Privy Council Appeal No. 131 *of* 1919.

The Matamajaw Salmon Club - - - - - *Appellants*

v.

Thadee Duchaine, since deceased - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST AUGUST, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD PARMOOR.
LORD CARSON.
SIR LOUIS DAVIES.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Supreme Court of Canada which reversed (by a majority consisting of Anglin, Brodeur and Mignault, JJ., Idington and Cassels, JJ., dissenting) a judgment of the Court of King's Bench of Quebec, affirming a judgment of the Superior Court.

The question to be decided relates to the title of the appellant Club to the fishing rights in a stretch of the Matapedia river opposite to a certain piece of land on one of its banks, and to the bed of the river itself at that place. It is common ground that there is title of some sort to a right of fishing there. The appellants claim that this title is not only vested in them, but is a right in perpetuity. The respondents maintain that it has never amounted to more than a right personal to the individual who originally acquired it, and terminable with his life.

A further point was raised on behalf of the respondents, which was in substance that even if Lord Mount Stephen, the original holder, possessed and had conveyed a transmissible right, that right no longer subsisted in the appellants by reason of failure

in renewing the registration of the deed by which it was originally conveyed to Lord Mount Stephen. This point was, however, decided adversely to the respondents in all the Courts below, the Supreme Court of Canada having affirmed, so far as the point was concerned, a declaration made by the Court of King's Bench of Quebec on the subject. As the respondents have lodged no cross-appeal against the judgment of the Supreme Court on this point, their Lordships hold that it cannot be raised in the present appeal. The only question before them therefore is that as to the character of the title acquired by Lord Mount Stephen and transmitted by him.

In order to see what this title really was it is in the first place necessary to examine the character of the deed of 6th September, 1890, by which Lord Mount Stephen, then Sir George Stephen, acquired it. That deed was one of exchange, and under it one Randolph Alexander Blais, purported to cede by way of exchange all the rights of fishing in the river Matapedia *vis-à-vis* the lot of the cedant, as described in a plan annexed, " with right to the said Sir George Stephen to pass over the said lot, on foot on in vehicles, for the exercise of the said right of fishing." There was ceded in counter exchange by Sir George Stephen on his part a certain piece of land in the deed described. Consequently, " the parties disseised themselves respectively of what was above ceded by them in exchange and counter exchange, and took seisin of it reciprocally." The deed was registered.

It will be observed that the language of the deed itself is unrestrained, so far as the duration of the rights granted under it is concerned, not less completely in the case of the cession of the fishing rights to Sir George Stephen than in that of the cession of land by way of exchange to Blais. The introduction of the words relating to reciprocal disseisin and seisin point to an intention to convey in perpetuity in each case. Unless the words " right of fishing " import in the character itself of the title granted something short of a perpetual right, there is no restriction in the deed itself on the duration of the right.

The action out of which the appeal arises was brought by the appellants against the predecessor in title of the respondents because the latter had interfered with the alleged exclusive title of the appellants to the fishing rights in question, and had formally denied its validity. The action was for a declaration that the appellants were the sole proprietors of the part of this river and of its bed so far as these fronted the bank at the *locus in quo*, as well as of the fishing rights, and for possession. The defence, which admitted that the river was unnavigable and non-floatable, and that there existed the alleged formal documents of title relied on by the appellants, denied possession in the past, and asserted that Sir George Stephen obtained no more than a personal servitude which was not transferable and was operative only against Blais and his heirs. The defence further alleged that the curators in bankruptcy of Blais had duly sold the land to which the fishing rights were opposite, to the pre-

decessor in title of the respondents who had thus become its proprietor. It was further pleaded that if the appellants had acquired a right it had lapsed for want of renewal of registration as prescribed by law.

The action was tried in the Superior Court of the Province of Quebec before Roy, J. That learned Judge decided in favour of the appellants, declaring the appellants to be proprietors of the rights of fishing in the river opposite the bank at the *locus in quo*, and decreeing their right to possession. Roy, J., considered a number of statements of the law contained mainly in French and Quebec textbooks and decisions, and held that what was passed to Sir George Stephen was a real right or one of property, which had been validly conferred in perpetuity in favour of a non-riparian proprietor, and had been duly transferred by him to the appellants. The Court of King's Bench of the Province on appeal took the same view, holding that the law of Quebec permitted the creation of such a right of property, including a right to the bed of the river to the extent required for the purposes of fishing, so far and so long as this purpose necessitated it for its efficacy. In that Court Pelletier, J., agreed in substance with the reasoning of Roy, J. Chief Justice Archambault found rather more difficulty, but he also arrived at the conclusion that the right in question was a real right available against the world, and created by the dismemberment of immoveable property. Even the old law of France had apparently regarded as possible the creation, by dismemberment of the original right of property, of a servitude of this kind. But in that law there was the difficulty that personal servitudes were prohibited, and the right to fish would have become a personal servitude if it had been alienated in perpetuity for the benefit of a person and not for the benefit of an immoveable. But in the law of Quebec, the learned Chief Justice considered this difficulty did not arise, for personal servitudes were admitted. Whatever might be the precise character of the right, he was of opinion that it was not merely a right of personal servitude, but one of usufruct which Sir George Stephen had obtained not only for himself but for his representatives. This would in itself be enough to call for a decision in favour of the appellants, for Sir George Stephen was still living. But the Chief Justice went further. A full right of property comprises a *jus utendi*, a *jus fruendi*, and a *jus abutendi*. This full set of rights was possessed by the owners of the river bank, with a title extending to the centre of the stream. A usufruct comprises only the first two of these three rights. If these were ceded a usufruct was established. It would not comprise merely personal rights, but a veritable real right. And it was because what took place was the dismemberment of the property in an immoveable, that the right of the usufructuary was a true real and immoveable right of servitude.

In the Supreme Court of Canada Mignault, J., expressed the opinion that in the law of the Province of Quebec there was nothing similar to the English Common law right of *profit-à-prendre*, a right which might be created in perpetuity, to enter the land

of another person and to take some profit of the soil or a portion of the soil itself for the use of the owner of the right. In Quebec he held that real servitudes can be granted for the benefit only of an immoveable and not of a person. The title in question could not, accordingly, be one of real servitude. Nor was it a right of ownership, for the purchase was not one of the river bed. It gave no more than a right of enjoyment, with at most the right to pass over the land of the grantor so far as necessary for the exercise of the title to fish. There was no real servitude within the Code, for the provisions there relate only to a " charge imposed on one real estate for the benefit of another belonging to a different proprietor." It was only in virtue of a right of enjoyment that Sir George could use the river bed, and he was not made co-owner of it. No doubt if, as Chief Justice Archambault thought, the right was one of usufruct, this would be a right of enjoyment differing from both ownership of a *profit-à-prendre* and from a real servitude. The old French law recognised such a right and that it could be restricted to certain fruits or products of a property. But could such a right extend beyond the life of Sir George Stephen or be assigned by him ? That it could be assigned Mignault, J., had no doubt. But on the other hand it was in his opinion only temporary and could not be granted in perpetuity. This was in his view not only to be expected as the outcome of public policy, but was prescribed by Article 479 of the Quebec Code, which said that usufruct ends by the natural death of the usufructuary, if for life, by the expiration of the term for which it was granted. These words meant that the usufruct might be created for life or for a term only. In the former case it ended with the life of the usufructuary, in the latter with the term. The reasonable construction was that if no term were fixed the usufruct ended with the life of the usufructuary. This view accorded with the general law of France, as stated by certain of the commentators, and with the Roman law. The right of Sir George Stephen was therefore one of mere enjoyment, but it should be made clear in the judgment that it would not come to an end till he died.

Anglin, J., and Brodeur, J., expressed similar views on the main question discussed by Mignault, J. Brodeur, J., added that, in his opinion, registration of the conveyance to Sir George Stephen had been essential.

Idington, J., was of a different opinion from that of the majority. It was to him clear that the substance of the transaction was that what Sir George Stephen bargained for was not merely a personal right, and unless the language of the deed and the state of the law rendered it necessary to hold otherwise it should not be so held. There were no doubt rights of personal servitude known to the law which ceased with the life of the grantee. But in his view there was no prohibition in the law of Quebec against an owner in perpetuity of property dismembering his property in any way he chose. The deed itself ran in terms which showed dismemberment as being the purpose for which it was framed.

Cassels, J., agreed with the conclusions of Idington, J. The

deed purported to be a conveyance of property. The question whether the right sought to be granted was in the nature of a *profit-à-prendre*, and whether such a right was known to the law of Quebec was, in his opinion, one of language only. The analogy of the grants by the King of France of rights to fish in the St. Lawrence River, to seigniors, showed that such a title as was claimed through Sir George Stephen was possible, for the rights in such cases were more than rights during the lifetime of the seignior.

In considering which of these diverging sets of opinions is right, their Lordships are impressed with the necessity of bearing in mind that the principles on which the jurisprudence of Quebec with regard to rights in land rests are very different from those which obtain in the common law of England. In the latter country there has always been permitted great latitude in splitting up the title to the fee simple, with important results as regards the right of possession. But in other countries, such as those where the Roman law prevails, and in countries such as Scotland, which has its own system, the fee simple cannot be so freely disintegrated. The property title may, as for example in the latter country, be in the main indissoluble, a right for life only being treated, not as a separate right of property as in England, but as a mere burden on the radical title. It follows that it is necessary to ask at the outset how far the system in Quebec has permitted encroachments on the radical right of property.

It appears that at all events to some extent, and quite apart from the Code, such encroachments have been permitted. The Seigniorial Court, to which fell the duty, under the Seigniorial Act of 1854 passed for Lower Canada, of giving authoritative answers to question specially submitted to it, relating to the terms on which feudal rights were to be abolished in Lower Canada, gave an answer to Question No. 27 submitted to it which bears on this point. The Court declared that "in seigniories bounded by a navigable river or stream, seigniors could lawfully reserve to themselves the right of fishing therein, or impose dues on their tenants (*censitaires*) for the exercise of that right, when the right of fishing in the same had been granted to them, but they could not make the reservation nor impose the dues without grant and as seigniors only." This answer implies that a right of fishing could be excluded and held separately from the right of the tenant to the land held by him under the seignior. Although the answer is concerned only with navigable rivers or streams, their Lordships see no reason to think that this makes any difference to the principle. If the title to the fishing could be separated from that to the other rights in the land in the case of a navigable river, it does not appear that there is any reason for coming to a different conclusion in the case of a river that is non-navigable. In the present case it is common ground that the tenure of the land to which the fishing rights belonged was not seigniorial, but was of the ordinary kind. The question is therefore whether the owner of the land could, in virtue of his general title, divide or split off the fishing rights which fell within his ownership and convey them

separately as a subject of property strictly so called. That such a division could take place in the case of seigniorial lands appears from what has been quoted. If so, it must have been because the law of Quebec permitted fishing rights to be isolated as separate items from the aggregate of proprietary rights. The land and the fishing rights constitute, in other words, separate subjects. It may be that no grant of fishing rights is practically possible without its comprising some right of using the solum. If this be so then the terms of the cession are sufficient to have passed such a right. Even if the right to fish and to use the solum for the purpose constituted no more than a usufruct, this would not, in their Lordships' opinion, constitute a difficulty in the appellants' way. For according to some at least of the French authorities cited in the judgment of Roy, J., such a right may be a transferable one. Their Lordships do not think that Article 479 of the Civil Code of Quebec ought to be read as cutting down the duration of such a right, at all events when granted under circumstances in which there is no practical objection to its existence in perpetuity. That Article provides that " usufruct ends by the natural or civil death of the usufructuary if for life," or " by the expiration of the term for which it was granted." Their Lordships see no sufficient reason for treating the words " if for life " as doing more than refer only to the kind of usufruct which is ended by death. They have considered what was said on this point by Mignault, J., in his judgment in the Supreme Court. But after consideration of the authorities it appears to them that, however marked was the tendency in the earlier Roman and French law to restrict what was called usufruct to a personal title, this tendency become relaxed in the later phases of both of these systems, to such an extent that the expression usufruct became so general as to extend to rights analogous in incident to those of property. They are impressed by the reasoning of Chief Justice Archambault in the passage in his judgment already referred to in which he comes to the conclusion that at least in modern times dismemberment of the complex of property rights is now possible under Quebec law, through which a usufruct may be created which is a veritable right *in rem*. As he points out a usufruct is a right of enjoying things in which another possesses the property. But he adds that it may, by a splitting off of incidents in that property, become a true real right against all who seek to interfere with it.

Their Lordships, in agreement so far with the Chief Justice, think that the right here was more than usufructuary in the older and stricter meaning. It is their opinion a right to a separable subject or incident of property. There is no inherent reason for refusing to treat a fishing right as a self-contained and separable subject. In the seigniorial cases they appear to have been treated as self-contained and separable. In the law of Scotland, where the fee cannot be split up, they are regarded as proper subjects for a separate title to property in fee. The definition in Article 405 of the Quebec Code presents this analogy that it places no difficulty

in the way of regarding the right of fishing as an item among the others comprised in the subject matter. It says, in general terms, that "a person may have as property either a right of ownership or a simple right of enjoyment or a servitude to exercise." Article 406 says that "ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations. Article 408 provides that "ownership in a thing, whether moveable or immoveable, gives the right to all it produces, and to all that is joined to it as an accessory, whether naturally or artificially. This right is called the right of accession. There appears to be no reason why, consistently with the language of these articles, there should not be ownership of a fishing right as a mode of enjoying and disposing of a separable physical subject for possession. The title to take the fish is a title to take a product of the river, and Article 408 recognises as possible in law the union with it as an accessory of the right to use the bed of the river or the banks when naturally or artificially stipulated for as part of that which is joined to the fishing right. Their Lordships not only think that this conclusion is that which is natural having regard to the character of the transactions which the law of Quebec was probably fashioned to provide for, but they find confirmation of the view they take in the authority cited in support of it in the judgments of both Roy, J., and Pelletier, J.

They will therefore humbly advise his Majesty that the judgment of the Supreme Court of Canada should be reversed, and that the judgment of the Superior Court of the Province of Quebec should be restored. The respondents must pay the costs here and in the Courts below.

In the Privy Council.

THE MATAMAJAW SALMON CLUB

v.

THADEE DUCHAINE, SINCE DECEASED.

DELIVERED BY VISCOUNT HALDANE.

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