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Jan. 29

IN THE MATTER OF THE PETITION OF RIGHT OF

FERDINAND LEMIEUX.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT;

AND

MICHAEL LAWRENCE DOHAN, THIRD PARTY, BROUGHT IN AT REQUEST OF CROWN;

AND

JOSEPH TELESPHORE DUSSAULT, THIRD PARTY, BROUGHT IN AT REQUEST OF DOHAN;

AND

JOSEPH BUTEAU, THIRD PARTY BROUGHT IN AT REQUEST OF DUSSAULT.

Easement—Deed—Interpretation—"Vaquer"—Third party.

Third party B. sold with covenant a certain piece of land but omitted to mention a certain easement mentioned and guaranteed in the deed from his predecessor in title. An action was taken by the beneficiary in that easement against the Crown who had become, after some further mutation of the property, the owner of the same.

Held, that while the beneficiary had a right of action, in respect of the same against the crown, the latter had its recourse against its *auteurs* who in turn had similar recourse and remedy.

2nd. That in construing an easement, guaranteed by a duly registered deed, where the meaning of the same may appear doubtful, it is the common intention of the contracting parties that must be sought and the same must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

PETITION OF RIGHT to recover the value of an easement taken by the Crown in the Province of Quebec.

The case was heard before the Honorable Mr. JUSTICE AUDETTE, at Quebec, November 24, 1916.

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Reasons for Judgment.

A. Bélanger, for suppliant; *A. Bernier*, K.C., and *V. DeBilly*, for Crown.; *J. E. Gelly*, for third party Buteau; *W. LaRue*, for mis en cause Dussault; *J. A. Gagné*, for third party Dohan.

AUDETTE, J. (January 29, 1917), delivered judgment.

The suppliant, by his petition of right seeks to have the Crown acknowledge his easement or servitude consisting of a right to *circulate*, or right of way by a private roadway, across a certain piece or parcel of land bought by the Crown from third-party Dohan on July 29, 1913. The private road in question runs from his dwelling house in a south easterly direction to the King's highway, as shewn on plan filed as Exhibit No. 1.

By a certain indenture bearing date July 11, 1912, the suppliant sold with covenant (*franc et quitte*) to third-party Buteau *inter alia*, the lands in question herein, with, among others, the following reservation, viz.:—

"Le vendeur se réserve sa vie durant pour lui et son frère "Olivier, sa vie durant, le droit d'habiter quatre chambres "dans la maison, à son choix; le droit de vaquer dans la "dite maison à son besoin.

"2. L'usage d'une partie du verger, étant la partie qui "se trouve à l'ouest du chemin conduisant à la grange et la "partie qui se trouve à l'ouest d'une ligne suivant le pan "est de la grange et se prolongeant dans la même direction "jusqu'au bout du dit verger, *avec en outre le droit de vaquer "sur le reste du dit lot* et dans les bâtisses à son besoin."

The decision of the present case depends upon the interpretation of the words above italicized:—viz.:—"*avec en outre le droit de vaquer sur le reste du dit lot.*"

On June 30, 1913, the said third-party Buteau sold and conveyed with covenant and free of all hypothecs to third-party Dussault, the same lot of land as having acquired it from the suppliant; but without making any mention, in the said deed of sale, of the above reservation, as contained and recited in the title from his *auteur* or predecessor in title, and this omission is the cause and origin of the present action.

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Again on July 25, 1913, the said third-party Dussault sold and conveyed with full covenant (avec garantie contre tous troubles et éviction, franc et quitte), to third-party Dohan, *inter alia*, the same lot of land as having acquired it from third-party Buteau. The easement, servitude or reservation above referred to being again omitted in the said deed.

Then on July 29, 1913, the said third-party Dohan, among other pieces of land, sold and conveyed to the Crown, with full covenant (avec garantie contre tous troubles et éviction, *franc* et *quitte*) the piece of land in question herein as having acquired it from third-party Dussault on July 25, 1913.

Therefore it appears clearly that the suppliant sold to Buteau the piece of land in question, subject to the easement above set forth; and that Buteau without mentioning this easement sold the same piece of land to Dussault, who, in turn, sold it in similar manner to Dohan who sold to the Crown.

There can be no doubt that the easement or servitude exists. It was converted into writing, forming part of a deed which was duly registered and the suppliant is entitled to the same.

The question to decide is first; What does this easement consist of, and secondly, what is its value?

The language used in the deed of July 11, 1912, is not perhaps the best the notary might have made use of in drawing the conveyance; and the expression or verb "vaquer" may at first sight appear odd. What we are concerned with here is what was in the mind of both parties at the time of the signature of the deed. The meaning in the mind of the contracting parties was never doubtful and were it so their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract. Art. 1013 C.C. Que. In endeavouring to appreciate the true meaning and value of this reservation the intention of the contracting parties may be sought outside of the literal meaning of the contract in the circumstances of the case. *Sirey*, 1890, 1, 112; 4 *Aubry et Rau*, 5th ed. p. 569; *Montpetit v. Brault*, Q.R. 50 S.C. 518. It is said in *Halsbury's Laws of*

England, vol. 10 p. 472, with respect to the reservation of a right of way: "In this case the reservation operates as a "regrant of the right of the grantee to the grantor, and it is "not effectual unless the deed in which it is contained is "executed by the grantee; and if the deed is so executed, "then the regrant may operate in favour of a person who "is not a party to the deed."

What is the meaning of the word "vaquer." Turning to Quicherat, Dictionnaire Français Latin at verbo "vaquer" we find that "vaquer" means: s'occuper de—vaquer à ses fonctions, munia obiré—vaquer à ses affaires, res suas obiré. Il nous empêche de vaquer à nos affaires. Detinet nos de nostro negotio—and vaquer à autre chose, navare aliam operam.

Littré, Dictionnaire de la langue Française, gives the following meaning to the word "vaquer": Vaquer à, se livrer à, s'adonner à, s'occuper de. Vaquer à son ouvrage etc., etc.

And Bescherelle, Dictionnaire National, at verbo *vaquer* has the following: Vaquer à, s'occuper de quelque chose, s'y appliquer. Vaquer à ses affaires. On ne peut vaquer à tant de choses à la fois, etc.

Going to Spiers & Surenne's Dictionary under verbo "vaquer" we also find that "vaquer" means to apply one's self to—to attend—vaquer à ses affaires—to attend to one's business.

Therefore, the word "vaquer" is not without meaning, as was contended in the case at bar. Furthermore reasoning under the rule of *ejusdem generis* we find this reservation in the deed covers also the right to occupy four rooms in the house with *"le droit de vaquer dans la dite maison à son besoin."* There can be no doubt that, in common parlance, these words would mean a right to go about in the house, besides that of occupying exclusively four rooms. The reservation indeed is not meaningless and he who established a servitude is presumed to grant all that is necessary for its exercise. Art. 552 C.C. Que. And the suppliant is entitled both for himself and his brother, during his lifetime, to this servitude or reservation and to the right de *"vaquer"* upon the lot in question. There is no reversion and that right dies with both of them. The suppliant is

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65 years of age, while his brother is 72 years old. The meaning of this easement ought not to be strained with such technical narrowness as to attempt making it meaningless, when it was not the intention of the original contracting parties.

It is obvious that the origin of the present action resides in the mischievous omission by Buteau to mention the reservation in his deed to his grantee. He is, therefore, the *fons and origo malorum*. He deliberately suppressed the knowledge of the reservation at the date of the sale, with the necessary object of procuring a larger price for the property and he must now reckon with the result of such intentional omission.

Buteau in his evidence says that this reservation, the private road, in his own estimation is worth nothing. The Lemieux live on their income and he does not see any use for them of this reservation. He, however, cannot take advantage of his own omission and it is not in his mouth to say the reservation granted by him to the suppliant is worthless; he cannot thus take advantage of his own wrong in suppressing the mention of the reservation in his deed to Dussault with the object of gaining a favourable interpretation of its value. *Nullus commodum capere potest de injuria sua propria.*

The contention appearing in the pleadings with respect to the sale of lots 550 and 520 being obviously unsound and unfounded at its face, I need not say more in that respect.

What is the value of this easement or servitude, taking into consideration the age of the two beneficiaries, their occupation and their manner of living? And there is no doubt, under the evidence, that the respondent cannot now allow the suppliant upon these lands which are held by the Crown for a cattle quarantine. No. one, indeed, is allowed now upon these premises without business and without leave and this is done in the public interest, because of contagious diseases that are at times treated thereon.

The deprivation of the easement does not deprive the suppliant of a road to any given place, that access to the property in question being only superabundant, supererogatory, so to speak; because he has the King's highway

leading to his property which takes him to any place he chooses to go. The access to the property in question may in some cases be a short cut to some place, or travelling through it the distance to a given place might be shorter and more convenient.

The suppliant, in his evidence, says he asked Buteau the sum of $3,000 for all the reservations under the deed of sale. He has the exclusive use of four rooms—with the right to circulate all over the house. That alone would be worth at least $10 a month.....$120.00

The use of the stable, barn, garden, etc., at $4 a month..... 48.00

The orchard—he said he made as much as $150 a year out of it; but allowing..... 100.00

That would represent for the year the sum of....$268.00

The interest at 6% on $3,000 would only give him $180. I would infer from this alleged valuation of $3,000 for all the reservations that a very small amount must be placed upon the easement in question which, after all, is indeed worth to him much less than any of the other privileges mentioned in the deed.

Taking all the circumstances into consideration and that is that the servitude is only for the lifetime of two old men, that they are practically retired farmers living on their money, with very little occupation and not much work to do, I hereby fix the value of such easement at the sum of $350. This servitude has been duly created by a notarial deed, and given effect with respect to third parties by its registration and the Crown as a third-party is bound thereby. The Expropriation Act, secs. 25 and 26. Arts. 2082, 2116a C.C. Que.

Therefore, there will be judgment as follows:—

The suppliant is entitled to recover from the Crown the sum of $350 with interest thereon from July 5, 1915, to the date hereof and costs.

Furthermore the Crown do hereby recover as against third-party Dohan the said sum of $350 with interest as above set forth and with all costs, including costs upon the issues with the suppliant and with Dohan.

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The said third-party Dohan do recover as against third-party Dussault the said sum of $350 with interest as above set forth with all costs on the three issues.

And the said third-party Dussault do recover judgment against the said third-party Buteau the said sum of $350, with interest as above mentioned and with all costs on all the issues herein. The said Buteau in the result paying the said sum of $350 with interest as above set forth and with all the costs resulting from all the issues herein, which were occasioned by him.

Judgment for suppliant.

Solicitor for suppliant: *Arthur Bélanger.*

Solicitors for respondent: *Bernier, Bernier & DeBilly.*