

[E.C.] 1883

MCQUEEN *v.* THE QUEEN.

Feb. 19. *Petition of Right Act, 1876, s. 7—Statute of Limitations—32 Henry 8, c. 9—Rideau Canal Act, 8 Geo. 4, c. 1—6 Wm. 4, c. 16—7 Vic., c. 11, s. 29—9 Vic., c. 42—Deed—Construction of—Estoppel.*

[S.C.] 1887

Dec. 13.

Under the provisions of 8 Geo. 4, c. 1, generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen as necessary for making and completing said canal, but only some 20 acres were actually used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to Wm. McQueen all his interest in the said lands, and on the 6th February, 1832, the said Wm. McQueen conveyed the whole of the lands originally granted to Grace McQueen to said Col. By in fee for £1,200.

By 6 William 4, c. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 Vic., c. 2, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was

enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the use of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

1883
 McQUEEN
 v.
 THE QUEEN.

By 9 Vic., c. 42, (Canada), it was recited that the foregoing proviso had given rise to doubts as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 George 4, c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for re-investing in him and his grantees of the portions of lands taken but not required for such purposes.

By the 19-20 Vic., c. 45, the Ordnance properties became vested in Her Majesty for the uses of the late province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada.

The appellant, the heir-at-law of William McQueen, by her petition of right, sought to recover from the Crown 90 acres of the land originally taken by Col. By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the Crown, and an indemnity for the value of such portions of these 90 acres as had been sold by the Crown.

Held: (per Gwynne, J. in the Exchequer)—Under the statute 8 Geo. IV., the original owner and his heirs did not become divested of their estate in the land until after the expiration of the period given by the act for the officer in charge to enter into a voluntary agreement with such owner, unless in virtue of an agreement with such owner. Nor was there any conversion of realty into personalty effected by the act until after the expiration of said period. By the deed made by William McQueen of the 6th February, 1832, all his estate in the 110 acres, as well as in the residue of the 600 acres, passed and became extinguished, such deed operating as a contract or agreement made with Col. By as agent of His Majesty within the provisions of the act and so vesting the 110 acres absolutely in His then Majesty, his heirs and successors.

2. Such deed was not avoided by the statute 32 Hy. VIII., c. 9, Col. By being in actual possession as the servant and on behalf of His Majesty, and taking the deed from William McQueen while out of possession, the statute having been passed to make void all deeds executed to the prejudice of persons in possession by persons out of possession to persons out of possession, under the circumstances stated in the act.

1883-7
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 McQUEEN  
 v.  
 THE QUEEN.  
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3. There was no reversion or revesting of any portion of the land taken by reason of its ceasing to be used for canal purposes. When land required for a particular purpose is ascertained and determined by the means provided by the legislature for that purpose, and the estate of the former owner in the land has been by like authority divested out of him and vested in the Crown, or in some persons or body authorized by the legislature to hold the expropriated land for the public purpose, if the estate of which the former owner is so divested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him in virtue of which he can at any subsequent time claim, upon any principle of the common law, to have any portion of the land of which he was so divested to be re-vested in him by reason of its ceasing to be used for the purpose for which it was expropriated.
4. Assuming that Grace McQueen had, by operation of the act, become divested of her estate in the land in her lifetime, and that her right had become converted into one merely of a right to compensation which, upon her death, passed as personalty, the non-payment of any demand which her personal representative might have had, could not be made the basis or support of a demand at the suit of the heir-at-law of William McQueen, to have re-vested in him any portion of the lands described in the deed of the 6th February, 1832, after the execution of that deed by him, whether effectual or not for passing the estate which it professed to pass.
5. The proviso in the 29th section of 7 Vic., c. 11, as explained by 9 Vic., c. 42, was limited in its application to the lands which were originally the property of Nicholas Sparks, and not conveyed or surrendered by voluntary grant executed by him, and for which no compensation or consideration had been given to him.
6. Her Majesty could not be placed in the position of trustee of the lands in question unless by the express provisions of an act of Parliament, to which she would be an assenting party.

On appeal to the Supreme Court,—

*Held*: (1). (Per Ritchie, C.J.) By the deed of the 6th February, 1832, the title to the lands passed out of William McQueen, but assuming it did not, he was estopped by his own act, and could not have disputed the validity and general effect of his own deed, nor can the suppliant who claims under him.

(2). (Per Ritchie, C.J., and Strong and Gwynne, JJ.) The suppliant is debarred from recovering by the Statute of Limitations, which the Crown has a right to set up in defence under the 7th section of the Petition of Right Act of 1876.

(3) (Per Strong, J.) Independently of this section, the Crown, having acquired the lands from persons in favour of whom the statute

had begun to run before the possession was transferred to the Crown, that body incorporated under the title of "The Principal Officers of Ordnance" would be entitled to the benefit of the statute.

1887  
 McQUEEN  
 v.  
 THE QUEEN.

- (4.) (Per Strong, J.) The act 9 Vic., c. 42, had not the effect of restricting the operation of the revesting clause of 7 Vic., c. 11 to the lands of Nicholas Sparks, and was passed to clear up doubts as to the case of Nicholas Sparks and not to deprive other parties originally coming within sec. 29 of 7 Vic., c. 11 of the benefit of that enactment.
- (5.) (Per Strong, J.) A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under sec. 29. Where it is within the power of a party, having a claim against the Crown of such a nature as the present, to resort to a petition of right a mandamus will not lie, and a mandamus will never, under any circumstances, be granted where direct relief is sought against the Crown.
- (6.) (Per Strong, J.) By the express terms of the 3rd section of 8 Geo. IV., c. 1, the title to lands taken for the purposes of the canal vested absolutely in the Crown so soon as the same were, pursuant to the act, set out and ascertained as necessary for the purposes of the canal; and all that Grace McQueen could have been entitled to at her death was the compensation provided by the act to be ascertained in the manner therein prescribed, and this right to receive and recover the money at which this compensation should be assessed vested, on her death, in her personal representative, as forming part of her personal estate. Therefore as regards the 110 acres nothing passed by the deed of 6th February, 1832. And up to the passing of 7 Vic., c. 11, no compensation had ever been paid by the Crown, nor any decision as to compensation binding on the representative of Grace McQueen.
- (7.) (Per Strong, J.) The proviso in sec. 29 of 7 Vic., c. 11 applied to the 90 acres not used for the purposes of the canal, and had the effect of reversing the original estate in William McQueen as the heir-at-law of his mother, subject to the effect upon his title of the deed of 6th February, 1832. But if it had the effect of revesting the land in the personal representative, the suppliant is not such personal representative and would therefore fail.
- (8.) (Per Strong, J.) This deed did not work any legal estoppel in favor of Col. By which would be fed by the statute vesting the the legal estate in William McQueen, the covenants for title by themselves not creating any estoppel. But if a vendor, having no title to an estate, undertakes to sell and convey it for valuable consideration, his deed, though having no present operation either

1887  
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 McQUEEN
 v.
 THE QUEEN.
 ———

at law or in equity, will bind any interest which the vendor may afterwards acquire even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, or his heir-at-law, will be compelled to convey to such purchaser accordingly. In other words, the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. Therefore, if the suppliant were granted the relief asked, the land and money recovered by her would in equity belong to the heirs of Col. By. Although nothing passed under the deed of the 6th February, 1832, yet the suppliant could not withhold from the heirs or representatives of Col. By anything she might recover from the Crown under the 29th section of 7 Vic. c. 11, but the heirs or representatives of Col. By would in turn become constructive trustees for the Crown of what they might so recover by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.

- (9.) (Per Strong, J.) The deed of the 6th February, 1832, being in equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire, there is nothing in the statute 32 Henry 8, c. 9, or in the rules of the common law avoiding contracts savoring of maintenance, conflicting with this use of the deed.
- (10.) (Per Fournier and Henry, JJ.) The mere setting out and ascertaining of the lands was not sufficient to vest the property in His Majesty, and Grace McQueen having died without having made any contract with Col. By the property went to William McQueen her heir-at-law.
1. (Per Fournier, Henry and Taschereau, JJ.) The deed of the 6th February, 1832, made before the passing of 7 Vic., c. 11, s. 29, and five years after the Crown had been in possession of the property in question, conveyed no interest in such property either to Col. By personally or as trustee for the Crown, and the title therefore remained in the heirs of Grace McQueen.
 2. The proviso in sec. 29 of 7 Vic. c. 11 was not limited by 9 Vic. c. 42 to the lands of Nicholas Sparks, and the appellant is entitled to invoke the benefit of it.
 3. The 90 acres now used for the purposes of the canal did not by 19 Vic. c. 54 become vested in Her Majesty, nor were they transferred by the B. N. A. Act to the exclusive control of the Dominion Parliament. The words "adjuncts of the canal" in the first

schedule of the B. N. A. Act could only apply to those things necessarily required and used for the working of the canal.

1887

4. The Crown was not entitled to set up the Statute of Limitations as a defence by virtue of sec. 7 of the Statute of Limitations Act, 1876, that section not having any retroactive effect.

MCQUEEN

v.

THE QUEEN.

5. (Per Fournier, Henry and Taschereau, JJ.) There could be no estoppel as against William McQueen by virtue of the deed of the 6th February, 1832, in the face of the proviso in 7 Vic. c. 11.

The court being equally divided the appeal was dismissed, without costs. See Can. S.C.R., vol. XVI., p. 1.