THE PINDER LUMBER & MILLING CO. LTD. ET AL
v. MUNRO ET AL

1927
*May 16, 17.
*June 17.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Real property—Trespass—Action for trespass by cutting timber—Plaintiff's title to the land—Construction of deed—Plaintiff's possession as ground of action.

APPEAL by the defendants from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), affirming the judgment of Byrne J. awarding the plaintiffs the sum of $2,491.48 damages assessed by the jury, in an action for trespass to land consisting in cutting timber upon it.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) [1927] 1 D.L.R. 1200.

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The cutting complained of had been made on land known as the "Queensbury Gore Lot," and the question for determination by this Court was whether the plaintiffs had shown such title to (or possibly, such possession of) that lot as gave them a status to maintain this action for trespass to it. An objection by defendants that trespass on that lot had not been sufficiently alleged in the statement of claim was held not to be open, in view of the course of the proceedings below.

The question of the plaintiffs' title to the said lot depended on the construction of a certain deed from the New Brunswick & Nova Scotia Land Company to Alexander Munro, Jr. The difficulty arose from certain words in the description in the deed. In this regard, the judgment of the Court (delivered by Anglin C.J.C.) said, in part, as follows:

"The title of the grantors in that deed was not contested; nor was it suggested at bar that the plaintiffs were not vested with whatever title it conferred on the grantee. The sole issue in regard to the title was whether or not that deed conveyed the Queensbury Gore Lot.

* * * * *

"After careful consideration of the plans and other relevant matters established by the voluminous evidence, we find it quite impossible to say that the Court of Appeal erred in holding that the deed from the New Brunswick & Nova Scotia Land Company to Alexander Munro, Jr., conveyed 'The Gore Lot' in the Parish of Queensbury."

As to the plaintiffs' right resting on possession, the Court said as follows:

"The defendants have not attempted to prove any sort of title to the Queensbury Gore Lot or anything in the nature of a license to cut upon it. Assuming that that lot was not granted to Alexander Munro, Jr., title to it in the New Brunswick & Nova Scotia Land Company, if set up, and established, would not avail the defendants as against proof of possession by the plaintiffs. (*Glenwood Lumber Co.* v. *Phillips* (1); *The Winkfield* (2)).

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(1) [1904] A.C. 405.

(2) [1902] P. 42, at p. 54.

"While the plaintiffs rested their claim on title and made no explicit allegation of possession of the locus of the trespass complained of, the defendants evidently regarded such possession as in issue because, in their amended statement of defence, they specifically pleaded that

> the plaintiffs were not at any time * * * in possession of any land in the Parish of Queensbury.

"Evidence of possession was adduced by the plaintiffs at the trial without objection or contradiction and the issue of possession was fought out between the parties. As put by Mr. Justice White, in delivering the judgment of the Court of Appeal:

> As against the defendants, who showed no title whatever to the locus, the possession of the plaintiffs would be sufficient to entitle them to a verdict. It is true that the question of possession was not left to the jury. This was no doubt owing to the fact that neither party asked to have such a question submitted. A great deal of the time taken up by the trial was devoted to proof that the plaintiffs had possession. The evidence that they had such possession was so full and conclusive that had the jury been asked to find whether the plaintiffs had such possession and had answered such questions in the negative, such answer must, upon application to this Court, have been decided to be one which a jury could not reasonably have given under the evidence.

"The Court of Appeal undoubtedly has the right to 'draw all inferences of fact not inconsistent with the finding of the jury and, if satisfied that it has before it all the materials necessary for finally determining the question in dispute, * * * may give judgment accordingly.' (3 Geo. V, c. 23, s. 4; N.B. Sup. Ct. Rules, 1909, 0. 40, r. 10; 0. 58, r. 4).

"That Court found possession to be established and that finding cannot be successfully attacked."

The judgment concluded as follows:

"On both grounds, that the plaintiffs had established title to the land in question and that they were in possession of it, asserting ownership, at the time of the trespass, the judgment appealed against must be affirmed."

Appeal dismissed with costs.

J. B. M. Baxter K.C. and *J. J. F. Winslow K.C.* for the appellants.

P. J. Hughes K.C. for the respondents.