868, and 10th and 18th December, 1868, and of the 16th February, 1869. In the 5th and 6th paragraphs of the petition it is so stated.

It is apparent that there was no intention to convey to Mutchmor or his representatives any portion of the land colored pink.

The 7th paragraph of the petition alleges that in pursuance of the said agreement, on the 25th June, twenty dollars was paid. The letter of the 25th June, 1869, Mutchmor to Col. Coffin (Exhibit No. 20) is as follows:—

“ Ottawa, 25th June, 1869.

Col. Coffin,
Ordnance Department,

Sir,—Enclosed herewith, please find \$20, said twenty dollars to cover the amount required for a conveyance

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of all the Ordnance land belonging to Lot Letter I in Con. C. Nepean, Rideau Front, held by lease for perpetuity, renewable every thirty years, deed to be without any reservations except to the Department of Public Works and of one chain on either side of the canal when actually required for canal purposes.

Deed to be made in favor of John Thornton Mutchmor and Thos. McMorrان, executors to the estate of the late John Mutchmor.

Yours very truly,

(Sgd.) A. MUTCHMOR.

Also that Mr. Mutchmor holds the Department harmless from flooding or any other damage at any time.

A. M."

The contention of the suppliants apparently is that because by this letter he states "deed to be 'without any reservations except to the Department 'of Public Works and of one chain on either side of canal when actually required for canal purposes'" that therefore the Crown is bound to convey. The letter of the 10th December, 1868, expressly stated that in the opinion of the authorities two hundred feet was required at the place in question:

The letter of the 16th February, 1869, expressly demanded payment for the lands which the Crown was willing as stated in their letter of 10th December, 1868, to convey and this money was sent on the 25th June, 1869. To argue that Mutchmor's statement in his letter of 25th June, 1869, binds the Crown to a new contract seems to me an absurdity. Besides there would be no right to convey what was required for canal purposes.

That Mutchmor understood that the Crown never receded from the position taken as to the 200 feet is

apparent from his letter of 26th December, 1873 (Exhibit No. 22):—

“ OTTAWA, 26th December, 1873.

Honourable A. McKenzie,

Premier and Minister of Public Works.

Dear Sir,—I have the honour to inform you, that while the Rideau canal was in course of construction, my grandfather, the late John Mutchmor, was the owner of Lot I, in Concession 'C, Rideau Front, Township of Nepean, and County of Carleton. The Government at that time anticipating a great future for the canal, forced us into selling them a much larger area of said lot than was ever required for canal purposes, the price being a mere nominal sum. They leased the land back to us in leases renewable every thirty years, for time immemorial, by us paying them the interest on the above nominal sum as the rent, which we have continued to do up to three or four years ago, when we made an application to purchase by paying the original amount received by the late John Mutchmor. The Ordnance Department acceded to our request at once, but reserved two hundred feet from the water's edge of the canal for canal purposes. To this we demurred, but offered to accept of a deed, with the exception of the two hundred feet, if we were allowed to lease as before the remainder not deeded to us, and if ever required for canal purposes, we were willing to relinquish our claim. We considered this a fair and reasonable proposal on our part, as the Department were bound to renew the lease originally made, and one chain was all the reserve made in it. The Department refused us and the matter remains in the same position to the present day. We still claim that in justice and equity, no more than the

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chain originally reserved, can be kept from us, and even that will never be required for canal purposes, as it is already nearly double the usual width where it runs through the above lot.

Hoping you will be pleased to include in our deed all contained in our original lease, and allow us the use or give us a lease of that until it may be needed for canal purposes.

I have the honour to be,

Sir,

Your obedient servant,

(Sgd.) ALEXANDER MUTCHMOR,
 For Estate late John Mutchmor."

I do not think the subsequent views of officials of the Government as to the rights of the suppliants have any bearing on the question. The right rests purely on contract, and in my opinion no contract has been proved entitling the suppliants to relief.

I have not overlooked the point that the parties were negotiating with a mistaken view of their rights.

Mutchmor's contention that he was entitled to renewals in perpetuity seems to have been taken for granted by the officials of the Government.

If otherwise entitled to specific performance, or damages in lieu thereof, this mistake would afford a defence.

Both parties take for granted that the lands in question passed to the Dominion at the time of Confederation. I have not thought it necessary to decide this question, but if Mr. Belcourt's contention that in 1862 the Ordnance Department prepared a plan delimiting the lands required for canal purposes as a chain in width on each side of the canal is correct, a serious question arises whether under 18 Vict. cap. 91 and 19

and 20 Vict. cap. 45, consolidated by cap. 24 of the Consolidated Statutes of Canada, 1859, the lands in dispute ever passed to the Crown as represented by the Dominion? See per Hagarty, C. J. in *Commissioners Queen Victoria Niagara Falls Park v. Howard* (1).

I think the petition should be dismissed with costs. The whole contention is in reference to the part colored pink. The Crown was always willing to convey the part coloured green.

Judgment accordingly.

Solicitors for suppliants: *Belcourt & Ritchie.*

Solicitors for respondent: *Chrysler, Bethune & Larmonth.*

(1) 23 O. A. R. at pp. 360, 361.

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