
[E.C.] 1877
April 10.
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Mar. 1.

CHEVRIER *v.* THE QUEEN.

Petition of Right—Demurrer—9 Vic., c. 37—Right of the Crown to plead prescription—10 years prescription—Good faith—Translatory title—Judgment of confirmation—Inscription en faux—Improvements, claim for by incidental demand—Arts. 2211, 2251, 2206, *C. C. (L.C.); Art.* 473, *C. P. C. (L. C.)*

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of *P. W. jr.*, certain parcels of land originally granted by Letters-Patent from the Crown, dated 3rd January, 1806, to *P. W., sen.*, together with a sum of $200,000 for the rents, issues and profits derived therefrom by the Government since the illegal detention thereof.

The Crown pleaded to this petition of right—1st, by demurrer, *defense au fonds en droit*, alleging that the description of the limits and position of the property claimed was insufficient in law ; 2nd, that the conclusions of the petition were insufficient and vague ;

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3rd, that in so far as respects the rents, issues and profits, there had been no signification to the Government of the gifts or transfers made by the heirs to the suppliants.

These demurrers were dismissed by Strong, J., and it was *Held*, that the objection taken should have been pleaded by *exception à la forme*, pursuant to art. 116 C. C. P., and as the demurrer was to all the rents, issues and profits as well those before as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of *P. W., jr.*

This judgment was not appealed against. *

As to the merits the defendant pleaded—1st. By peremptory exception, setting up title and possession in Her Majesty under divers deeds of sale and documents; 2nd. Prescription by 30, 20 and 10 years. An exception was also filed, setting up that these transfers to petitioner by the heirs of *P. W., jr.*, were made without valid consideration, and that the rights alleged to have been acquired were disputable, *droits litigieux*. The general issue and a supplementary plea claiming value of improvements were also filed.

To the first of these exceptions the petitioner answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed *en faux* against a judgment of ratification of title to a part of the property rendered by the Superior Court for the district of Aylmer, P. Q. To the exception of prescription the petitioner answered denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of defendant. There were also general answers to all the pleas.

On the issues thus raised, the parties went to proof by an *enquête* had before a commissioner under authority of the Exchequer Court, granted on motion in accordance with the law of the Province of Quebec.

The case was argued in the Exchequer Court before J. T. Taschereau, J., and he dismissed the suppliant's petition of right with

*REPORTER'S NOTE.—The important judgment of STRONG, J. on demurrer not having been before reported, will be found on the following page. Had the notes of the learned judge been received at an earlier date, they would have been printed in their chronological order in the main portion of this volume.

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costs. Whereupon the suppliant appealed to the Supreme Court of Canada.

Held (Fournier and Henry, JJ., dissenting): 1. That before the Code, and also under the Code (art. 2211), the Crown had, under the laws in force in the province of Quebec, the right to invoke prescription against a subject, which the latter could have interrupted by petition of right.

2. That in this case the Crown had purchased in good faith with translatory titles, and had, by ten years peaceable, open and uninterrupted possession, acquired an unimpeachable title.

3. That in relation to the *inscription en faux*, the art. 473 of the Code of Procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the register of the court.

4. That the petitioner was bound to have produced the minute or draft of judgment attacked, but having only produced a certified copy of the judgment, the inscription against the judgment falls to the ground.

5. That even if S. O.'s title was *un titre précaire*, the heirs by their own acts ceded and abandoned to L. all their rights and pretensions to the land in dispute, and that the petitioner C. was bound by their acts.

Held, also, that the *impenses* claimed by the incidental *demande* of the Crown were payable to the petitioner, even if he had succeeded in his action.

Per H. E. Taschereau and Gwynne, JJ., that a deed taken under 9 Vic. c. 37, s. 17, before a notary (though not under the seal of the commissioners) from a person in possession, which was subsequently confirmed by a judgment of ratification of a Superior Court, was a valid deed, that all rights of property were purged, and that if any of the *auteurs* of the petitioner failed to urge their rights to the moneys deposited by reason of the customary dower, the ratification of the title was none the less valid.

See Can. S.C.R., vol. iv, p. 1.

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STRONG, J. *on Demurrer.*

This is a petition of right, in the nature of a petitory action against the Crown, instituted to recover certain lands, parts of lots Nos. 2 and 3, in the 5th range of the township of Hull. The petition alleges that Philemon Wright, the original grantee of the Crown of the land in question, conveyed these lands to his son Philemon Wright, the younger, who subsequently died intestate leaving eight children co-heirs at law and also his widow surviving, and after stating the deaths of some of the original heirs, and also the death of the widow of Philemon Wright,

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the younger, who had been entitled to her customary dower in these lands, the petition sets forth certain deeds executed by the heirs of Philemon Wright and the heirs of such of them as had died, conveying to the suppliant their respective undivided shares in the lands in question; the earliest of these deeds, dated in May, 1875, alleges that the parties executing these deeds also transferred to the suppliant their undivided shares of all and every the rents and issues, indemnity and damages due by any party having occupied or occupying said lots of land, or any part thereof.

The petition further alleges that 159 acres of the said lots numbers 2 and 3, in the 5th range of the township of Hull (including a pond), which was part of the estate of Philemon Wright, the younger, and of which he died seized and possessed, are now in the possession, occupation and control of the Government of the Dominion of Canada; and also that the petitioner is proprietor, and entitled to claim the said lots numbers 2 and 3, in the 5th range of the township of Hull, including a certain strip of land used for a canal, which said last mentioned property is now held and possessed by the Dominion Government as property belonging to the Department of Public Works; that the Government of Canada have been in the possession of the property claimed for twenty-nine years, and that the suppliant is entitled to the rents, issues and profits thereof during that time. It is further stated that Sarah Olmstead, the widow of Philemon Wright, the younger, died on the 5th December, 1871, and that the only title the Government have to the property is derived from Sarah Olmstead (Mrs. Sparks) who had the usufruct for her dower. The prayer of the petition is that the suppliant be declared to be the true and lawful owner and proprietor of the above mentioned property, to wit, of all the property now held by the Government in said lots numbers 2 and 3, and that the same be awarded to him, and that he is entitled to have and receive the sum of $200,000 for the rents, issues and profits derived therefrom by the Government since their illegal detention thereof, with costs. To this petition the Crown has filed three demurrers, or *défenses en droit*. The ground of the first demurrer is that the petition failed to describe by clear and intelligible description, or by metes and bounds, the limits and position of the said 159 acres of land. The second demurrer shows for cause that the suppliant, by his petition, claims to cover the arrears of rents, issues and profits in respect of the detention by the Government prior to the accrual of the suppliants title by virtue of the deeds of transfer to him made by the heirs of Philemon Wright, the younger, without showing that signification and copy of the transfer of these rents and profits was ever given to the Crown. The third demurrer conjoins the two distinct grounds separately embraced in the first and second.

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The first demurrer must be dismissed for these several reasons, first: petitions of right are not dependent on the forms and modes of pleading and procedure in force in the province of Quebec. The pleadings subsequent to the petition are, pursuant to the second of the General Rules of this Court, to conform as nearly as may be to those in use in Her Majesty's Superior Court for the province of Quebec, but the form of the petition itself is prescribed generally for all the Provinces by section 2 and form No. 1 of the schedule of the Petition of Right Act, 1876. That form requires the petitioner, or suppliant, to state with convenient certainty the facts on which he relies entitling him to relief. The article 52 of the Code of Procedure of the province of Quebec, which has been invoked by the Crown in support of the first demurrer is, therefore, not applicable, the question being simply whether the petition in compliance with the statute sets forth the facts with convenient certainty.

Secondly : the principle of construction applicable to such a pleading as this is not the old rule of English common law pleading, which required every possible intendment to be made against the pleader, but the more benign doctrine which presumes everything in his favor, now universally applied to all pleadings. The description given in the petition as "159 acres, part of the lots mentioned, now in the possession of the Government as property belonging to the Department of Public Works," is surely sufficient to inform the Crown of the situation and extent of the land which the suppliant seeks to recover, since the officers of the Crown must know with exactitude, and be able to identify, the precise parcel or parcels of which the Crown is in the occupation. It was always a rule in the strictest system of pleading ever known—that which prevailed formerly in the English courts of common law—that less than the ordinary degree of certainty was required in the allegation of a fact more within the knowledge of the opposite party than of the party pleading, and that rule is very applicable here ; the Crown can have no embarrassment in shaping its defence, for its officers are able to designate the exact quantity of land they claim to be in possession of ; and, as regards the pretention that the conclusions of the petition are not sufficiently precise to enable the court to draw up its judgment for the suppliant, the answer to that objection is that the identity and exact description of the land, with its boundaries, are easily ascertainable by evidence which may be given for that purpose, or by the ministry of experts appointed by the court to ascertain them. The well known maxim *id certum est quod certum reddi potest*, sums up the answer to this argument. I am of opinion, therefore, that on these grounds alone the first demurrer fails. It would appear, however, that even if the rules of pleading and procedure enunciated by the Code of Procedure for the province of Quebec are applied to this

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demurrer, it must equally fail, for the objection, assuming it to be a valid one, is not properly taken by demurrer.

Article 116 of the Quebec Code of Procedure enacts that informalities in the declaration, when they contravene the provisions contained in article 52, or any of them, must be pleaded by exception to the form. The insufficiency of the description of the land in the petition, if a good objection in any shape, depends altogether on article 52 which requires in an action brought to recover a corporeal immoveable that the nature of the immoveable, the city, town, village, parish or township, street, range or concession wherein it is situated, and also the lands co-terminous to it, should be mentioned. The proper mode of raising an objection to the sufficiency of the description was, therefore, by exception to the form, and not by demurrer.

This article 52 is a reproduction of article 64 of the French Code of Civil Procedure, which, in its turn, is derived from the Ordonnance of 1667 s. 9, arts. 3 and 4, with the exception that both the ancient and modern rule of the French practice are more rigorous than that of the Quebec Code of Procedure since they both prescribe the penalty of nullity for non-compliance with the requisite formalities (*le tout à peine de nullité*) ; but a strict and literal conformity to the requirements of the Quebec as well as the French procedure would make it incumbent on the plaintiff to describe the " héritage " by its boundaries.

It appears, however, from the authorities that the spirit rather than the letter of this provision has been regarded, and that the jurisprudence does not require all the particularity of designation which the words of the Ordonnance and Codes demand, but that it is considered sufficient if the description is such that defendant cannot be ignorant of the situation and quantity of the land which constitutes the object of the action. The history of the law shows that this is a reasonable construction, for article 9 ss. 3 and 4 of the Ordonnance of 1667 was substituted for the ancient practice of requiring the plaintiff to go to the land and point out to the defendant, on the spot, what he sought to recover in his action, and the defendant was entitled to a dilatory exception suspending the action until the plaintiff thus defined the object of his demand (1). Then, although this petition fails to give the boundaries and exact quantities of the land in litigation, I think there is contained in it a description sufficient to give the Crown notice of the exact portion of land which the suppliant seeks to recover, and this, which I hold to be be sufficient to satisfy the reasonable certainty called for by the Petition of Right Act, 1876, before referred to, will also, in my judgment, and as I read the authorities, meet the requirements of article 52 of the Code of Procedure of Quebec. The first demurrer is dismissed with costs.

(1) Carré Chauveau, vol. 1, p. 379. Boncenne, *Théorie de la Procédure*, vol. 2 p. 151. Pigeau, *La Procédure Civile*, vol. 1, p. 10.

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The second demurrer must be dismissed for the reason that being good in part only, its conclusion is too large in asking that the whole of the petition, so far as regards the rents, issues and profits should be dismissed.

The suppliant, by his petition, seeks to recover rents and profits which have accrued before as well as since the dates of the several deeds of donation, under which he claims, the earliest of which was executed on the 12th of May, 1875. This is clear from one of the statements of the petition which is as follows: "Your petitioner is entitled to claim the rents, issues and profits of the said portion of the property so held by the Government of Canada since the illegal detention thereof, to wit: since 29 years," and from part of the conclusion, or prayer which is for a declaration that the suppliant is entitled to have and recover the sum of $200,000 for the rents, issues and profits derived from the lands by the Government since their illegal detention thereof.

Rents and profits from the date at which the suppliant acquired his title, he is clearly entitled to recover as incidental if he succeeds in his claim for the recovery of the lands. Art. 1498 of the Civil Code of Quebec enacts, that from the time of the sale all the profits of the thing belong to the buyer.

As regards revenues and fruits which accrued anterior to the execution of the deeds under which the suppliant claims title, they constitute a debt due to the suppliant's *auteurs*, and he can only recover those rents as being a transfer of the debt due to the heirs of Philemon Wright, the younger, under the express clause of cession of those rents contained in the deeds set forth in the petition. In order, however, to show a perfect title under these transfers the suppliant, pursuant to article 1571 of the Civil Code of Quebec, should have shown that he had signified the acts of sale and delivered copies to the proper officers of the Crown, or he should have shown an acceptance of the transfers by those officers. This he has omitted to do.

The petition is, therefore, defective in not shewing a title to sue in respect of rents and profits which accrued before the date of the suppliant's own title. Prior to the enactment of the Civil Code, a practice prevailed in lower Canada of regarding the service of the summons in the action as a sufficient signification of the cession of a debt. *Aylwin* v. *Judah* (1). But, since the code, (see *Mignot* v. *Reeds*) (2) there appears to be a well settled jurisprudence the other way, and notice or signification anterior to the action must now be alleged and proved. *Forsyth* v. *Charlebois* (3), *McLennan* v. *Martin* (4). Although the suppliant fails to show by his petition a right to recover rents and profits accrued before the date of his titles, yet as he sufficiently alleges a

(1) 7 L. C. R. 128.
(2) 9 L. C. J. 27.
(3) 13 L. C. J. 328.
(4) 17 L. C. J. 78.

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right to those subsequently accrued, it follows that the conclusion is too large and that the demurrer must, therefore, be dismissed with costs.

This will not, of course, prejudice the right of the Crown to insist, at the hearing of the cause, on limiting the suppliant to a recovery of the subsequent rents.

The third demurrer, which is mere reiteration of the two others conjoined, must be, for the reasons already given, also dismissed with costs.