Paul v. Bates

[1934] B.C.J. No. 95, 48 B.C.R. 473

British Columbia Supreme Court

[1] ROBERTSON J.:— The plaintiff and the defendant are the registered owners of adjoining lands at Kye Bay near Courtenay, B.C., and the plaintiff claims that the defendant has taken possession of part of his land and brings this action to recover possession thereof and for an injunction restraining the defendant from interfering with the plaintiff's use and enjoyment thereof and from interfering with the plaintiff's right of access "over the foreshore," and for damages for trespass.

[2] The plaintiff's title commenced with a conveyance (Exhibit 1) dated the 1st of December, 1908, from Essie Moore to Mai L. Lawrence by the following description:

> ALL AND SINGULAR that certain parcel or tract of land and premises situate lying and being in Comex District, in the Province of British Columbia, and being part or portion of lot 208, known and described as follows: commencing at the South East corner of said lot 208; Thence North 65 degrees 45' West 2500 links; Thence North 2005 links; Thence East 1500 links. Thence running in a South Easterly direction 1060 links, more or less, along the shore line, Thence South 2370 links to the point of commencement, and containing fifty-five and ninety-three one-hundredths (55.93) acres, more or less, as shewn on the map or plan hereto annexed.

[3] The plan referred to in Exhibit 1 was prepared by H. Neville Smith, C.E., B.C.L.S., in February, 1908, and is signed by Essie Moore and shews that lot 208 ran to the "Strait of Georgia," that is, I take it, to high-water mark on the said Strait and the north boundary is 15 chains in length. Mrs. Lawrence's title became vested by transmission in her husband Jerrold who on the 20th of April, 1927 (Exhibit 2), conveyed to Edith J. P. Wilson who on the 14th of September, 1921 (Exhibit 3) conveyed to the plaintiff that part of lot 208, for which the plaintiff now holds a certificate of indefeasible title dated 19th September, 1931, in which the property conveyed to him is described as parcel "A."

[4] The defendant's title starts with the conveyance dated the 18th of May, 1909 (Exhibit 13), from the said Essie Moore to Francis R. F. Biscoe in which the land conveyed is described as follows:

> ALL AND SINGULAR that certain parcel or tract of land and premises situate lying and being in Comex District, in the Province of British Columbia, being part or portion of lot Two hundred and eight (208) described as follows: commencing at a point situate South

> 65 degrees 45' East (Astl) Twenty-five chains from a post at the North East corner of Section 82 and being also the South West corner of lot 93, Comex District, in the province aforesaid; thence due South 20.65 chains thence due Rest 15 chains to sea beach; thence along sea beach North 57 degrees 30' West (Magnetic) 18.36 chains; thence South 37 degrees West (Magnetic) 31.95 chains more or less to Western boundary of lot 208; thence due South along said Western boundary of lot 208 10.42 chains; thence along Southern boundary of said lot 208 North 89 degrees East (Magnetic) 25.25 chains more or less to place of commencement containing by admeasurement 64.75 acres more or less and more particularly described by the map hereto annexed coloured red ...

[5] The plan attached to the said conveyance (Exhibit 13) which was prepared by a surveyor, E. Priest, and signed by Essie Moore, shews the common boundary, 15 chains in length, and skews a post placed at high-water mark. The boundary in said description (Exhibit 13) namely "thence due west 15 chains to the sea beach" is the same as the boundary "thence east 15 chains" in the description in Exhibit 1, and it is apparent from Exhibit 1 and Exhibit 13 that in 1908 and 1909 the defendant's common boundary line ran to high-water mark.

[6] In May, 1913 (see certificate on plan Exhibit 14), Biscoe subdivided the south-eastern corner of parcel "C" into two lots. Cokely was the surveyor and he prepared a subdivision plan dated May 1st, 1913, and on the 9th of July, 1913, Biscoe conveyed the lot in parcel "C" immediately adjoining parcel "A," now belonging to the plaintiff, to G. R. Bates (Exhibit 14) and the plan attached to the said conveyances shews the common boundary of 15 chains above mentioned, and shews a post placed at high-water mark at the east end of the said boundary, which post, Cokely says, was pointed out to him by Biscoe. Cokely says it was the only post there and he checked back the 15 chains. The description in, and plan on, Exhibit 14 also shew that the said post was at high-water mark, and the plan attached thereto is signed by the said G. R. Bates as well as by Cokely. On the 12th of April, 1926, G. R. Bates conveyed the said parcel "C" to the defendant F. H. Bates, who holds a certificate of indefeasible title thereto in which his land is described as parcel "C."

[7] The area in dispute is a triangular shaped piece, shewn on Exhibit 19, lying to the East of the line MG on the composite plan thereto.

[8] It is common ground that neither the plaintiff nor the defendant's certificate of indefeasible title includes any part of this area. This is clear from the evidence of Cokely and Schjelderup. Were it not for this express evidence I would be inclined to hold that this post which Cokely says is the common corner post of the parties' lands as registered, was not that, but was a post placed some distance back from the high-water mark, to mark the property line, because the evidence shews that it was the custom of land surveyors not to place a post at

high-water mark, for the obvious reason that the Spring and Neap tides would likely wash it away. It then becomes necessary to consider whether the area in dispute, or any part thereof, is dry land; accretion or foreshore.

[9] The plaintiff alleges it is either foreshore or accretion, and if foreshore the defendant has no right to prevent his access thereto and, if accretion, it should be divided between the parties by a line drawn at right angles to the seashore, commencing at the "old corner post." The defendant says the land in question was always dry land or alternatively (1) he is in possession thereof; or (2) entitled thereto by conventional boundary; or (3) that he is entitled to all land to the north of the common boundary line produced in a straight line to the foreshore.

[10] Now as to accretion, Cokely says that when he made his survey in 1913, he did not think the old corner post was at high-water mark, but as far as he can remember, it was not very far from it and that the red line on Exhibit 5 marked as the high-water mark, was not the exact high-water mark in 1913; so that it appears that there was dry land east of parcel "C" in 1913, although Cokely says it was not the intention to leave any land between the east boundary of parcel "C" and high-water mark.

[11] In 1932 Cokely made a survey (Exhibit 8) of that part of parcel "A" immediately adjoining parcel "C" and he then found, as is shewn on said Exhibit 8, that the high-water mark was 70 feet east of parcel "C" and he shews the same high-water mark on Exhibit 5, marked "present high-water mark," and he says this land is accretion and that seawards, of this present high-water mark, is foreshore. In 1929 Cokely had made a survey (Exhibit 7, plan 3739) of part of parcel "A" south of the survey shown on Exhibit 8, and upon this plan he shewed the high-water mark of this part to be considerably farther seaward than the high-water mark on Exhibit 8, and Wilhelm Schjelderup who prepared Exhibit 19 says the latter high-water mark as shown on Exhibit 7 is the same, i.e., on the same line as the high-water mark shown in red on the said Exhibit 19. The defendant says that the area between the line MM and the red line on Exhibit 19 is dry land.

[12] Dealing first with the area shewn on Exhibit 19, between the line MM and the fence, I may say I have carefully considered all the evidence as to accretion and upon the whole of this evidence I find this area was dry land. I shall only refer to part of the evidence. G. R. Bates who bought parcel "C" in 1912, built a fence along the shore line, but back from it, so that the tides would not injure it, and that fence was within a few feet of the present fence as shown on Exhibit 19. He says that he put in a garden, rose trees, etc., in the area to the west of the fence and that in 1912 he and Lawrence, who then owned parcel "A," agreed to build a fence along their common boundary, Lawrence to supply materials and Bates to do the work, and that he

did build this fence in 1912 and the junction of the two fences, as shewn on Exhibit 19, is practically the same as the junction of these two fences which he built in 1912.

[13] The plaintiff says he moved the shore-line fence 6 to 8 feet seawards in 1926.

[14] Schjelderup examined this area shortly before the trial and he found grass, bulbs, garden, buildings and trees 60 years old, and he says this area has been dry land for 100 years. Mulholland, chief forester for the Province, examined this property a week before the trial and he gave evidence as to the age and size of the fir trees, now growing, and the stumps of trees which have been cut down on the said area. He found fir trees 60 years old. He further states that fir trees will not grow on tidal lands and that it was impossible for this area to have been tidal land within the past 26 years. In addition, as I have mentioned supra, admittedly there was land east of parcel "C" when Cokely made his survey in 1913.

[15] Next, as to the area seawards of the fence on Exhibit 17. I may say that I have also carefully considered all the evidence on this question and I find that the land in this area is accretion. Again I refer to only part of the evidence. The strongest feature is that Cokely actually surveyed the land immediately adjoining this area in 1929 and he found the high-water mark to be in line with the present fence on Exhibit 19. Then there was only one tree on this area, viz., a fir about 12 years old. Knight says the accretion would be 30 to 40 feet. Further the defendant (Exhibit 19) places the old boat-house on the high-water mark found by Cokely in 1929, where one would expect to find it. I, of course, have carefully considered Mulholland's evidence upon this point. He says there is a permanent drift line on the area of logs thrown up there "any time the last 100 years" and some logs have been there 50 years, and that there is a line of grass along the land where high-water mark is shown on Exhibit 19, and that there are two kinds of land grass growing on this area and that he thinks there has been no accretion within the past 20 years. I have further considered the fact that on Exhibit 7, Cokely indicated high-water mark on part of parcel "A" was on the same line as high-water mark on Exhibit 19, but it must be remembered that the land shewn on Exhibit 7 is some distance away from parcel "C." It is quite possible for the accretion to have taken place since 1929, after which one would find the grass and shrubs, etc., which are there.

[16] I find that the defendant was in possession of the area between the line MM and the fence on Exhibit 19. The evidence shews, as above mentioned, that he built the fence along the common boundary line in 1912, pursuant to an agreement with Lawrence and although this fence may have fallen into disrepair the defendant says this fence in 1915 was practically in the sauce position as it is today, and this line fence continued, to join an old fence which ran north and south along the front of parcel "C" as shewn on Exhibit 19. Further the plaintiff negotiated with the defendant to acquire this further area, inside the defendant's fence, which he is now

claiming in this action. As neither party has title to it, the defendant being in possession, is entitled to retain possession thereof.

[17] There was considerable evidence led, in an endeavour to shew the position of an old fence which was supposed to be on the line MG on Exhibit 19. No one was able to place the position of this fence accurately, nor could anyone say that it was a boundary-line fence and as I have come to the conclusion that the fence along the south boundary was built in 1912 as G. R. Bates says, it is not necessary to make any finding with regard to this old fence, but if such old fence had existed it only goes to confirm the defendant's submission that the area between the line MM and the fence was dry land.

[18] The defendant also relied upon the foregoing facts with establish a "conventional boundary." See *Grasett v. Carter* (1884), 10 S.C.R. 106. It does not appear to me that this case is in point for there was never any dispute in the case at Bar, about the boundary, at the time it was agreed to build the fence. Both parties thought, no doubt, that it was a common boundary and if there was any mistake about this, the plaintiff would not be debarred from recovery on that account. See *Les Soeurs de Misericorde v. Tellier* (1932), 40 Alan. L.R. 351, particularly at p. 360.

[19] The defendant has never been in possession of the area seaward of the fence. Three posts were put in by the defendant on the line, 83.8 feet in length shewn on Exhibit 19, lying eastward from the old boat-house and the next summer defendant says they were gone. Probably they were washed away by the sea. He then put up three more posts. Afterwards the plaintiff brought this action. There was no wire or boards on these posts so that no one was prevented from going upon this area.

[20] There is no doubt that the accretion belongs to the owners of the adjoining lands and the mode in which the accretion should be divided has been laid down in *McTaggart v. McDouall* (1867), 5 M. 534, in which Lord Justice-Clerk (Inglis) said at p. 540:

> ... because where the shore is upon the open sea, and there is no opposite coast or opposite bank, a different rule must be adopted. What, then, is the rule that would be adopted in that case, following as near as possible the analogy and the principle of *Campbell v. Brown*. I think it is extremely well stated by the Lord Ordinary. In one passage of his note he says: "The true question to be solved was born to strike the boundary line as to properties on the shore of the open sea. Using the analogy of the case of *Campbell v. Brown*, the Lord Ordinary was disposed to think that the proper method was to take a line representing the line of the share drawn at such distance seawards as to clear the sinuosity of the coast, and let fall a perpendicular from the end of the land boundary. Of course he does not mean a line representing the whole coast

> of the Bay of Luce, but a line fairly representing the average line of the shore, extending on either side of the land boundary ..."

[21] In that case, as in this, there was no evidence before the Court upon which a division could be made and accordingly the Court directed (p. 541):

> ... that we should have a line laid down by a man of skill, representing the average line of this coast upon which the two properties are situated, and shewing in what way perpendiculars let fall from that average line upon the land boundary will divide the shore between these two properties. The precise terms of the remit may require some little attention, and I should also be very much inclined, with a view to keeping open anything that it is not at present necessary to determine, to give the parties on either side an opportunity of asking the reporter to lay down any other line that he thinks may illustrate the position of the properties, and the claims upon both sides of this action.

[22] Perhaps the parties will be able to agree upon the proper line. In any event further consideration of the case is adjourned so that the parties may have an opportunity of supplying such evidence on this point as they may care to offer. All questions of costs are reserved.

Order accordingly.