JOSEPH B. PORTER (PLAINTIFF).....APPELLANT; 1894

AND *May 5, 7.
*May 31.

FREDERIC H. HALE AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Evidence—Foundation for secondary evidence—Execution of agreement—Laches—Right to relief inconsistent with claim.

On the hearing of an equity suit, secondary evidence of a document was tendered on proof that its proper custodian was out of the jurisdiction and supposed to be in Scotland; that a letter had been written to him asking for it, and to his sister and other persons connected with him, inquiring as to his whereabouts, but information was not obtained.

Held, affirming the decision of the Supreme Court of New Brunswick, that this was not a sufficient foundation for secondary evidence; that the letters should have stated that this specific paper was wanted; that an independent person should have been employed to make inquiries in Scotland for the custodian of the document, and to ask for it if he had been found; and that a commission might have been issued to the Court of Session in Scotland, and a commission appointed by that court to procure the attendance of the custodian and his examination as a witness.

The suit was for specific performance of an agreement by C., one of the beneficiaries under a will vesting the testator's estate in trustees for division among her children, to sell lands of the estate in New Brunswick to the plaintiff P.; and the document as to which secondary evidence was offered was an alleged agreement by the trustees and other beneficiaries to convey the said lands to C. The evidence was received, but only established the execution of the alleged agreement by one of the trustees and one of the beneficiaries, and the proof of the contents was not consistent with the documentary evidence and the case made out by the bill.

Held, that if the evidence was admissible it would not establish the plaintiff's case; that the alleged agreement, not being signed by

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau and Sedgewick JJ.

1894

PORTER v. HALE.

both the trustees, could convey no estate, legal or equitable, to C.; and that the proof of its contents was not satisfactory.

At the hearing P. claimed to be entitled to a decree, in the event of the case made by his bill falling, on the ground that the said will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate.

Held, that on a bill claiming title under the will, P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but antagonistic to, that set out in the bill, especially as such amendment was not asked for until the hearing.

The agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later. P. was in possession of the land during the interval.

Held, that as the evidence clearly showed that P. was only in possession as agent of the trustees and caretaker of the land, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit.

APPEAL from a decision of the Supreme Court of New Brunswick reversing the judgment of the Judge in Equity in favour of the plaintiff.

The facts of the case are sufficiently stated in the judgment of the court.

McLeod Q.C. and *Palmer* Q.C. for the appellant. That the secondary evidence was properly admitted, see *Slasser* v. *Gloyop* (1).

The plaintiff is entitled to a decree for any interest that Angus Campbell may be shown to have had in the estate. *Graham* v. *Olliver* (2).

The defence of laches was not pleaded and cannot be set up by the defendant, as the delay was caused by Angus Campbell, one of their grantors. See *Morse* v. *Merest* (3).

Weldon Q.C. *Currey* and *Vince* for the respondents, referred to *Doe d. Richards* v. *Lewis* (4) and *Boyle* v. *Wiseman* (5).

(1) 2 Ex. 409.
(2) 3 Beav. 128.
(3) 6 Mad. 26.
(4) 11 C. B. 1035.
(5) 10 Ex. 647.

1894

PORTER v. HALE.

The Chief Justice.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Supreme Court of New Brunswick sitting in appeal from the Judge in Equity, whereby the court, (Mr. Justice Hanington dissenting), reversed a decree in a suit for specific performance and for an injunction to restrain proceedings in an action of trespass brought by certain of the defendants. The plaintiff in the suit has appealed to this court against the latter judgment which was concurred in by the Chief Justice and by King and Fraser JJ.

By articles of agreement dated the 7th of August, 1884, signed and sealed by the parties thereto and made between Angus W. Campbell, a defendant to the suit, of the first part, and the appellant Joseph B. Porter, of the other part, Angus W. Campbell, who was a son of Lady Campbell the testatrix hereafter mentioned, and one of the beneficiaries under her will, contracted to sell to the appellant certain lands in New Brunswick, comprising in all about 3,389 acres, for the price of $3,000 payable as follows, namely:—$1,000 when the vendor Angus Campbell should have prepared and ready to be delivered to the appellant a good and sufficient deed in fee simple of these lands, which conveyance Angus W. Campbell agreed to make or cause to be made within three months from the date of the agreement. And it was further agreed that the residue of the price should be paid in two annual instalments of $1,000 each. Further, it was stipulated that time should be of the essence of the agreement. The articles also contained a recital that the lands agreed to be sold were, by the last will and testament of Sir John Campbell, devised to Helen Lady Campbell, his wife, and were then held in trust for her, as the said Angus W. Campbell supposed.

1894

PORTER v. HALE.

The Chief Justice.

The appellant besides stating the before mentioned agreement by his bill alleged in substance as follows: — Helen Lady Campbell, the widow of Major General Sir John Campbell, being under her husband's will seised in fee of the lands in question, made her will whereby she devised the same lands to four trustees upon certain trusts, the ultimate trusts as regards these New Brunswick lands being that the trustees should divide and apportion the same amongst her surviving children, except Sir Archibald Campbell the eldest son of the testatrix, and power was given to the trustees in their discretion to sell and turn into cash the lands in New Brunswick. The testatrix died on the 3rd May, 1883. The bill further alleged as follows:—That only two of the trustees, John Myles and James Ogilvie Holdane, accepted the trusts of the will, and that these trustees appointed the defendant Angus W. Campbell their attorney and agent in the Province of New Brunswick to look after, sell and dispose of the lands in question; that the agreement referred to was registered in the proper registry office in New Brunswick on the 24th November, 1884; that by an agreement of sale made between the trustees before named and Helen Elizabeth Barbara Campbell (who was a daughter of the testatrix and one of the beneficiaries under her will) and Angus W. Campbell, the lands mentioned in the agreement were bargained and sold by the first mentioned parties to Angus W. Campbell. That after this sale and on or about the 24th November, 1886, the trustees made a deed bearing date the day and year last mentioned whereby they purported to convey the same lands to the defendant Helen Elizabeth Barbara Campbell for the consideration of $2,338.67.

The bill further stated that on or about the 18th March, 1887, Helen Elizabeth Barbara Campbell sold and conveyed the same lands for the consideration of $3,400

to the defendants Irvine and Hale, who afterwards for valuable consideration sold and conveyed a part interest therein to the defendant Donald Fraser; that all the last named defendants had full notice of the appellant's claim to the lands and of the agreement between the appellant and the defendant Angus W. Campbell before and at the time they accepted their deed. The appellant further alleged and charged that the conveyances from the trustees to Miss Campbell, and from Miss Campbell to the defendants Irvine and Hale, were made and accepted for the sole and only purpose of defrauding the appellant and to defeat and annul the sale made to the appellant by Angus W. Campbell, and that the defendants Hale, Irvine and Fraser had brought an action of trespass against the appellant for alleged trespasses committed on the land comprised in the appellant's agreement with Angus W. Campbell.

The bill prayed for specific performance against the defendant Angus W. Campbell, and that it should be decreed that the defendant Angus W. Campbell was the agent and attorney of the trustees, the defendants Myles and Holdane, in making the agreement. That it should be decreed and declared that the defendants Myles and Holdane sold the lands to the defendant Angus W. Campbell and that he sold the same to the appellant, and that they might be decreed to convey the same to the appellant. Further, it was prayed that the deed from the trustees Myles and Holdane to Miss Campbell and from Miss Campbell to the defendants Hale and Irvine and any conveyance from the latter to the defendant Fraser might be declared fraudulent and void as against the appellant; that the defendants Irvine, Hale and Fraser might be restrained from cutting timber on the land in controversy; and that further proceedings in the action at law might be restrained.

1894

PORTER v. HALE.

The Chief Justice.

The bill was taken *pro confesso* against the defendants Myles and Holdane, and also against the defendants Miss Helen Elizabeth Barbara Campbell and Angus W. Campbell.

The defendants Irvine, Hale and Fraser answered denying the appellant's title and putting him to proof thereof, and insisting on the validity of their own title and denying all notice of any title in the appellant at the time of their respective purchases.

The cause coming on to be heard before the judge in equity, Mr. Justice Palmer, that learned judge made a decree in favour of the plaintiff for specific performance and an injunction as prayed. Upon appeal against this decree to the Supreme Court in banc that court pronounced judgment reversing the decree made by the court of first instance, and ordering that a decree be entered dismissing the bill with costs.

Full written judgments were delivered by Mr. Justice King and Mr. Justice Fraser, the Chief Justice concurring in the judgment delivered by Mr. Justice King. The judgment of the court as indicated by Mr. Justice King and Mr. Justice Fraser proceeded upon the following grounds: It was held that the alleged agreement with the trustees under which Angus W. Campbell claimed title was not sufficiently proved for the following reasons; the agreement itself not being produced it was considered by the court that a proper foundation for the admission of secondary evidence of that instrument had not been laid, and that even if secondary evidence was admissible the parol evidence was insufficient to establish it. Further, it was held that the delay in instituting the suit had been such that the defence of laches would by itself have been fatal to the appellant's claim for relief. Lastly, it was considered that in the state of the pleadings, and under the circumstances disclosed by the evidence, the appel-

lant was not entitled to specific performance to the extent of Angus W. Campbell's share as one of the coheirs of his mother, this relief having been claimed for the first time at the hearing in the event of the case made by the bill of a claim under the will failing, upon the principle that the will was void as against the appellant under the registry laws for want of registration within three years from the date of the death of the testator.

I am of opinion that in all these respects the conclusions arrived at by the Supreme Court of New Brunswick were correct and that its judgment should be affirmed. I do not feel called upon to refer to the evidence in detail as it has been stated with fulness and particularity in the judgments of Mr. Justice King and Mr. Justice Fraser, to which I refer. It appears to me that no sufficient foundation for the reception of the secondary evidence of the agreement or other written document, whatever it may have been, under which Angus W. Campbell claimed to have a title from the trustees and his sister, was laid and that therefore the parol evidence of the appellant and of Mr. Gallagher, the conveyancer who prepared the agreement of the 7th of August, 1884, ought to have been rejected. There can be no doubt that the discretion of the judge of first instance who admitted this evidence is subject to be reviewed on appeal. The proper custodian of the document in question was, of course, Angus W. Campbell. He had returned to Scotland in the latter part of 1884. He was undoubtedly without the jurisdiction of the New Brunswick courts, but that was no reason why proper inquiries should not have been made of him as to this document, inquiries which it was incumbent on the appellant to show he made before he could be in a position to give parol evidence of its contents. The appellant did, it is true, write letters

1894

PORTER v. HALE.

The Chief Justice.

addressed to Angus W. Campbell, but in none of these, nor in the letter written to Miss Campbell, does it appear that he ever inquired for this paper. Then in the letter written to Myles it does not appear, even from Porter's own evidence, that in his inquiry for Angus Campbell he made any reference to this agreement or document on the proof of which his case now depends, as Mr. Justice Fraser points out; what he did refer to was his own agreement with Angus, not to the agreement between the trustees and Angus. He did not intimate to Myles that he wanted to find Angus in order to procure from him this important paper or information as to it. Moreover, his letter of the 12th February, 1886, is not consistent with his making any inquiries of Myles in the character of a purchaser of these lands; it would rather appear to Myles that what the appellant wanted Angus for had reference to the accounts for he does not in this letter make any pretentions to an interest in the lands. It was natural, therefore, that Myles in his answer should tell him as he did that the accounts had to be settled, not with Angus but with the trustees.

What the appellant should have done was this; he should have stated in his letters to Angus and Miss Campbell that he wanted this specific paper, and in his letters to Myles he should have asked for information as to Angus stating that his object in making the inquiries was to obtain this document. Moreover he might, and I think he ought, to have had inquiries made in Scotland by some independent person, in order first to ascertain where Angus Campbell was to be found, and then if Angus should have been found he should have been asked for the paper in question. Nothing of this kind was done.

Further, a commission might have been issued addressed to the Court of Session, and under the

Imperial Statutes (22 Vict. cap. 20 and 48 & 49 Vict. cap. 74) that court would have appointed a commissioner to take evidence before whom the attendance of Angus W. Campbell and his examination as a witness might have been enforced by the appropriate process in use in Scotland to compel the attendance and examination of witnesses.

I must, therefore, concur with the court below in holding that no proper effort was made to enforce or procure the production of the written instrument, the contents of which it was sought under exceptional rules of evidence to prove by oral testimony.

Then, assuming the parol evidence to have been admissible, it was insufficient to establish that any document had ever been executed by the trustees vesting any title to these lands in Angus W. Campbell. Unless such an instrument as that described in the evidence of both Porter and Gallagher had been signed by both trustees it was worthless as an instrument conferring title, either legal or equitable, on Angus. Mr. Myles may have signed it but for want of the concurrence of his co-trustee, Mr. Holdane, it might have been wholly inoperative. Then neither Porter nor Gallagher pretend to say it was executed by Mr. Holdane. Further, the description of the contents of the paper produced by Angus as given by both Porter and Gallagher was not satisfactory. Porter's statement does not accord with that contained in his bill which he swore to. In his letter to Myles of 12th February, 1886, he does not assume the position of a purchaser but very plainly refers to himself as still the mere agent for the estate. He says, "I am paying taxes and having a good share of trouble and work looking after the lands and getting very little for my trouble." Surely such a statement as this is entirely inconsistent with a consciousness of the claim he now advances as

1894

PORTER v. HALE.

The Chief Justice.

a purchaser who had acquired a title under his agreement with Angus. Had Angus Campbell really produced to the appellant such a document as he pretends Angus then had in his possession, he must when he wrote this letter, have known that he had a title in equity. Gallagher, as I have said, does not say more than does Porter himself as to the parties to the paper which he saw in the possession of Angus.

Then, as Mr. Justice Fraser points out, Gallagher speaks of a sale by Angus W. Campbell as a person "authorized by some parties interested in the estate," which is quite inconsistent with the case made at the hearing and on the assumed proof of which the original decree was made.

On the whole I must agree with the court below that assuming the parol evidence to have been admissible it would have been insufficient to establish the plaintiff's case.

The probability is that the instrument which Gallagher saw was some agreement in anticipation of a title to be acquired by Angus Campbell from the trustees. The letter from Myles to Angus Campbell of the 1st August, 1884, which was produced and put in evidence by the appellant himself, does not refer to any completed contract or arrangement between the trustees and Angus but rather to some such transaction being in contemplation.

The appellant cannot have the relief which he asked for in the event of his case as made by his bill failing, namely, a decree for specific performance to the extent of the share of Angus W. Campbell as one of the coheirs of his mother, the testatrix Lady Campbell. The claim to this relief was based on the ground that the will had become fraudulent and void as against the appellant as a purchaser from one of the heirs under the registry law by reason of its not having been re-

1894

PORTER v. HALE.

The Chief Justice.

gistered within three years from the death of the testatrix, as required by the New Brunswick Registration Act. It is impossible that on this bill claiming title under Lady Campbell's will the appellant could have a decree founded on the proposition that the same will was fraudulent and void against him. Then no amendment could be permitted, consistently with the general and reasonable rules of equitable procedure, which would make a case not only at variance with but actually antagonistic to that stated by the bill, and that, too, an amendment not asked for until the cause had reached the stage of the hearing. Lastly, it is not an unreasonable inference, as Mr. Justice Fraser points out, that the appellant must have had notice of the will. Then the agreement of the 7th August, 1884, itself on its face refers inferentially to Lady Campbell's will when it refers to her trustees and this would establish notice.

Lastly, the delay alone is a sufficient answer to the suit. The agreement was entered into on the 7th August, 1884; the first payment of purchase money and the delivery of the deed was to be in three months thereafter. By the agreement time was to be of the essence of the contract. It is out of the question to say that the plaintiff was ever in possession otherwise than as a mere agent and caretaker in the face of his letter to Myles of the 12th February, 1886. Upon this point the case of *Mills* v. *Haywood* (1), cited in the judgment of my brother King, is an authority. Then the appellant did not file his bill until October, 1888, nearly four yeas after Angus Campbell had made default in not producing a title. This delay must on well established principles of the law governing relief by way of specific performance be fatal to the plaintiff even if the trustees were shown to have entered into some executory

(1) 6 Ch. D. 202.

1894

PORTER v. HALE.

The Chief Justice.

agreement with Angus preceding in point of time the conveyance to Miss Campbell.

I should have said that I consider the case of *Sugden* v. *Lord St. Leonards* (1), relied on by the judge in equity, to have no application to a case like the present. It establishes, no doubt, an important principle of the law of evidence applicable in testamentary causes but is no authority for extending the doctrine of presumption for the purpose of general application.

The result is that we dismiss the appeal. This will still leave the plaintiff's remedy at law intact, and it will be open to him to pursue it by action against Angus W. Campbell (or against his estate if he is dead) for damages for breach of contract.

The dismissal must of course be with costs.

Appeal allowed with costs.

Solicitor for appellant: *C. A. Palmer.*

Solicitors for respondents: *Weldon & McLean.*

(1) 1 P. D. 154.