Supreme Court of Canada

The Temiscouata Railway Co. v. Clair, (1906) 38 SCR 230

Date: 1906-12-26

The Temiscouata Railway Company (Defendants)

Appellants;

And

John Clair (Plaintiff)

Respondent.

1906: Dec. 18, 19; Dec. 26.

Present: —Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Order extending time—Jurisdiction—R.S.C. c. 135, s. 42—Practice — Trespass — Possession — Evidence — Expropriation—Railway.

The court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a judge of the court appealed from after the expiration of that time was *ultra vires* and could not be permitted under section 42 of the Supreme and Exchequer Courts Act, R.S.C. c. 135.

The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass.

Judgment appealed from (1 East. L.R. 524) reversed.

APPEAL from the judgment of the Supreme Court of New Brunswick[[1]](#footnote-1) refusing to set aside a verdict for the plaintiff and enter a nonsuit or make art order for a new trial.

The- action was for trespass by the railway company by constructing and operating their railway across lands in the Parish of St. Hilaire in the County of Madawaska, N.B., without taking proceedings for its expropriation and making compensation for the

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land taken by the company for their line of railway. The company denied the plaintiff's title and also contended that, even if he was in possession of the land in question at the time of their entry and the construction of the railway thereon, he had acquiesced and stood by without objecting for fifteen years before action and that he could not, at so late a date, bring an action for trespass or claim damages.

Upon the answers of the jury to questions put to them at the trial, Mr. Justice Landry entered judgment in favour of the plaintiff and gave him damages assessed at the rate of ten dollars per annum for the six years preceding the institution of the action.

By the judgment appealed from the Supreme Court of New Brunswick, in bane, refused to set the verdict aside and enter a judgment of nonsuit or to order a new trial.

The judgment in the court below was rendered on the 15th of June, 1906, and notice of appeal to the Supreme Court of Canada was given on the 21st June, 1906. No proceedings towards the prosecution of the appeal were taken until the 17th of August, 1906, when a summons was taken out, returnable on the 23rd of that month, to settle the case on appeal and, on 27th August, 1906, Mr. Justice McLeod, one of the judges of the court appealed from, made an order under section 42 of the "Supreme and Exchequer Courts Act," granting leave for the appeal and approving the security bond filed by the appellants.

On the present appeal coming on for hearing a motion to quash was made on the ground that the appeal had not been properly taken within the sixty days limited by the statute and that the order so made

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by Mr. Justice McLeod, after the expiration. of the sixty days, was *ultra vires* and could not then be made under or in virtue of said section 42.

Hazen K.C. for the motion,

Stevens K.C. contra.

The court ordered that the appeal should be heard upon the merits.

The questions at issue on the appeal are stated in the judgment now reported.

Stevens K.C. for the appellants.

Hazen K.C. for the respondent.

The judgment of the court was delivered by

DAVIES J.—At the conclusion of the argument I was strongly of the opinion that the plaintiff (respondent), whose only claim to the lands, for trespass upon which he brought this action, was alleged possession, had entirely failed to make out a case to go to the jury and should have been nonsuited. Mr. Hazen, for the respondent, submitted that there was some evidence, however slight, for the jury and urged very strongly that the evidence subsequently given by the appellants sheaved that there had been some negotiations on the part of the railway company with the plaintiff to buy out his claim, and that the Government of New Brunswick had a year or two ago recognized plaintiff's claim to the remainder of the block of land not taken by the railway company, and that all this evidence, combined with the plaintiff's user of

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that block of land for the last fourteen or fifteen years, together constituted sufficient evidence to warrant the finding of the jury that, at the time the railway company entered upon and took possession of the strip of land required by them for the track of their railway the plaintiff was in possession of it.

The question upon which the case largely, if not entirely, turned was whether or not the plaintiff was at the time of the taking of the land in question by the railway company its actual possessor. If he was not, then no other question need be considered and he must be nonsuited.

The evidence shews to my mind, beyond any doubt, that plaintiff was not only not in possession of the land at the time referred to, but that he knew that he was not, and that it was not till many years afterwards that the idea first entered into his mind that he could have any claim for damages for the land against the appellants. In his evidence he says he was working with Ritchie, a sub-contractor of the railway, near, but not on, the locus and goes on to say:

There was no question about them taking possession. I never said a word. I didn't think I had possession of the point at the time.

And then, being asked the question :

Q.—And you didn't think so until just here about a year ago when this question came up about selling it to the Government?

A.—Yes. I had a notion two or three years ago, four or five years ago. I always thought I would try and get my pay out of them. I have had that in my mind the last seventeen years, and Mr. Laforest was going around getting persons to sign the deeds, and Denis Hebert, next door neighbor, paid him a hard $l00.

Later, being asked as to whether Daniel Chisholm was not in possession at the time the railway was built, he said:

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Yes; when I would go on there, Chisholm wouldn't interfere with me and I didn't with him. I knowed my father gave Chisholm permission to go on and use the point and I didn't interfere with Chisholm and he didn't with me. I guess everybody had a hand in the soup then; they would go on there and I didn't bother any body and nobody bothered me.

Not a single overt act of possession was attempted to be proved by plaintiff before and up to the time the railway company entered beyond the vague claim that he had used the land for pasture one summer in common with Chisholm and others. As the land was vacant and admittedly being used also for pasture by Chisholm and others at the same time, it would be difficult to hold such vague evidence of casually pasturing cattle on it as evidence of possession.

The fact was that such evidence as there was of actual possession in any one of the land in question at the time the railway entered sheaved it to have been in Chisholm who paid rent for it to another man.

Chisholm left there and abandoned the possession in 1893, two years after the railway company had entered and built their track and with respect to such part of the "point" as the railway company had not taken, it was after that possessed and occupied by plaintiff.

Such rights as he had in these lands outside of the railway belt and specially excepting that belt, were purchased from the plaintiff by the provincial Government about a year or more before this action was commenced.

It would be impossible, however, to infer possession by the plaintiff of the railway belt at the time the railway company entered on the land under the evidence given by the plaintiff himself, from the subsequent user by him of the remainder of the land or

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from the purchase of his squatter's rights in such remainder by the Government.

His possession previously to defendants' entry seems to have been purely imaginary and such as he did have arose subsequently and never embraced the railway track which has been fenced off for the past fifteen years or more. The finding of the jury on the point was not one which reasonable men could fairly have come to under the evidence and must be set aside and the appeal allowed with costs and a judgment of nonsuit entered as proposed by Chief Justice Tuck in the court below.

*Appeal allowed with costs.*

Solicitors for the appellants: Stevens & Lawson. Solicitors for the respondent: Laforest & Jones.

1. 1 East. L.R. 524. [↑](#footnote-ref-1)