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 *Nov. 2.
 *Dec. 23.

THE CAP ROUGE PIER, WHARF }
 AND DOCK COMPANY } APPELLANTS;

AND

THE HEIRS OF THE LATE HON- }
 OURABLE ANTOINE JECHE- }
 REAU DUCHESNAY } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Possession—Prescription—Interruptive acknowledgment—Evidence.

The company claimed prescriptive title to a part of the bed of a small river on which D., the respondents' *auteur*, had been a riparian owner. D. had leased lands on the banks of the river to the company which, it was alleged, included the property in dispute. The only evidence as to interruption of prescription consisted of a letter by the company to D. enclosing a cheque in payment for "use of your interest in Cap Rouge River this year," with an indorsement by D. acknowledging receipt of the funds "with the understanding that the navigation of the river is not to be prevented."

Held, reversing the judgment appealed from (13 Ex. C.R. 116), Girouard and Idington JJ. dissenting, that the memorandum was too vague to serve as an interruptive acknowledgment sufficient to defeat the title claimed by the company.

APPEAL from the judgment of the Exchequer Court of Canada(1), allotting to the respondents the sum of \$800, with interest, from and out of the amount awarded as compensation for property expropriated

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Duff and Anglin JJ.

(1) 13 Ex. C.R. 116.

by the Crown for the purposes of the National Trans-continental Railway.

On an information by the Attorney-General of Canada, on behalf of the Crown, against the parties to the present appeal to have the certain wharves, timber coves and riparian lots, including the lands in question, vested in the Crown and compensation therefor ascertained, the value of the whole property to be expropriated was fixed at \$40,000 and, in the court below, the remaining question to be decided was whether or not the Duchesnay heirs were, at the date of the expropriation, in 1906, entitled to compensation in respect of six-tenths of an acre of the property forming part of the bed of the Cap Rouge River. The heirs claimed the property in dispute in virtue of a seigniorial grant, in 1652; at high tide it was completely covered with water, but at low tides the area above mentioned was uncovered; the value was fixed at \$800. The company claimed the property in dispute, having held possession of the whole area as owners since 1857, while it was contended by the heirs that it had been held by the company as tenants of their *auteur* under a lease which was still subsisting in 1877. On 21st June, 1877, the manager of the company wrote the following letter to the late Honourable A. J. Duchesnay: "Enclosed please find cheque for \$60 for use of your interest in Cap Rouge River this year. Can you oblige 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." Written across this letter was the following, signed by A. J. Duchesnay: "Received the sum of sixty dollars as

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mentioned in the note, with the understanding that the navigation of the river is not to be prevented. — Another receipt sent. — In a few days I shall be able to give you the description of the property which Messrs. Atkinson (former managers) had at Cap Rouge.” The learned judge of the Exchequer Court held that the effect of this letter was to interrupt prescription in favour of the company and awarded the value of the lands in dispute (\$800), to the Duchesnay heirs.

The material questions on this appeal are discussed in the judgments now reported.

G. G. Stuart K.C. for the appellants.

Flynn K.C. and *E. T. Paquet* for the respondents.

Arthur Fitzpatrick for the Attorney-General of Canada.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed with costs for the reasons stated in the judgment of Anglin J.

GIROUARD J. (dissenting).—I am of opinion that this appeal should be dismissed for the reasons stated in the court below.

DAVIES J.—I agree in the opinion stated by my brother Anglin and that the appeal should be allowed with costs.

IDINGTON J. (dissenting).—I think this appeal should be dismissed with costs. I agree with Mr. Justice Cassels’ reasoning. The test he applies to the

effect of the receipt as a piece of evidence that would have answered any action brought to recover the premises in question is, to my mind, on this evidence as a whole unanswerable.

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The evidence relied upon to furnish any answer does not go far enough and only gives rise to a suspicion that there may, after all, have been existent at the time some further explanation or evidence thereof lost through lapse of time. The onus of answering the case, the receipt shews, rested upon the respondents.

DUFF J.—It is hardly disputed that the appellants entered into corporeal possession in 1857, or that the *animus rem sibi habendi* was sufficiently evidenced by the character of the occupation then assumed.

This state of facts is met by the respondents with an allegation that an interruption of this possession occurred in 1877. Since there was no rupture of the continuity of the appellants' physical occupation, the respondents, on this point, can only succeed by proving an express acknowledgment of title in them, or by adducing evidence unmistakably evincing an intention to recognize such a title. The evidence they produce is a letter addressed to M. Duchesnay by the appellants, dated the 21st June, 1877, containing this sentence:

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

This document does not appear to me to imply any admission respecting the *extent* of M. Duchesnay's interest; how then can it be said to contain an acknowledgment that within his interest was comprised the property in dispute? With that property the docu-

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ment does not connect itself; and it is, consequently, inefficacious for the purpose of establishing an interruption of the appellants' possession of it.

ANGLIN J.—Subject to an alleged interruption founded on a letter of their manager, dated the 21st of June, 1877, the evidence in the record, in my opinion, satisfactorily establishes the prescriptive title of the appellants to the property in question in the present appeal. This letter is, in part, as follows :

Hon. A. J. Duchesnay,
Quebec.

Quebec, 21 June, 1877.

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

Yours truly,
J. Bowen, Jr.

Without evidence that M. Duchesnay had no interest in the river other than that in question in this action the allusion in this letter to “your interest in the Cap Rouge River” is, in my opinion, too vague and indefinite to warrant ascribing it to the property now claimed by the appellants and, without more, treating their prescriptive title as defeated by “interruptive acknowledgment.”

Les lettres ont donné lieu à bien des contestations, parcequ’il est rare qu’elles aient la précision requise en droit. Laurent, vol. 32, n. 128.

But when produced by the respondents, this letter bore upon it this memorandum, presumably in the handwriting of the late M. Duchesnay :

Received the sum of sixty dollars as mentioned in this note; with the understanding that the navigation of the river is not to be prevented.
22 June, 1877.

Ant. J. Duchesnay.

Another receipt sent.
A. J. D.

It has also been proved that the interests of the Hon. A. J. Duchesnay in Cap Rouge River were not confined to the property in issue. The appellants were, indeed, lessees of some of his other interests and paid him rental therefor. These latter facts alone, in my opinion, suffice, in the absence of any evidence that the appellants ever paid rent for the property now in question, to render it not improbable that the letter of the 21st of June referred to such other interests.

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But the indorsement,

with the understanding that the navigation of the river is not to be prevented—

seems to me to make it still more doubtful that the “interest in Cap Rouge River” to which the writer of the letter of the 21st of June had reference was the property in question in this action. This wharf was of such a character that its use for legitimate wharfage purposes while necessarily involving some interference with navigation would not prevent it. As owner of interests in another part of the Cap Rouge River the seigneur Duchesnay leased to the appellants the right to boom or store logs. This right might be so exercised as to prevent navigation and the stipulation in the memorandum “that the navigation of the river is not to be prevented” indicates that the rental of which receipt is acknowledged was in respect of an interest of this character.

In my opinion the respondents have not satisfied the burden which was upon them to make out a case of interruptive acknowledgment.

It is, therefore, unnecessary to consider the other important and difficult question, to which so much argument was devoted at bar, viz., whether the *fundus* upon which the wharf in question is erected properly

1910 forms part of the bed of the Cap Rouge River, or
 CAP ROUGE should be regarded as part of the bed of the River St.
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DOCK Co. I am, with great respect, of the opinion that the
 v. appeal should be allowed with costs and that judg-
 DUCHESNAY. ment should be entered in the Exchequer Court for
 Anglin J. the appellants also with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*

Solicitor for the respondents: *E. J. Flynn.*
