Cite as: Chute v. Nova Scotia (Attorney General), 1992 NSCA 16

S.C.A. No. 02509

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hallett and Matthews, JJ.A.

BETWEEN:

BYRON G. CHUTE and BARBARA JANE CHUTE Appellants - and - THE ATTORNEY GENERAL FOR THE PROVINCE OF NOVA SCOTIA, representing HER MAJESTY THE QUEEN in right of the PROVINCE OF NOVA SCOTIA and DEAN R. BAKER and GAYLE BAKER Respondents	Barbara S. Penick for the Appellants Michael S. Ryan, Q.C. for the Respondents Appeal Heard: May 19, 1992 Judgment Delivered: May 28, 1992

THE COURT: Appeal dismissed with costs to the respondents per reasons for judgment of Hallet, J.A.; Jones and Matthews, JJ.A. concurring.

HALLETT, J.A.

This is an appeal from a decision of Judge Haliburton granting the respondents a certificate of title to a parcel of land on the Medway River at Fox Creek, Queen's County pursuant to the provisions of the **Quieting of Titles Act**, R.S.N.S., Volume 9, Chapter 32. He refused the appellants' application for a certificate relating to the northern part of the land.

To deal with the issues raised on the appeal, the facts and the trial judge's findings of fact are, of course, relevant.

On March 12, 1921, Simeon Clattenburg conveyed three parcels of land to Laurie Clattenburg. Two of those parcels are described as being at Fox Creek, Queens County. The descriptions are extremely vague but are consistent with the descriptions in earlier conveyances which bring the title to those two parcels of land into Frank Clattenburg by deed dated April 10, 1918, and recorded at the Registry of Deeds for Queens County in Book 59, page 77. The two parcels of land are described as follows:

> "All that certain lot piece or parcel of land situated at Fox Creek in the County of Queens on the East side of Port Medway River being the same land conveyed to John Clattenburg by George

Wentzell the same being fully described in Book 14 of folio 564 at the Office of the Registrar of Deeds, Liverpool County of Queens, Province of Nova Scotia being Lot No. 2.

Also that piece and parcel of land situated at Fox Creek being the same land conveyed to Joseph Faulkenham by Stephen Mack and Augusta Mack and better described in Book 12 Folio 455 in the Registry Office at Liverpool County of Queens, N.S.

The above lands and premises being a part of the land and premises conveyed to Margaret Clattenburg from John Clattenburg by indenture dated August 6th 1912 and recorded in Registry Office at Liverpool, N.S. in Book 52 page 541."

There is no record of a conveyance from Frank Clattenburg to Simeon Clattenburg. Therefore, there is a gap in the paper title. The deed from Simeon Clattenburg to Laurie Clattenburg which was dated March 12, 1921, was not registered until June 15, 1966. The deed is registered in Book 105, page 442 and conveys the land by the descriptions herein before recited. The lands in dispute which purport to be the lands conveyed to Laurie Clattenburg are mainly wooded and front on the east side of the Medway River where it flows into the Medway Harbour. Access is by boat as the bridge on the Kettle Creek Road which abutts the land to the west has been out since the early 1970s.

The evidence would indicate that in a period between 1921 and 1932 Laurie Clattenburg and his family lived in a home on the southern part of the lands. In

1932 they moved across the Medway River. In 1932 Laurie Clattenburg permitted his brother Herb Clattenburg and his family to move into the home on the property. Herb Clattenburg lived there until 1938 when Laurie Clattenburg evicted him after an altercation. The two brothers apparently never spoke again. Laurie Clattenburg died in 1968 and Herb Clattenburg in 1972. No one lived on the land after Herb Clattenburg was evicted in 1938.

On July 12, 1968, Laurie Clattenburg and his wife conveyed the lands that had been conveyed to them at Fox Creek to Dean R. Baker, Elizabeth Lawrence and Wilma Schields. The deed is recorded in Book 107, page 401. It is a warranty deed.

On the 21st of August, 1968, Herb Clattenburg made a statutory declaration in which he described an alleged oral agreement made by Laurie Clattenburg in 1932 that he would sell to Herb Clattenburg the northern portion of the lands being the lands now claimed by the appellants. According to the declaration Herb Clattenburg paid the $25.00 purchase price but never received a deed. In the declaration Herb Clattenburg says since he was acquiring the property from his brother he did not press him for a deed and that when the dispute took place in 1938, in the course of which blows were exchanged, Laurie said he would never give him a deed

to the lands. The declaration goes on to state that Herb Clattenburg and members of his family exercised various acts of possession on the lands he claimed from 1932 until the making of the declaration in 1968 by cutting wood, picnicking, etc. A letter dated August 14, 1968, from Laurie Clattenburg to Herb Clattenburg's solicitor stated that he took $30.00 as rent from Herb and that there was never any mention about giving Herb a deed at any time. This letter was in response to a letter that Laurie Clattenburg had received from his brother's lawyer requesting a deed.

There is no evidence that Herbert Clattenburg pursued Laurie Clattenburg for a deed between the period 1932 and 1968. He did not commence any proceedings to enforce the alleged oral agreement.

On October 13, 1977, Wilma Schields and Elizabeth Lawrence conveyed their interest in the lands to the respondents. However, the description used in that conveyance was not that contained in the deed to them from Laurie Clattenburg but was based on a plan that had been prepared by a surveyor by the name of Roger F. Melanson and dated June 2, 1974. Mr. Melanson testified that he was unable to plot the old descriptions (which I have set out earlier in this decision) but he walked the land with Laurie Clattenburg prior to

his death and the plan Mr. Melanson prepared was based on what Mr. Laurie Clattenburg showed him as to the location of the boundary lines of his property.

Subsequent to the conveyance by Laurie Clattenburg to Schields, Lawrence and Baker in 1968, Maud Clattenburg, the widow of Herb Clattenburg, on December 14, 1972 executed a deed to Byron G. Chute and Barbara Jane Chute (her daughter) to a parcel of land which I have referred to as being the northern portion of the lands and being those claimed by her late husband Herbert Clattenburg. The deed was recorded in Book 124, page 753. It contains a metes and bounds description; the description used in the deed to the appellants was based on the description of the lands Herbert Clattenburg claimed which was set out in his statutory declaration made in 1968.

When the respondents acquired their interest in the property they did not have the title searched nor did Byron G. Chute and Barbara Jane Chute have the title searched when they acquired the northern portion of the property from Maud Clattenburg.

In 1984 the respondents learned that Byron Chute was building a shed on the northern portion of the lands which they considered to be theirs. An action was commenced by the respondents under the **Quieting of Titles Act** seeking a certificate of title for the lands shown

on the Melanson plan. They also sought a certificate of title to a right-of-way described in the notice of claim as follows:

> "TOGETHER with a perpetual, free and uninterrupted right-of-way over the existing road, Twenty-five Feet (25') in width, leading from the aforesaid Public Highway to the Southern part of the lands hereinbefore described and situate as shown on the Plan hereinafter mentioned."

The plan being referred to is the June, 1974 plan prepared by Mr. Melanson. There is no reference to a right-of-way in the conveyance to the respondents or in any prior deed. The owner of the lands over which the right-of-way passes is described in the Melanson plan as "unknown".

The appellants counter-claimed for a certificate of title to the northern portion of the lands being those lands which were shown on a plan prepared by Allan W. Comfort dated September 8, 1986, to show the lands claimed by Herb Clattenburg and described in Herb Clattenburg's statutory declaration. The claim is based on the deed from Maud Clattenburg to the appellants and an assertion by the appellants that they and their predecessors had been in exclusive , continuous, open and adverse possession for a period in excess of 40 years.

In accordance with the requirements of the **Quieting of Titles Act** advertisements were placed in a local

newspaper advising of the claims of the parties and advising persons with interests how to intervene. No one intervened in the proceedings. As previously stated, the trial judge granted a certificate of title to the respondents and dismissed the appellants' claim with respect to the northern portion of the lands as shown on the Comfort plan.

The essence of the trial judge's decision is that he was satisfied that Laurie Clattenburg was the owner of the lands in 1921 and that the acts of possession of Herb Clattenburg and his successors in title were insufficient to have ousted Laurie Clattenburg or his successors in title from possession of the lands shown on the Melanson plan. The appellants have raised nine issues on the appeal. They are stated in the appellants' factum as follows:

> 1. Are the Respondents (Plaintiffs) entitled to a Certificate of Title?
>
> 2. Were the defects in the Respondents' (Plaintiffs') chain of title mere technicalities?
>
> 3. Did the Trial Judge err in finding that both the Appellants' and the Respondents' claims "arise from the validity of the title of Laurie Clattenburg"?
>
> 4. Did the Trial Judge err in holding that the "claim advanced by the Appellants (Defendants) that their subsequent adverse possession of the property has displaced the title of Laurie

Clattenburg obviously assumes that the property belonged to him at that time"?

5. Did the Trial Judge err in treating the Appellants' claim as one against a "true owner"?

6. Did the Trial Judge err in holding that the Statutory Declarations were not admissible?

7. Did the Trial Judge err in fact and in law in finding that there was no evidence that Parcel B was a separate lot?

8. Did the Trial Judge err in finding that the concept of Colour of Title is not helpful to the claim of the Appellants?

9. Are the Appellants entitled to a Certificate of Title?

The foundation under all the grounds of appeal raised by the appellants is that the trial judge erred in his approach to the case in concluding that Laurie Clattenburg was the true owner between 1921 and 1968 of the lands claimed by the respondents which, of course, include the northern portion of the land which is claimed by the appellants. The appellents assert that Laurie Clattenburg had not acquired good title as there is no conveyance of the lands into Simeon Clattenburg. Secondly, the appellants assert that the lands that were acquired by Laurie Clattenburg as described in the conveyance to him are so vaguely described that the land could be anywhere. The appellants assert that the proper approach would have been for the trial judge to look at and compare the acts of possession of both

the appellants and their predecessors, particularly Herb Clattenburg, with respect to the lands claimed by the appellants vis-a-vis the acts of possession exercised from 1921 over that northern portion of the land by Laurie Clattenburg and his successor.

It is an undisputed fact that there is no evidence as to how title passed from Frank Clattenburg to Simeon Clattenburg. It is also an undisputed fact that the descriptions in the old deeds to Laurie Clattenburg and to the grantees in the deed from Laurie Clattenburg could not be plotted by the surveyor Melanson and in that sense Laurie Clattenburg's paper title is defective.

The very purpose of the **Quieting of Titles Act** is to deal with title problems. Defects of title per se do not disqualify an applicant from obtaining a certificate of title under the **Act**. Otherwise the **Act** would serve no useful purpose. The trial judge found it of considerable significance and in my opinion properly so that there were no persons other than the two claimants who claimed an interest in the lands. In 1921 Laurie Clattenburg acquired two parcels of land at Fox Creek. The evidence of Harley Clattenburg who was born in 1917 and lived at Port Medway in the 20s and early 30s was that Laurie Clattenburg lived in the home on the southern part of the lands until he moved across the harbour

in 1932. Laurie allowed his brother Herb Clattenburg and his family to occupy the home from 1932 to 1938. It is a reasonable inference that if there were any other persons who had a claim to the property this exclusive possession of Laurie Clattenburg would not have existed from 1921 to 1938, a period of 17 years. Secondly, it is apparent that Herb Clattenburg considered that his brother Laurie was the owner of the northern portion of the lands which Herb's successors now claim as Herb asserted that he bought that portion of the land from Laurie Clattenburg in 1932. These facts lead to the inference that despite the defect in title Laurie Clattenburg exercised the rights of a true owner from approximately 1921 to 1938 and these rights were recognized by Herb Clattenburg and apparently went unchallenged by anyone else. I cannot accept the argument made on behalf of the appellants that there is no evidence that the conveyances into Laurie Clattenburg included the northern portion of the lands which are now claimed by the appellants. It is unrealistic to suggest that Laurie Clattenburg was not the owner of these lands in view of the fact that no one else was claiming them and Herb Clattenburg considered Laurie Clattenburg had the right to sell them to him.

Mr. Melanson testified that Laurie Clattenburg

walked the lines with him and he drew the 1974 plan which includes the lands claimed by the appellants as being the Laurie Clattenburg lands which were subsequently conveyed to the respondents. It is true that the old descriptions are extremely vague but when one considers the evidence I am satisfied that the finding made by the trial judge that Laurie Clattenburg was the true owner of the lands claimed by the respondents is supported by the evidence. I therefore disagree with the appellants argument that the approach taken by the trial judge was incorrect.

The question then becomes whether the trial judge erred in concluding that Herb Clattenburg and his successors in title had not ousted Laurie Clattenburg and his successors from possession of the property claimed by the appellants. The learned trial judge found that the respondents' evidence as to acts of possession was generally more credible than the appellants. He found that the acts of possession by Herb Clattenburg and his successors were sporatic and intermittent and therefore insufficient to have established a possessory title. I can see nothing in the evidence that would warrant coming to a different conclusion.

The appellants assert that the trial judge also erred in finding that the concept of colour of title

was not helpful to the claim of the appellants. With respect to counsel for the appellants, I agree with the finding by the trial judge on this issue. The appellants have no colour of title. Herb Clattenburg did not have a deed from anyone with an interest in the land. He did not have an agreement of sale in writing or any memorandum of such an agreement. He had not been delivered title deeds to the lands which are now claimed by the appellants. In short, he had nothing on which to suggest he had any colour of title. Therefore the appellants claiming under a deed from Maud Clattenburg, who likewise had no title, had themselves no colour of title.

The appellants also assert that the learned trial judge erred in holding that the statutory declarations of Herbert Clattenburg and others were not admissible. The learned trial judge made reference to my decision in **Lynch v. Lynch** (1986), 71 N.S.R. (2d) 69 in concluding that the declarations should not have been admitted. He concluded there was some question as to the reliability of the declarations and that the declarations were further impaired in their value because they differed in some minor respects from the viva voce evidence given at trial. He concluded that even if they were admissible they did not assist the appellants' case. I have reviewed

those declarations which are part of the record and I am satisfied that there is little in the declarations that would assist the appellants. The matters dealt with in the declarations were covered by the evidence of witnesses called on behalf of the appellants. Therefore nothing turned on the trial judge's decision that he ought not to have admitted the statutory declaration at the trial. In my opinion it is a matter for the trial judge in any particular land dispute to assess whether statutory declarations should be admitted; that would depend on their reliability. The learned trial judge did not quote the following relevant paragraph from my decision in the **Lynch** case:

> "There are the provisions in our Civil **Procedure Rules** to which I have referred pursuant to which affidavits can be tendered in evidence in the discretion of the court. I can think of situations where in a property case such declarations could be quite useful; for instance, if they were declarations of a deceased surveyor, known for his integrity and competency, that dealt with the location of old lines, etc. If a court were satisfied that the declarations had been duly signed and sworn to by the deponent and satisfied of his competency and impartiality, then a court could exercise its discretion under Civil Procedure Rule 31 to admit such documents even though the surveyor was not alive to be cross-examined. The reason why such evidence might be accepted is that a surveyor engaged by one of the parties to give expert opinion evidence as to the location of a line would be acting within recognizable bounds if he

> were to consult work of other surveyors and give his opinion based in part on his review of their work so that in effect his opinion is based in part on hearsay but is nevertheless admitted; the hearsay component only going to weight.
>
> In this case, the deponents whose statutory declarations the plaintiffs sought to introduce were not experts and from the face of the documents it could be readily seen that one would have to question the reliability of the declarations and I exercised my discretion not to allow them to be tendered. It would only be cases in which the court was very satisfied as to the reliability of the declarations that such declarations should be accepted if the deponent was dead and therefore not available for cross-examination."

I would not disturb the findings of fact made by the trial judge. He properly applied the law and in my opinion, did not commit an error in granting a certificate of title to the respondents and refusing to grant a certificate to the appellants.

I would dismiss the appeal with costs to the respondents.

J.A.

Concurred in:

Jones, J.A.

Matthews, J.A.

District No. 2

88

JUN 7 1991

1985 C.L.P. No. 2769

QUEENS

IN THE COUNTY COURT OF DISTRICT NUMBER TWO

BETWEEN:

DEAN R. BAKER and **GAYLE BAKER**

PLAINTIFFS

- and -

ATTORNEY GENERAL FOR THE PROVNCE OF NOVA SCOTIA, representing Her Majesty The Queen, in the right of the Province of Nova Scotia, and Byron G. Chute and Barbara Jane Chute

DEFENDANTS

AND BETWEEN:

BYRON G. CHUTE and **BARBARA JANE CHUTE**

PLAINTIFFS BY COUNTERCLAIM

- and -

ATTORNEY GENERAL FOR THE PROVINCE OF NOVA SCOTIA, representing Her Majesty the Queen, in the right of the Province of Nova Scotia, and Dean R. Baker and Gayle Baker

DEFENDANTS BY COUNTERCLAIM

HEARD: At Liverpool, Nova Scotia, on the 19th and 20th days of September, A.D. 1990

BEFORE: The Honourable Judge Charles E. Haliburton, A/J.C.C.

DECISION: The 4th day of June, A.D. 1991

COUNSEL: Michael S. Ryan, Q.C., Esq., for the Plaintiffs

Barbara S. Penick, for Byron and Barbara Chute

W. Yorke Tutty, Esq., for the Attorney General

D E C I S I O N