ANGUS D. McISAAC (DEFENDANT) . . . APPELLANT;

AND

DANIEL J. McDONALD (PLAINTIFF) . RESPONDENT.

1905

*Dec. 13.

*Dec. 22.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute of Limitations—Possession of land—Constructive possession—Colourable title.

McI. by his will devised sixty acres of land to his son charged with the maintenance of his widow and daughter. Shortly afterwards the son with the widow and other heirs conveyed away four of the sixty acres and nearly thirty years later they were deeded to McD. Under a judgment against the executors of McI. the sixty acres were sold by the sheriff and fifty including the said four were conveyed by the purchaser to McI.'s son. The sheriff's sale was illegal under the Nova Scotia law. The son lived on the fifty acres for a time and then went to the United States, leaving his mother and sister in occupation until he returned twenty years later. During this time he occasionally cut hay on the four acres, which was only partly enclosed, and let his cattle pasture on it. In an action for a declaration of title to the four acres:

Held, that the occupation by the son under colour of title of the fifty acres was not constructive possession of the four which he had conveyed away and his alleged acts of ownership over which were merely intermittent acts of trespass.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the defendant.

The facts are sufficiently set out in the above head note.

Newcombe K.C. for the appellant.

Alexander McDonald, for the respondent.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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Davies J.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—But for the strong opinion expressed by Townshend J. as to the rights acquired by the defendant by the application of the principle of constructive possession I should not have entertained the slightest doubt upon this case.

In deference to that opinion I have carefully examined the evidence and weighed the arguments advanced for the defendant.

All the alleged general acts of possession on the block of land occupied by the defendant and his mother, brothers and sisters may well be held applicable alone to such part of the fifty acres as they admittedly own.

The isolated and intermittent entries upon the vacant and unenclosed four acres in dispute which they had sold and conveyed to the predecessor in title of the plaintiff cannot be held to be anything else than mere acts of trespass.

To apply the doctrine of constructive possession to such a case as this and to extend it to the four acres which the defendant, his mother, brothers and sisters had sold and conveyed for valuable consideration and by warranty deed to the plaintiff's grantor, and to do this under colour of a void deed which on its very face relates back to and professes to convey to defendant's vendor amongst other lands the very lands which the defendant, his mother, brothers and sisters had already sold and conveyed to the plaintiff's vendor and the title to which they had warranted, would, it seems to me, be not only introducing a novel and indefensible extension of the doctrine, but one destructive of the plainest principles of law and equity.

I agree that the appeal should be dismissed with costs.

IDINGTON J.—The appellant seeks to establish title to four acres of land by virtue of the Statute of Limitations in force in Nova Scotia.

The evidence of actual and continuous possession entirely fails to support the appellant's contention unless he can rely, as he seeks to do, upon an alleged constructive possession he sets up.

His father devised to him certain lands and by virtue of such devise he entered into possession of the same, and whilst in such possession he sold and conveyed the part thereof, which comprises the four acres now in dispute, to the person through whom respondent claims.

In this conveyance dated 9th Oct., 1877, the heirs at law, and legatees given by the will certain interests charged by the will upon the said devise, joined as grantors. The appellant and these other grantors covenanted as follows, in said deed of conveyance, that they

> the said lot of land and premises against the lawful claims and demands of all and every person and persons whomsoever will warrant and forever defend.

A creditor of the testator recovered judgment against the executors of said will, and thereupon the sheriff, by virtue of an alleged writ of execution, pretended to sell and convey the whole of the lands of the testator to one Gillis, in 1880.

The appellant being in possession saw fit, rather than have any contest with Gillis, to take from him a deed purporting to convey fifty acres of said land. This land now in question was by the description in

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said last-mentioned deed comprised in the said fifty acres.

The sheriff's sale is now conceded to have been null and void and to have conveyed nothing, and the deed from Gillis to the appellant falls with it.

The rather startling proposition is put forward that the *original possession,* continued by the appellant, had the effect of giving such vitality to the deed as to enable the appellant to claim as law, that his *continuing* in undisturbed and undoubted possession of part of the land covered by this void deed must be held as giving him a constructive possession also of the four acres in question over which he occasionally exercised some sporadic acts of ownership, such as cutting marsh hay on it, and letting his cattle roam over it, as others might, and probably did, for it was only partially fenced about.

He says this constructive possession was such as to satisfy the possession required to acquire title by virtue of the Statute of Limitations.

Manifestly there are two complete answers to this pretension.

There must be shewn in every case of constructive possession something done by him claiming it, under and pursuant to the defective or void deed relied upon, to enable the grantee to ask the court to interpret his acts of possession as intended to extend to or have a relation to all the property comprised in such deed.

The *entry under* such a defective or void deed upon one part of the whole described as conveyed thereby has been taken as indicating a purpose to enter upon the whole and the acts of possession, following such an entry, need not extend to every part and corner of the lot thus dealt with, to shew such an

actual physical use thereof as when a trespasser enters and claims to have acquired title by length of possession.

The reason for this is obvious and need not be laboured with. How can anything of this sort ever be attributed to a void deed under which the grantee did nothing? He made no entry for he was already in as devisee and never in law and in fact held in any other character.

No matter however adroitly he may answer questions on the point, there is left nothing else to rely upon.

Again, how can he claim anything as arising from this deed? How could he who would, if the deed which rested on the title of the father had been valid, and cut out the grant he had made to the respondent's vendor, have been compellable, under his warranty covenant, to have reconveyed to the respondent or his grantor all he had got under such a deed, set up what if valid would have been in breach of his own covenant?

In the definition of constructive possession good faith is sometimes included, and in any event is one of the elements it must rest upon. This supposed violation of his covenant in the case I put does not seem to be a very sound basis upon which to rest a claim that must have good faith to support it.

It seems from the effect we are asked to give to this void deed as if it were to be held a case of nothing being more valuable than something.

I think the appeal should be dismissed with costs.

MACLENNAN J. concurred in the dismissal of the appeal with costs.

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Appeal dismissed with costs.

Solicitor for the appellant: *Frank A. McEchen.*

Solicitor for the respondent: *Alexander McDonald.*