
JOSIAH WOOD (PLAINTIFF)..... APPELLANT;

AND

HENRY S. LEBLANC (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.

1904
*Feb. 16, 18.
*May 4.

*Title to land — Colourable title — Possession — Statute of limitations —
Evidence.*

The possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title if open, exclusive and continuous for the whole statutory period.

Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land continuously or at intervals, during any portion of such period.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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APPEAL from a decision of the Supreme Court of New Brunswick (1) maintaining the verdict for the plaintiff and refusing a new trial.

This was an action brought by the appellant as plaintiff in the Supreme Court of New Brunswick for the recovery of the possession of a quantity of saw logs claimed by the appellant to be his property upon the ground that they were cut upon certain lands of the plaintiff situate in the Parish of Sackville, in the County of Westmoreland, known as the Dickie lot.

To this the defendant pleaded—

1. That he did not take the logs.
2. That the logs were the property of Sylvain P. LeBlanc.
- 3 That neither the lands nor the logs were the property of the plaintiff.

Upon these pleas issue was joined. and the case was tried at the Westmoreland circuit in July, 1902, and resulted in a verdict for the defendant.

The plaintiff moved before the Supreme Court of New Brunswick to set aside such verdict and for a new trial, and that court after consideration refused the motion, whereby the verdict was confirmed, against which last mentioned decision this appeal is taken.

The action, although nominally a personal one, involved the trial of the title as between the parties to the lands where the logs were cut. These lands formed part of the lot situate in the Parish of Sackville known as the Dickie lot, which lot is part of a large tract of wilderness land known as the "Sackville Rights."

Both parties gave evidence of possession by those through whom they claimed, that on plaintiff's part beginning in 1851 and that for defendant going back ten years earlier. The plaintiff, however, claimed

title through a deed from a squatter followed by running lines and enclosing the land.

Powell K. C. and *Teed K. C.* for the appellant. This being an action of replevin the burden of proof is on the defendant.

The defendant's possession at the best consisted of isolated acts over a small portion of the lot and was not continuous. This could never give him title to any part of it. *Sherren v. Pearson* (1).

The plaintiff, on the other hand, had an exclusive and continuous possession of nearly all the lot for over twenty years and the conveyances made from time to time had confirmed his title. *Bentley v. Peppard* (2).

Pugsley K. C. and *Friel (Masters K. C. with them)* for the respondent. Defendant having pleaded *non cepit* the plaintiff must prove the wrongful taking. *Graham v. Wetmore* (3).

Plaintiff having gone into possession under a deed from one who had no title and which did not convey by metes and bounds his subsequent running of lines added nothing to the strength of his position. *Harris v. Mudie* (4).

THE CHIEF JUSTICE. In form the appellant's action is in replevin for alleged unlawful taking of logs by the respondent upon a lot of land called the Dickie lot, but in substance the controversy is as to the title to the said lot. Neither the appellant nor those through whom he claims nor the respondent have any documentary title to this lot. The question is one of possession, and of course, as such, a question of fact and peculiarly within the province of the jury. Now, there was ample evidence to warrant the findings of the

(1) 14 Can. S. C. R. 581.

(3) 9 N. B. Rep. 373.

(2) 33 Can. S. C. R. 444.

(4) 7 Ont. App. R. 414.

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jury in favour of the respondent. And with these findings, approved of as they were by the learned judge who presided at the trial and by the court *in banco* unanimously, we would not be justified in interfering.

I agree in the reasoning of the Chief Justice of New Brunswick.

I would dismiss the appeal with costs.

SEDGEWICK J.—Concurred.

DAVIES J.—This was an action of replevin brought by the appellant against respondent to obtain possession of certain logs alleged by plaintiff to have been cut upon lands claimed as his and described in his declaration by metes and bounds.

The defendant, in addition to pleading *non cepit*, by his fourth plea denied that the lands and premises or the logs or any of them were the property of the plaintiff.

The logs after having been cut, hauled and made into merchantable timber by defendant must then be presumed to have been his property and will be so held against all the world but the real owner or some one legally entitled under him to their possession. The onus in this case lay upon the plaintiff to prove that he was such real owner, and the main question for our decision is whether or not he has satisfied such onus. The defendant in his pleadings and at the trial raised other issues claiming himself to be the owner of the lands from which the logs were cut. It may well be that the evidence does not support such a claim, but even if it must be held unproved, that does not help the plaintiff who only can recover if and when he has proved a legal title, either by conveyance or possession to the lands in dispute. If he failed to prove such

title he cannot recover however weak defendant's title may be to the lands in dispute. Neither party pretended to have a good documentary title. Both claimed to have acquired title by possession.

Chief Justice Tuck in delivering judgment states the facts as follows :

The action is one of replevin. It was tried at Dorchester, in the County of Westmoreland, in July, 1902, before Mr. Justice McLeod, and after many days' trial resulted in a verdict for the defendant. Although in form the action is for alleged unlawful taking of logs, the property of the plaintiff, yet, in substance, the trial was concerning the title to land where the logs were cut. This land is situate at Sackville, in the County of Westmoreland, and forms a part of what is known as "Sackville Rights." The lot immediately in question in this action consists of seven hundred acres, and is known as the "Dickie" lot. It is claimed, on the part of the plaintiff, that the land in dispute is part of a large tract of land which probably more than fifty years since was run out by John Dickie and continued in Mr. Dickie's possession until 1867. He sold certain lots or shares in it, and in that year he conveyed the remainder to David H. Calhoun, who there owned a mill property. It is also claimed on behalf of the plaintiff that, during Dickie's ownership and control, he exercised the usual acts of ownership over the property without interference. That so long as David H. Calhoun owned the property, he continued to operate upon it for logs in the usual way. That in 1881 David H. Calhoun conveyed this property, with other timber lands and his mill property, to his sons, Thomas B. Calhoun and Clement Calhoun. That they went into possession and cut logs in the usual way. In 1885 the whole property became vested in the plaintiff. That since the last named time the title has remained in him and lumbering operations have been carried on, under his control or on his behalf, down to the present time.

In the fall of 1901 the defendant cut logs on the Dickie lot, being the land in question. Those are the logs to get possession of which the writ of replevin was issued, and this action is defended by LeBlanc, who claimed title to the property in question.

On the other hand the defendant says that there is ample proof upon which a jury could find, that there were acts of possession on the part of the French settlers, as they are called, running back from a period of sixty years. That they had this land in occupation since 1842, and down to 1867 they were not interfered with in their occupation. That it is not pretended there was an act of ownership by Dickie further back than 1851.

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The plaintiff and those through whom he claimed had at different times cut trees and carried on lumbering operations on different parts of this tract of land which plaintiff claimed. It was not pretended by the plaintiff's counsel that they had proved anything more than a title by constructive possession under the Statute of Limitations. There was no *continuous occupation* by the plaintiff or his predecessors in title of the general tract of land said to be within the boundaries of his deeds much less of the special 700 acres here in dispute, or any part of it. Nor, as I understand, was it contended that there was any such possession as, in the absence of the deeds under colour of which plaintiff claimed, would have extinguished the true owner's title and given a title to the plaintiff by possession. What was contended for was that those through whom plaintiff claimed were first in possession and that from their possession such as it was a seisin in fee might or should be presumed. To my mind it is perfectly clear under the evidence that there was not such possession as under the statute extinguished the true owner's title and gave a statutory one to the plaintiff unless indeed it is held that the existence of the deeds give to the isolated and intermittent acts of possession relied on, such as surveys and lumbering in the winter months, cutting out roads to haul the lumber and so forth, a legal effect alike as to the *continuity* and to *extent* entirely different from the effect which would be given to such acts in the absence of the deeds. The plaintiff in his factum submits that "the question to be decided really is *who was first in possession?*" He argues that "if Dickie was first in possession of the land the law would presume him to be seised in fee and that the case should then be governed as if the plaintiff and those through whom he claims were in possession under the best of

documentary titles." Such an argument assumes two conditions as premises. First, that constructive possession as distinguished from actual possession is good enough to enable the possessor to claim the presumption of a "legal seisin," and secondly, that such possession need not be continuous but may be gathered from intermittent and isolated acts. I agree that seisin in fee may and will be presumed from evidence of the *actual possession* of a house, field, close, farm or messuage. But I cannot find any authority for extending the application of any such presumption to large tracts of wilderness lands which may be held in *constructive possession*, nor do I think it can on principle be so held. It is the *actual possession* which justifies the presumption. The very basis from which it arises is absent in the case of constructive possession only. *When and while* actual possession is in a man seisin will be presumed to the extent of his actual possession or occupation. But the moment he ceases actually to possess or occupy, that moment the presumption ceases, and it does not arise at all with respect to lands of which there is no actual possession or occupation or *beyond the bounds of such actual possession or occupation*. To my mind, therefore, the question is not whether those through whom the plaintiff or defendant claimed first trespassed upon and temporarily occupied the disputed lands or a part of them, but the onus of proof being upon the plaintiff whether with respect to the lands off which the trees in question were cut (or the block of such lands contained within the colourable title deeds) he has shewn such open, notorious, continuous, exclusive possession or occupation of any part of such lands as would constructively apply to all of them, and operate to extinguish the title of the true owner and give plaintiff a statutory one. The nature of the possession necessary

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to do this in the absence of colourable title was fully considered by this court in the case of *Sherren v. Pearson* (1). It was there decided that isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title under the statute.

In the carefully reasoned opinions of the judges in that case statements on the point are made which do not seem to leave the matter open to any doubt. Chief Justice Ritchie formally approved of the law as laid down in *Doe d. DesBarres v. White* (2), and at page 585 goes on to say :

To enable the (trespasser) to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.

And in another place he says,

the trespasser to gain title must as it were "keep his flag flying over the land he claims."

Strong J. and Fournier J. concurred. Taschereau J., (now the Chief Justice of this court, said (pp. 594-5) :

The fact that the wrongdoer or trespasser supposes he has a claim or title to the land does not alter the character of his acts. His unfounded belief cannot diminish or destroy the legal claims of the true owners or deprive them of their right to treat him as a wrongdoer in entering on their land. The effect to be given to repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of wilderness lands. If the property is of a nature that cannot easily be protected against intrusion, mere acts of user by trespassers will not establish a right.

Owners of wilderness or wooded lands lying alongside or in rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoliation.

(1) 14 Can. S. C. R. 581.

(2) 3 (N. B. Rep.) 595.

Henry J. said, (page 592):

Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should *continue that disseisin so as to amount to an ouster*, and that *ouster maintained for the statutory period*. That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of land of which the party claims possession.

Now, in my judgment, the possession necessary under a colourable title to *oust* the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed *but only when and while there is that part occupation*. And before it can be extended it must exist and is only extended by construction while it exists. It may be that a person with colourable title engaged in lumbering on land would be held *while so engaged and in actual occupation of part* to be in the constructive possession of all not actually adversely occupied even if that embraced some thousands of acres within the bounds of his deed. But it is clear to my mind that if and when such person withdraws from the possession of the part by ceasing to carry on the acts which gave him possession there he necessarily ceases to have constructive possession of the rest. His possession in other words must be an actual continuous possession, at least of part.

When the lumbering ceased in the spring of the year and actual occupation of any part of the lands ceased, then as a necessary consequence all construc-

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tive possession ceased with it. As was said by Mr. Justice Burton in *Kay v. Wilson* (1):

But in both cases (that is one entering with and one without colour of title) an actual, visible occupation or possession of some portion of the land is necessary for the full period of twenty years,

and, I add to that, a continuous possession.

The character and nature of the possession, the *extent* of which is sought to be broadened and lengthened by construction so as to cover lands not in actual possession, must not, nowever, be equivocal. It must possess those characteristics which have been determined to be essential to a possession claimed by a squatter as against the true owner, that is it must be open, exclusive, continuous, so notorious that the claimant may be said to "have his flag flying over it." Can the intermittent and isolated acts of cutting down trees in winter constitute alone such a possession?

In the case at bar it is not and could not be contended for a moment that there was any actual, visible, *continuous and* exclusive possession of any part of the lands within the boundaries of plaintiff's deeds by himself and those through whom he claims. On the contrary the defendant and those settlers under whom and with whose authority he cut the trees on the land had obtained and, since the building of the brush fence in 1869, or 1870, had retained the possession of the land enclosed by the fence. It may well be true that each party cut trees at times off these lands. Chief Justice Tuck who delivered the leading judgment of the Supreme Court of New Brunswick said with respect to the findings of the jury:

It is not necessary that I should refer in detail to the questions put by the learned judge and the answers of the jury. They found that prior to 1850 or 1851, the old settlers were in possession of the whole of the tract of land known and spoken of in this suit as the big block, and they exercised ownership over it, claiming and treating it as their

land, and what they did were not individual acts of trespass ; that the settlers of the Gould settlement prior to the survey made by John Dickie had possession of, and exercised ownership over that portion of what is called the Dickie lot in this suit to the northeast of the Calhoun Portage road, so called, and within the line where the brush fence spoken of in this suit now is, claiming and treating it as their lands ; that John Dickie, David H. Calhoun, Thomas B. Calhoun and Clement Calhoun did not, nor did any of them, go into possession of the lot down to the time the property was sold and conveyed to the plaintiff ; that the plaintiff after the lot was sold and conveyed to him did not go into possession of the whole of the lot, and exercise ownership and use the whole of the lot as his own ; that the brush fence was put around the big block, so called, by the Gould settlers about 1869 or 1870 ; that when Dickie made the survey of that lot there were old roads used by the settlers, around that portion of the land on the Dickie land northeast of the Calhoun Portage road, which is claimed by the defendant to be comprised in the big block, and six of the jurors say that when the brush fence was put around it followed old roads then in existence around the big block.

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The evidence is very voluminous, somewhat difficult in parts to understand and very conflicting. It was submitted to a jury by Mr. Justice McLeod in a charge as to which no exception is taken. The learned judge submitted some twenty-eight questions to the jury and all were substantially answered in defendant's favour. The trial judge concurred with the rest of the court in refusing to disturb the verdict. Amongst other important statements made in the considered judgment of the trial judge, Mr. Justice McLeod, is the following :

The jury found, first that the Bonhomme Gould settlers, (of whom defendant was one) had had possession long prior to 51 and exclusive possession and exercised acts of possession, and found the lines were the old lines that ran around it at the time, and in about 1869 or 1870 a brush fence was put around and which they found followed the old lines, and also found neither Dickie or Calhoun or plaintiff ever had exclusive possession.

There was evidence on which they could find Bonhomme Gould had possession. In the case of *Estabrooks v. Breau* there was the same of evidence, although they themselves might not come to the

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conclusion, yet there was evidence to warrant the jury in finding as they did, and I think under that charge we could not disturb the verdict.

On the other hand the jury *also found neither the plaintiff nor Calhoun nor Dickie ever had entire possession, and I think there was ample evidence to warrant that finding.* So we find both branches in favour of the defendant and therefore I think the verdict should not be disturbed.

For my own part, I do not say that the evidence given was sufficient to give a statutory possessory title to either of the parties. The issues of fact are not which of the parties was first in possession. It is simply whether or not the plaintiff has complied with the onus which lay upon him of proving a good title to possession in himself.

The case is one between two conflicting claims neither of which may be perfectly good. A similar case *Estabrooks v. Breau* (1) was tried in the courts of New Brunswick in 1874 respecting a portion of this very land. The defendants' title there was the same as that of defendant here. The court there held that as between parties without title each seeking to make a title for himself the court will not interfere with the finding of a jury unless clearly and unequivocally wrong.

I agree with that decision and see no ground upon which this court should interfere with such a verdict as that rendered here approved of by the trial judge and supported by the unanimous judgment of the Supreme Court of New Brunswick.

I would summarise the main reasons I have advanced as follows: The onus of proving title under the pleadings lies on the plaintiff and unless he satisfies that he must fail. He did not pretend to have a good legal documentary title but one gained by constructive possession under colour of title. To gain such a title by constructive possession it was essential that he should prove an *open, notorious, exclusive and continuous*

(1) 15 N. B. Rep. 304.

possession of at the very least a part of the lands described in his deeds. So far from the evidence shewing such continuous, notorious and exclusive possession in the plaintiff it was, even if all of plaintiff's evidence is accepted, simply intermittent and isolated acts of lumbering on parts of the land, and which were suspended altogether in the summer months. Such evidence was entirely wanting in that essential element of a continuous occupation of at any rate part of the lands claimed and so far from being exclusive was found by the jury, on conflicting evidence, it is true, but which was for them to decide on, to be for many years back in the defendant.

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Evidence that a party claims land by possession either with or without colour of title is not sufficient when it merely establishes that the claimant used the lands in the same way and for the same purposes as an ordinary owner would. A true owner of lands is not bound to use them in any way. He may prefer to leave them vacant. While they are vacant he still retains the legal possession, and he only ceases to be in legal possession when and during the time that he is ousted from it by a trespasser or squatter, who has acquired and maintained what the law holds to be an actual possession. If the squatter claims to have ousted him by constructive possession he must prove a continuous, open, notorious, exclusive possession of *at least part of the lands* the whole of which he lays claim to under his colourable deed.

The appeal therefore should, in my opinion, be dismissed with costs.

NESBITT J.—I agree in the dismissal of the appeal.

KILLAM J.—After a very careful examination of the evidence in this case, I am of opinion that the appeal should be dismissed.

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Neither plaintiff nor defendant established a title to the logs in question, either directly or by ownership of the land on which they were cut. The real question was whether or not the plaintiff had a technical possession of land and logs, which enabled him to recover the logs from the defendant who could show no better title.

After a long and expensive trial the defendant had a verdict, which the Supreme Court of New Brunswick refused to disturb.

It is clear that this court should not interfere unless it finds the argument against the verdict to be of an overwhelming character.

It is not a case of a *prima facie* title to be inferred from possession, but a case of a plaintiff who, upon his own showing, has no title to land or logs, asserting a technical right, upon a claim of a merely constructive possession which for thirty years has been actively disputed by the defendant and his associates, and which has never been effectively established in fact.

I quite accede to the plaintiff's contention, that the jury were wrong in finding that the Bonhomme Gould settlers had any possession of the *locus in quo* prior to or at the time when Dickie and his associates assumed to lay out and appropriate the block of land subsequently known as the Dickie lot. Upon this point the evidence shows no more than a series of trespasses in cutting hay upon the meadows, or wood from the forest. And there is nothing whatever to warrant the conclusion that the old roads used by the settlers for hauling wood and hay were made or used as boundaries evidencing possession of the lands enclosed within them.

Down to the time of the construction of the brush fence, found by the jury, upon evidence warranting the finding, to have been built in 1869, there was

nothing to indicate an actual attempt to take possession of any part of the disputed territory by these settlers or to warrant a finding of possession by them.

On the other hand, the evidence was such as to amply warrant a finding by the jury that neither Wood, Palmer nor Dickie was in possession of any portion of the tract when Wood and Palmer conveyed to Dickie, and he to David Calhoun, in 1867. The basis of the original attempt at appropriation of this unoccupied wild land was in claims to "wilderness rights" by Benjamin Scurr, Jabez Palmer and William Sears. None of the counsel were able to inform us what was meant by this expression. There is nothing in the evidence to suggest that it designated any right recognized either by law or by custom. It was certainly open to the jury to reject it as evidencing any real *bond fide* claim of right.

The attempted description by metes and bounds in the conveyance by Sears to Wood was of a very vague character. On one side the boundary was by "wilderness lands." No courses or distances were given by which to trace the real boundaries intended to be assigned.

Dickie says that "he used to go in once in a while to see about it"—about twice in a summer, and that he sold some ship timber from it to one Dickson, who made a road into the property and cut and took away the timber. Upon Dickie's evidence, Dickson took off the timber in two winters, about 1860. Wood, also, sold off some timber.

There is no evidence of any continued occupation or use of the tract by Dickie, Palmer or Wood extending to 1867, when it was conveyed to Calhoun.

Upon the evidence of Thomas B. Calhoun, his father did enter upon active operations upon the property immediately after the conveyance to him, and carried

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these on continuously over the whole property until he conveyed to his sons in December, 1881, and they pursued the same course while they held it and afterwards for the plaintiff Wood down to the time of the cutting of the logs in question.

His evidence by itself made a fairly strong case of a real possession which would be carried by construction to the boundaries given by the deed to David Calhoun.

But Thomas Calhoun is still an interested party and it was open to the jury to distrust the reliability of his testimony either on that ground or on that of possible defects of memory as to the events of thirty years.

So far as I can find, no other witness corroborated Thomas Calhoun's statement that, from the commencement of his operations, in 1867, his father cut from the portion of the lot enclosed in 1869 within the brush fence.

Thomas Eadon, who cut under contract with David Calhoun from the very beginning and got out timber for him continuously for some fifteen years thereafter, and who placed the first camp upon that portion of the land, gave no such evidence. Upon his testimony and that of other witnesses, the erection of that camp and any attempt at actual continuous occupation by Calhoun of any part of the territory within that enclosure occurred after the erection of the brush fence. From the very initiation of such an attempt Calhoun was met with remonstrances and resistance by the settlers. The brush fence was evidently erected as a sign that he was to go no farther in that direction.

There was abundant evidence that these settlers who claimed to have previously held possession of a certain tract, and to have confirmed this by enclosing it within the brush fence, continued from the time of its erection to cut timber, logs, poles and firewood over

the tract until the cause of action arose, and this without active interference between the years 1874 and 1900. There was, also, evidence that the Calhouns, at times during this period, purchased from these settlers logs and timber known by the purchasers to have been cut on a portion of the Dickie lot included within the brush fence, without previous authority. In 1873 and 1874, several of the settlers transferred their claims to what they called the "company lot" to one Teakles who had a mill in the neighbourhood. In 1875 Jeremiah McManus began taking out logs upon the so-called "company lot" for Teakles, and in 1876 Teakles transferred his claims to McManus who continued thereafter, from time to time, until about 1896, to take logs from the land and cut them up at his mill, to the knowledge of the Calhouns and without any interference by them. McManus says that he took poles from the lot as late as 1900.

It was certainly open to the jury to find that the settlers and McManus had as much actual possession of the *locus in quo* from 1869 until the commencement of the action as the Calhouns or the plaintiff.

The main ground upon which, as I understand, the plaintiff relies is that John Dickie and Mariner Wood respectively, and then David Calhoun, and then his sons, and then the plaintiff himself, took actual possession of a portion of the whole lot now claimed by the plaintiff, including the *locus in quo*, under conveyances describing the property by metes and bounds, and continued one after the other in such actual use and occupation of, at least, parts thereof as the nature of the property admitted, and that this possession thus gained extended, by construction of law, to the bounds set by the conveyances, and was continuous.

As already intimated, the evidence of any continued actual occupation by Mariner Wood or John Dickie was of a very vague character.

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The principle of constructive possession of a tract of wild land, unenclosed and not separated from adjoining land of the same character, by entry upon and actual possession of a portion, under colour of title to the whole tract, has received its development chiefly in the United States, where, it seems to me, it has been carried, in many cases, to extreme lengths.

To some extent it has been accepted in the Courts of the Provinces of Canada. See *Cunard v. Irvine* (1); *Doe d. Baxter v. Baxter* (2); *Ferrier v. Moodie* (3); *Dundas v. Johnston* (4); *Davis v. Henderson* (5); *Mulholland v. Conklin* (6); *Heyland v. Scott* (7); *Harris v. Mudie* (8).

In the American and English Encyclopædia of Law, (2 ed.) vol. 1, p. 824, the principle is thus stated:

An entry into possession under a conveyance *from a person having colour of title* is presumed to be made according to the description in the deed, and his occupancy is construed as possession of the entire lot where there is no actual adverse possession of the parts not actually occupied by him.

At page 868. the following is said :

To entitle a claimant under colour of title to the benefit of the doctrine of constructive possession, there must be a *bonâ fide* reliance upon the merely apparent title as being good and valid. Therefore if the instrument constituting colour of title was obtained by fraud on the part of the grantee, or with a knowledge by him that it conveys no title, he cannot have the advantage of an entry under colour of title.

And on page 869 :

The question of what is good faith in a person claiming under colour of title in one of fact for the jury.

In the Cyclopædia of Law and Procedure, 1 Cyc. 1125, the principle is rather more widely stated :

The general rule is well settled that where a party enters, under colour of title, into the actual occupancy of a part of the premises described

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| (1) 2 N. S. Rep. 31. | (5) 29 U. C. Q. B. 344. |
| (2) 9 N. B. Rep. 131. | (6) 22 U. C. C. P. 372. |
| (3) 12 U. C. Q. B. 379. | (7) 19 U. C. C. P. 165. |
| (4) 24 U. C. Q. B. 547. | (8) 7 Ont. App. R. 414. |

in the instrument giving colour, his possession is not considered as confined to that part of the premises in his actual occupancy, but he acquires possession of all the lands embraced in the instrument under which he claims. This is true although the land is not actually enclosed, and though the tract may be divided by a river running through it.

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Again, page 1134:

Actual possession of a part of the land under colour of title will not draw to it constructive possession of the balance, unless such colour of title is also accompanied by claim of title co-extensive with the boundaries.

In *Wright v. Mattison* (1), Daniel J., delivering the judgment of the Supreme Court of the United States, said:

The courts have concurred, it is believed, without an exception, in defining "colour of title" to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colourable title; the inquiry with them has been, whether there was an apparent or colourable title, under which an entry or a claim has been made *in good faith*.

Again he said, p. 59:

Defects in the title may not be urged against it as destroying colour, but, at the same time, *might have an important and legitimate influence in showing a want of confidence and good faith in the mind of the vendee, if they were known to him, and he believed the title, therefore, to be fraudulent and void.* What is colour of title is matter of law, and when the facts exhibiting the title are shewn, the court will determine whether they amount to colour of title. But good faith in the party in claiming under such colour is purely a question of fact, to be found and settled as other facts in the cause.

In *Dundas v. Johnston* (2), Draper C.J. said, p. 550:

When, therefore, a person without any title, or without any real or *bonâ fide* claim of title (though erroneous), entered upon any such lot, clearing and fencing only a portion thereof, I do not understand upon what principle this wrongdoer can be deemed to have taken and to be in possession of the whole of such lot.

In *Davis v. Henderson* (3), Wilson J. said, p. 352:

(1) 18 How. 50.

(2) 24 U. C. Q. B. 547.

(3) 29 U. C. Q. B. 344.

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I think, although the learned judge drew a marked distinction between the position and rights of a squatter as opposed to that of a person claiming a right which he believes and asserts he has, and upon which he enters and occupies, there was no misdirection, for he put the defendant's claim upon its proper basis.

And Morrison J. said, (p. 358.)

After the best consideration, in my judgment, if a person takes possession of a wild and partly cleared lot of land, consisting of one or two hundred acres, as the case may be, by virtue of a paper-title which he purchased and acquired from one whom *he believed to be the rightful owner*, and if for twenty years he occupies and deals with the cleared and uncleared portion of the lot in the same way that a rightful owner would deal with it (instancing various acts) such acts would be *evidence to go to the jury* that for such period the person so living on and so dealing with the land was in actual possession of the whole one hundred or two hundred acres.

And then (p. 359), after a citation.

The latter part of the quotation goes far to qualify the preceding portion, and I think it shews that that learned judge would have held that, if the occupier of the cleared portion was *bonâ fide* in possession as the owner of the whole lot under a title invalid, but under which he went into possession and remained there, *believing it to be good*, it would be *evidence* to shew that he was claiming and was in actual possession of the whole.

In *Shepherdson v. McCullogh* (1), Armour J., after referring to the doctrine of presumption of possession of all the lands described in a conveyance derived from possession of part, said, p. 597 :

It is not for me to say whether this principle is well founded or not, or whether it should have been or should be extended beyond the case of a person in actual pedal possession of land under a conveyance which he *honestly believed*, and was *justified in believing*, conveyed to him the true title to the land.

And in *Harris v. Mudie* (1), Burton J., said p. 420 :

The doctrine of constructive possession can obviously have no application to the case of a trespasser.

And, p. 427 :—

(1) 46 U. C. Q. B. 573.

(1) 7 Ont. App. R. 414.

But it has no doubt been treated as settled by a long current of authorities as the general rule that, when a party having colour of title enters *in good faith* upon the land professed to be conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed.

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And again, p. 428.

Under a good deed his possession would be co-extensive with the boundaries given in the deed, and under one which proves for some reason to be defective, although as against the true owner he is a trespasser, his entry would give him a right to maintain trespass against any one making a subsequent entry without right. But how can that apply to a trespasser entering without colour of right? His possession, so as to maintain trespass, must be an actual possession. What pretence would there be for his maintaining trespass against a person who had entered and cut timber upon woodland beyond his enclosure?

When a person so enters under a mere mistake as to his rights, purchasing or intending to purchase under what he believes to be a good title as from one whom he believes to be the heir-at-law or devisee under a will, or under a deed from a married woman defectively executed, or a forged deed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with the supposed title, and come within the class of cases intended, in my opinion, to be protected by the statute; but it must in every case be a *bonâ fide* claim, and ought not lightly to be extended to a purchaser from a squatter or other person having no title, where the party has neglected to ascertain from the registry office, as he can always do in this country, whether the land has been patented, and who is the registered owner; and clearly not to cases where he knows the grantor has no title.

The opinions which I have formed are that the person relying upon this doctrine must enter under a real, *bonâ fide*, belief of title; that, while in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title; and that, in such cases, a jury is warranted in treating the party as in no better position than a mere trespasser, acquiring no possession of any

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land which he does not take into his actual and effective occupation.

Here I cannot think that the jury were bound to treat Dickie and his associates, or Mariner Wood, as having colour of title, or as being in possession, actual or constructive, of any part of the land. I think, too, that the jury could not be said to have erred if they imputed to David Calhoun, when he entered upon the land, full knowledge of the unreality of the title conferred by the conveyance to him and full consciousness that he was but continuing a wrongful appropriation, or if they refused to recognize that he acquired possession of any portion until he reduced it to actual occupation.

The jury were warranted in refusing to accept the view that Calhoun entered upon any part of the tract enclosed within the brush fence until after it had been erected. When he did assert any rights over it others were doing the same. Whether or not the facts warranted the belief that these others had acquired any better possession than himself does not seem to me important.

All it appears to be necessary to say is that, if the evidence satisfied the jury that Calhoun never effectively asserted his claim or acquired any actual, exclusive possession, they were not bound by any rule of law to find a technical possession in him, and the case for a presumption of fact in favour of such a possession was not so overwhelmingly strong that the verdict should be disturbed.

And it appears to me that the jury were not bound to treat the younger Calhoun or the plaintiff as occupying any better position. Of course, as years went on, as transfers were repeated and the land actually occupied and used, the claim of right would grow apparently stronger. It would be difficult, if there

were no adverse claim actively asserted, to impute absence of good faith or of colour of title to the younger Calhouns, and still more difficult to impute such to a mere mortgagee, as this plaintiff originally was. But adverse claims to possession and the title were being actively asserted during the whole period from 1869 to 1900. Under such circumstances I do not think that the jury should be held to have been bound, whether as a matter of law or of fact, to find that any of the Calhouns or the present plaintiff acquired a possession of the *locus in quo* which entitled any of them to say that, while we had no title to the land, we had a possession which entitled us to maintain an action such as the present against those claiming adversely but shewing no better title than our own.

Upon a view of the whole case, I think that it cannot be said that there was no reasonable hypothesis upon which the findings of the jury against any possession on the part of the plaintiff, necessary to maintain the action, could be properly based. It seems to me, therefore, that the verdict cannot properly be disturbed.

Appeal dismissed with costs.

Solicitor for the appellant: *M. G. Teed.*

Solicitor for the respondent: *Henry R. Emmerson.*

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