

BETWEEN

1910
 April 16.

THE KING ON THE INFORMATION OF THE } PLAINTIFF;
 ATTORNEY-GENERAL OF CANADA..... }

AND

THE CAP ROUGE PIER AND } DEFENDANTS.
 WHARF COMPANY, AND THE HEIRS }
 OF THE ESTATE OF THE HONOURABLE AN- }
 TOINE JUCHEREAU DUCHESNAY..... }

*Expropriation—National Transcontinental Railway—Title of defendants—
 Prescription—Interruption of—Letter admitting tenancy—Effect of.*

In an expropriation proceeding by the Crown, an issue of title in the lands taken was raised between two defendants, the Cap Rouge Pier and Wharf Co. and the Duchesnay heirs, the former asserting title, by prescription, in the lands at the date of the expropriation, viz.: 23rd May, 1906. The Duchesnay heirs, however, claimed that such prescription was interrupted by the following clause in a letter written by the manager of the Cap Rouge Co. to the Honourable A. J. Duchesnay in his life time:—

“QUEBEC, 21st June, 1877.

“HONBLE. A. J. DUCHESNAY,
 Quebec.

SIR,—Enclosed please find cheque for \$60 for use of your interest in Cap Rouge river this year. . . .

Yours obediently,
 (Sgd.) J. BOWEN, JR.”

Duchesnay's interest embraced the lands in question.

Held, that under the provisions of Arts. 2227 and 2242, *et seq.* C. C. P. Q., the clause of the letter above quoted operated as an interruption of prescription. *Walker v. Sweet* (21 L. C. Jur. 29); and *Darling v. Brown* (1 S. C. R. 360.) referred to.

THIS was an information exhibited by His Majesty's Attorney-General for Canada, seeking the expropriation of certain lands in the Province of Quebec.

The facts are stated in the reasons for judgment.

March 22nd and 23rd, 1910.

The case was now heard at Quebec.

L. A. Taschereau, K.C., for the Crown;

G. G. Stuart, K.C., for the Cap Rouge Pier and Wharf Company;

E. J. Flynn, K.C., and *E. T. Paquet* for the Duchesnay estate.

On the issue of title between the Cap Rouge Pier and Wharf Company and the Duchesnay estate, *Mr. Flynn* argued that title by prescription had not been shown by the company. The evidence showed that they were in possession as tenants of the Duchesnay estate, and therefore, there was no foundation for prescription. (Cites Art. 2231 C. N.; Art. 2195 C.C.P.Q., *Duranton* (1).

Mr. Stuart contended that the company's title by prescription was perfect if the letter of the 21st June, 1877, could not be construed as an interruption of prescription. There is nothing to show on the face of the letter that it applied to the land in dispute, and no presumption arises that it does. Our possession is not referable to a lease from Duchesnay. The burden is upon the Duchesnay heirs to show that we are in possession under them, and that burden has not been discharged. (Cites Art. 2174 C.C.P.Q.) We are in possession and all presumptions of title are in our favour.

Mr. Flynn, in reply, contended that the letter of the 21st June, 1877, covers all the Duchesnay interest on the river.

CASSELS, J., now (April 16th, 1910,) delivered judgment.

The information in this case was filed on behalf of His Majesty to have it declared that certain lands required for the National Transcontinental Railway (which lands are described in the information) are vested in the Crown, and to have the compensation for such lands ascertained.

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The lands in question were measured off by metes and bounds and a plan and description of same were deposited of record on the 23rd May 1906. At the opening of the trial the following consent was filed :—

“The parties, plaintiff and defendants, admit that the value of the property expropriated and in question in the present cause is the sum of Forty thousand dollars (\$40,000), and that such sum, together with interest from the date of the taking possession of the property by the Crown, is a just and sufficient compensation to the owners of the said property, for the value thereof and all damages accruing by reason of the taking of the said property and the expropriation thereof.”

The only questions remaining for adjudication are whether or not the Duchesnay estate were entitled at the date of the expropriation to the lands claimed by them in their statement of defence.

The defendants the Cap Rouge Pier and Wharf Co. do not admit the title of the Duchesnay state, and also claim that if the Duchesnay estate were the proprietors or owners of the lands their title thereto is now and was at the date of the expropriation (23rd May, 1906) vested in the Cap Rouge Pier and Wharf Co. by prescription.

The lands, the title to which is in controversy, comprise 60/100 of an acre. They are part of the bed of the river Cap Rouge according to the contention of the Duchesnay estate, and passed under the seigniorial grant of the 8th February, 1652, if such lands formed part of the bed of the Cap Rouge River. At low water the lands in question, 60/100 of an acre, are uncovered. At high water they are completely covered.

At the trial counsel for The Cap Rouge Pier and Wharf Co. contended that the lands in question are not and were not at the time of the seigniorial grant part of the bed of the Cap Rouge river, but formed part of the bed

of the river St. Lawrence, and therefore the said lands were not included in the seigniorial grant.

If the lands in question formed part of the bed of the river St. Lawrence then they are vested in the Crown on behalf of the province.

The province is not represented in this action, and if they are Crown lands of the province no prescription has been pleaded or proved as against the Crown representing the province, and the title of the Cap Rouge Pier and Wharf Co., on the pleadings and evidence adduced before me to the 60/100 of an acre in question, would not be proved.

It was agreed at the trial by counsel for the Cap Rouge Pier and Wharf Co. and the Duchesnay estate that the value of the 60/100 of an acre should be fixed as of the time of the expropriation at the sum of \$800.

If the Duchesnay estate were the owners of these lands at the date of the expropriation, then out of the \$40,000 they would receive the sum of \$800 and interest thereon. The 60/100 of an acre in question is now known as Cadastral No. 167. It is shown on the plan Exhibit D-3 marked (33) (E).

Mr. Taché, the agent for the Duchesnay estate, in his evidence admits that up to 1905 there had been no cadastral number for this lot. I think it clear from the evidence that if this lot now numbered 167 formed part of the bed of the river Cap Rouge it passed by the seigniorial grant of 8th February, 1652, and the title of the Duchesnay estate thereto has been clearly proved, if not lost by prescription, as claimed by the Cap Rouge Pier and Wharf Co. In the information filed clause 3 of paragraph 2 is as follows:

"3rd. A certain piece or tract of land forming part of lot No. 33 on the plan and book of reference of the Transcontinental Railway being a part of lot Cadastral No. 167 of the Parish of St. Felix du Cap Rouge, containing seventy-four (74) hundredths of an acre more

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or less, described as follows:—Commencing at the point of intersection of the eastern side of an old wharf with the southern side of the old public road, thence going in a westerly direction along the southern side of the said public road, a distance of two hundred and seventeen (217) feet more or less to a point where the public road turns at right angles towards the south, thence in a southerly direction along the eastern side of the said public road a distance of one hundred and fifty (150) feet more or less to a point where the public road turns to the south-west, thence in a south-westerly direction along the south-eastern side of the said public road a distance of twenty-four (24) feet more or less to a point situate at a perpendicular distance of one hundred and sixty (160) feet from the centre line of said railway, thence in an easterly direction along a line parallel to the centre line of the said railway and at a distance of one hundred and sixty (160) feet therefrom a distance of two hundred and sixty-two (262) feet more or less to the eastern side of the old wharf above mentioned, thence in a northerly direction along the eastern side of the said old wharf a distance of one hundred and eighteen (118) feet more or less to the point of beginning. The said piece of land is bounded as follows:—To the east by Cap Rouge river, to the north and west by the old public road, and to the south by the remainder of said lot Cadastral No. 167, belonging to the said Defendants the Cap Rouge Pier and Wharf Co.” Paragraph 3 of the information is as follows :

“3. The defendants, the Cap Rouge Pier and Wharf Company, claim to have been the owners in fee simple at the date of such expropriation of the said lands and real property free and clear from all encumbrances and adverse claims, subject, however, to an annual seignioral rent of twenty-nine dollars

payable to the said Duchesnay estate on that portion of said lands and real property firstly above described, and except that the said defendants the heirs of the said Honourable Antoine Juchereau Duchesnay claim to be the owners of, or are otherwise entitled to, a part of that portion of the lands and real property thirdly above described, which said part so claimed is described as follows:—

A certain piece of land forming part of lot 33, on the plan and book of reference of the parish of St. Felix du Cap Rouge, containing sixty (60) hundredths of an acre, more or less, described as follows:— Commencing at the point of intersection of the low water mark of the western shore of the Cap Rouge River with the southern side of the old public road, thence going in a westerly direction along the southern side of the said public road, a distance of one hundred and ninety (190) feet, more or less, to a point on the plan shown as the high water mark, thence in a southerly direction along said high water mark, as shown on plan for a distance of about one hundred and fifty-five (155) feet, more or less, to a point shown on plan where the line drawn from the point on public road intersects the high water mark, at a perpendicular distance of one hundred and sixty (160) feet from eastern line of railway, thence in an easterly direction along a line parallel to the centre line of said railway for a distance of two hundred and twenty-five (225) feet, more or less, to the line of low water mark above mentioned, and thence northerly following the said line of low water mark for a distance of one hundred and eighteen (118) feet, more or less, to point of beginning; and the said defendants claim that they have sustained loss and damage in respect of their said estate and title in the said lands and real property by reason of the

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entry and taking of the said lands and real property, and by reason of the construction and maintenance thereon of the said railway and by reason of other lands of said defendants being injuriously affected by the said expropriation."

The Cap Rouge Pier and Wharf Co. by their defence admit the allegations in clause 3 of the 2nd paragraph of the information. They also admit by paragraph 3 of their defence as follows:—

"2. The defendant, the Cap Rouge Pier, Wharf and Dock Co., admits so much of the allegations of the 3rd paragraph of the information as sets up its claim to the whole of the property described in the information, and further admits that the heirs of the said Honourable Antoine Juchereau Duchesnay claim to be the proprietor of that part of the property described in the said 3rd paragraph, but the defendant denies that the heirs of the said Honourable Antoine Juchereau Duchesnay are the proprietors or have any claim to the portion of the said land expropriated described in the 3rd paragraph of the said information."

That part of the property described in the 3rd paragraph of the information is part of the bed of the river Cap Rouge.

Moreover, as I have pointed out, if the lands in question do not form part of the bed of the river Cap Rouge but part of the bed of the river St. Lawrence, then the title of the Cap Rouge Pier and Wharf Co. by prescription would fail.

I am moreover of opinion that on the evidence adduced before me the lands in question do form part of the bed of the river Cap Rouge.

I am unable to accede to Mr. Stuart's contention that high water mark when the tide is at full height is to be taken as the banks of the St. Lawrence. If this conten-

tion were well founded then every river flowing into the St. Lawrence whose waters are raised by the tide would, to the head of tide-water, form part of the St. Lawrence. The Saguenay, as far as Chicoutimi, and numerous other rivers would disappear. The effect of the tide is to back up the waters of the Cap Rouge river and overflow the lands in question.

The only question in my opinion is whether on the evidence adduced before me, the claim of the Cap Rouge Pier and Wharf Co., to the title of prescription is to be maintained.

The claim of the Cap Rouge Pier and Wharf Co. is in their defence put as follows:—

“7. The Cap Rouge Pier, Wharf and Dock Co. further represents that it is the proprietor of the whole of the lands expropriated in the present case, and described in the information herein, as well that part claimed by the estate Duchesnay, as that part not claimed by such estate, for having been in the open, public, peaceable and unequivocal possession of the whole thereof, as proprietor for more than thirty years prior to the deposit of the plan by the Commissioners of the Transcontinental Railway, and they allege that any right which the Estate Duchesnay may ever have had to the land described in the 3rd paragraph of the information, and set out in the statement of defence filed, if such estate ever did have any right thereto, which is expressly denied, has been lost, and a full and complete title to the said land acquired by the said company by the prescription of thirty years.”

The conveyance to the Cap Rouge Pier and Wharf Co. (Exhibit D-28) is dated 29th November, 1850. On the 14th October, 1823 (Exhibit D-6) a conveyance was made to William and Henry Atkinson by L. J. Duchesnay of certain lands not including the 60/100 of an acre in question. On the 27th November, 1823 (Exhibit D-7) a lease

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was executed by M. J. Duchesnay, of, among other lands, the lands in question for 9 years from 1st October, at a rental of £25 per annum. On the 16th September, 1840 (Exhibit D-8) a lease was executed by A. J. Duchesnay to William Atkinson of the lands in question for a term of 6 years at a yearly rental of £25. On the 4th December, 1846 (Exhibit D-27) William Atkinson conveyed certain lands to Forsythe and Stephenson. The lands in question are not referred to in this conveyance, nor is there any mention of the lease of 16th September, 1840, which expired on the 16th September, 1846.

Mr. Flynn contended that Forsythe and Stephenson obtained possession of the leased lands by virtue of this conveyance, and cited certain articles of the Code to support his contention that the statute had not commenced to run, no notice having been given, &c. Mr. Stuart on the other hand contended that Forsythe and Stephenson never were in possession under the lease. In his argument he places the commencement of his prescription title in 1857.

In the view I take of the case it is unnecessary to consider the points raised by Mr. Flynn. As I have pointed out the conveyance to the Cap Rouge Pier and Wharf Co., was in 1850. They plead their possession

It is admitted by both counsel that thirty years adverse possession is required to give title. No title by prescription had accrued in 1877.

On the 21st June, 1877, James Bowen, jr., was the manager of the Cap Rouge Pier and Wharf Co. On this date the Duchesnay Estate could, so far as the evidence before me shows, have ejected the Cap Rouge Pier and Wharf Co.

On this date the following letter was written to the Honourable A. J. Duchesnay, enclosing \$60 :—

“QUEBEC, 21st June, 1877.

“Honourable A. J. DUCHESNAY,
Quebec.

SIR,—Enclosed please find cheque for \$60 for use of your interest in Cap Rouge river this year.

Can you oblige me by letting me know from old deeds or otherwise where my line is between you and the property I bought on the Cap Rouge hill. I would be willing to make all the fence at my expense if you will be kind enough to have the lines hunted up.

Yours obtly.,

(Sgd.) J. BOWEN, Jr.

(Written across letters):—

“Received the sum of sixty dollars as mentioned in the note, with the understanding that the navigation of the river is not to be prevented.

22nd June, 1877.

(Sgd.) ANT. J. DUCHESNAY.

Another receipt sent :

“A. J. D.”

“In a few days I shall be able to give you the description of the property which the Messrs. Atkinson had at Cap Rouge.

In haste.

Yours truly,

(Sgd.) ANT. J. DUCHESNAY.”

22nd June, '77.

The payment made was for the use of “your interest in the Cap Rouge river” this year.

His interest in the Cap Rouge river embraced the lands in question. There is nothing to qualify this letter as to what is included.

Col. Forsyth gave evidence to show that what the company had been leasing were the waters further up the river.

It is contended that under Article 1283 C. C. this evidence was not admissible, not being in writing. In any event it is of no importance as Col. Forsyth was

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testifying to facts occurring during his management. He left the management in 1867 or 1868—was replaced as manager by James Bowen, and on the death of James Bowen, Amos Bowen succeeded as manager. Amos Bowen died in 1892

It is in my view of the case unnecessary to consider the question of the admissibility of the entries proved by Larue.

After this letter of 21st June, 1877, and the receipt of the rent, the Duchesnay Estate during the year 1877 could not have brought ejection successfully on the evidence adduced before me.

I think the prescription was interrupted. See Articles 2227-2242 et seq. See *Walker v. Sweet*, (1) *Darling v. Brown*, (2). The auds were expropriated on the 23rd May, 1906, before any title by prescription accrued.

I may mention that the latter part of the letter of 21st June, 1877, has no bearing on the question in dispute.

I think judgment should be entered declaring the lands described in the information vested in the Crown, and that the Cap Rouge Pier and Wharf Co. is entitled to recover from the Crown the sum of \$89,200 with interest thereon to the date of judgment, and the Duchesnay Estate \$800, with interest thereon to date of judgment.

The Crown should pay the costs of the defendants to the date of trial.

The Cap Rouge Pier and Wharf Co. should pay the Duchesnay Estate the costs occasioned by their contestation.

Judgment accordingly.

Solicitor for Plaintiff: *E. L. Newcombe.*

Solicitor for Duchesnay Estate: *E. T. Pacquet.*

Solicitors for Cap Rouge Pier Co.: *Pentland, Stuart & Brodie.*

(1) 21 L. C. Jur. 29.

(2) 1 S. C. R. 360.

REPORTER'S NOTE.—On appeal to the Supreme Court of Canada this judgment was reversed, 23rd December, 1910.