Supreme Court of Canada

Bentley *v.* Peppard (1903) 33 SCR 444

Date: 1903-06-02

Newcombe N. Bentley and Others (Defendants)

Appellant

And

J. Ashley Peppard, Administrator of the Estate and Effects of J Gourley Peppard, Deceased (Plaintiff)

Respondent

Present:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard and Davies JJ.

1903: May 8; 1903: June 2.

(Mr. Justice Mills heard the argument but died before judgment was given.)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Possession—Statute of limitations.

In 1821 M, obtained a grant of land from the Crown and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years when he removed to a place a few miles distant after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed of this land to B. who proceeded to cut timber from it. In an action of trespass by P.

*Held,* that the jury on the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870 which had ripened into a title. If not the deed to his sons in 1870 gave them exclusive possession and if they had not a perfect title then they had twenty years after in 1890.

Appeal from a judgment of the Supreme Court of Nova Scotia affirming the verdict for the plaintiff at the trial.

The facts are sufficiently stated in the above headnote.

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Roscoe K.C. for the appellants.

Borden K.C. and Gourley K.C. for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia in favour of the plaintiff, respondent, ordering the appellants to restore to him the goods replevied and payment of nominal damages for the trespass. The judgment of the Supreme Court unanimously affirmed the judgment of Mr. Justice Townshend, the trial judge, in favour of the respondent, and upon appeal his judgment was confirmed.

As the decision of the case mainly depends upon the question whether or not the rights of the parties are to be determined by the provisions of the Statute of Limitations, it may be well to state certain fundamental propositions, the proper application of which to the facts in controversy must settle this appeal.

1. According to the English law the word "possession as applied to real estate, has a purely technical meaning. The word "occupancy" is not a word of legal import apart from its popular acceptation. Occupancy may as a matter of fact negative possession in its legal sense, but possession in the same sense is consistent with non-occupancy. In other words, all land in the dominions of the Crown must be in the possession of some one, whether that "some one" be the Crown itself or a natural or artificial entity. "Vacant" land—"abandoned" land, (where title is involved) is an impossibility. Possession must be somewhere—in somebody—and he who has the title is presumed to have the possession unless the actual dominion and occupancy is elsewhere.

2. Where the owner (also a non-technical word)—the person having a present legal estate, whether by word

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of mouth or by a written instrument—lets blackacre, the tenant accepting and entering by virtue thereof has possession of every foot of ground comprised in blackacre, although he may possess himself of but one foot of it only.

3. Where a person without title and without right (in Canada we call him a "squatter") enters upon land, his possession in a legal sense is limited to the ground which he actually occupies, cultivates and encloses; it is a *possessio pedis*—nothing more.

4. But where a person in good faith under a written instrument from one purporting to be the proprietor, enters into blackacre—a definite territorial area—his actual occupancy of a part—no matter how small—in the absence of actual adverse occupancy by another, gives him a constructive possession of blackacre as a whole. He has it, as the phrase is, under "colour of title."

5. At common law and notwithstanding the old limitation statutes, the actual and exclusive possession of a tenant or parcener could not work to the detriment of his co-tenant or co-parcener. His possession was theirs and could be invoked not only as against the alleged title of a trespasser, but in aid of their own:

(But this principle has long since been changed by statute both in England and Nova Scotia.)

6. Since this change, therefore, exclusive possession by one of such co-owners is regarded as adverse against the others.

7. But independently of that, and notwithstanding the statute, his grant or feoffment of the whole estate to one entering into possession under it operates as an ouster of the others and the latter's right under the Statute of Limitations begins from the date of the grant.

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In the present case one Samuel McLellan obtained a grant of the land in dispute in 1821 and a year afterwards permitted his son, Robert, to enter into possession of it. For more than ten years, and until after the death of his father, he lived upon it, built a house and barn upon it, and cultivated a considerable portion of it. It appears that afterwards he removed from the place some few miles distant where he continued to live, but the evidence shows, and the jury has found, that he occupied the land and had sole and exclusive possession for twenty years before the year 1870. And I think they would have been justified in finding a sole and exclusive possession for 47 years.

Samuel McLellan, Robert's father, left ten sons and four daughters, and it is proved that not one of these children, nor any of their descendants, ever claimed title to nor occupancy of any portion of the land in dispute, from the time that Robert entered it in 1823 down to the commencement of this action in December 1899, and that during all of that period, when fencing or pasturing or cultivation of any kind, or the taking of wood or timber therefrom, was necessary, Robert and those claiming under him were the only ones that ever attempted or claimed or exercised the right to do so. In 1870 Robert conveyed the lot to his four sons, Samuel. Charles, John A. and Albert, and although none of them lived upon the lot the possession must be presumed to be in them, they taking seizin under their father. These four brothers just mentioned, in December 1873, sold to one Frederick A. Fullmore, but Fullmore's deed was not registered. Fullmore's title was sold under a registered judgment against him by the sheriff to one Amos Hill on the 13th June 1882, and Hill conveyed to one J Gourley Peppard, by deed dated the 24th March, 1884, the two latter deeds being registered. The plaintiff is the administrator of Gourley Peppard. The

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defendant purported to purchase the lot from Charles McLellan (who had previously conveyed to Fullmore as above mentioned), Edward McLellan and Sylvius McLellan, nephews of Robert McLellan, and cousins of Charles, the deed being dated 10th August, 1896, and registered in November following. It is under this deed that the appellants claim the right to cut the timber in question.

It is, I think, clearly established, as already intimated, that Robert McLellan having been let into possession of the land by his father, then being the patentee from the Crown, the Statute of Limitations began to run against the father in the father's lifetime; that twenty years exclusive possession, in the absence of evidence to the contrary, would give him a good title at their expiration. So that his possession, after his father's death, would not, under the common law, inure to the benefit of his co-heirs, the brothers and sisters above mentioned. That would be a sufficient answer to the plaintiffs claim. But assuming otherwise, the deed from Robert McLellan, he then being in possession, to his four sons, in April, 1870, gave them exclusive possession of the whole lot, and even supposing they had not then a perfect title, that title became perfect twenty years thereafter, namely, April 1890.

The purchase therefore by the defendant in 1896 could not avail as against their deed and possession.

A point was raised at the argument as to whether the defendant's title was good inasmuch as the deed to Frederick A. Fullmore was not registered. The subsequent deeds were registered, as already stated, and it is not necessary to decide whether under the Registry laws these deeds are of no avail as against the purchase by Bentley in 1896 inasmuch as the trial judge found, and we think upon sufficient evidence, that the consideration for his deed was merely nominal

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and deeds of that character do not come within the protection afforded by the Registry laws.

On the whole we are of opinion that the judgment below should not be disturbed.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: Norman J. Layton.

Solicitor for the respondents: G. H. Vernon.