

MICHAEL O'SHAUGNESSY, *et al.* } APPELLANTS ;
 (PLAINTIFFS)..... }

1892

*June 1.

*Oct. 10.

AND

GEORGE BALL (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
 LOWER CANADA (APPEAL SIDE).

36 *Vic. ch. 81 P.Q.*—*Booms—Proprietary rights—Replevin—Revendication—Estoppel by conduct.*

O'S. claiming to be the legal depositary and T. McG. claiming to be usufructuary of certain booms, chains and anchors in the Nicolet River under 36 *Vic. ch. 81 P.Q.*, and which G.B., being in possession of the same for several years under certain deeds and agreements from T. McC., had stored in a shed for the winter, brought an action *en revendication* to replevy the same and for \$5,000 damages.

Held, affirming the judgment of the court below, that O'S. and T. McC. were not entitled to the possession as alleged and that they were precluded by their conduct and acquiescence from disturbing G. B.'s possession. See *Ball v. McCaffrey* (20 *Can. S.C.R.* 319).

APPEAL from a judgment of the Court of Queen's Bench Lower Canada (appeal side) affirming the judgment of the Superior Court sitting in Three Rivers which dismissed the plaintiffs' action.

This was an action brought by the appellants for the recovery (*revendication*) of certain booms, chains, &c., which the respondent had been using on the Nicolet River and had stored in a shed (1).

The appellants claimed title to the booms and chains replevined, Michael O'Shaugnessy as the legal de-

*PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.
 (Sir W. J. Ritchie was present at the argument but died before judgment was delivered.)

(1) See also the report of the the facts are substantially the case of *Ball v. McCaffrey* reported same and are fully set out. in 20 *Can. S.C.R.* 319, in which

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positary, and Francis McCaffrey as usufructuary under certain agreements entered into with and transfers made by Antoine Mayrand and Charles McCaffrey, to whom certain rights and privileges were granted by 36 Vic. ch. 81 P.Q., "An act to authorize the erection of piers and booms in the River Nicolet."

The respondent pleaded that by virtue of certain deeds and agreements entered into between Antoine Mayrand and himself and his *auteurs* which are also referred to in the report of the case of *Ball v. McCaffrey* (1), he had become the absolute owner of the booms and chains, &c. seized, had been in possession of the same for several years and had always stretched and maintained them, and stored them in a shed during the winter with the consent and acquiescence of the appellants, and moreover that the appellants had no such right or title to the property in question as alleged by them in their declaration.

Geoffrion Q.C. and *Honan* with him for appellants contended that under the deeds alleged they were joint proprietors as alleged of the booms and anchors seized, and could as such revendicate them as they must be held to be movables: art. 866 C.C.P.; arts. 384, 385, 478, 479 C. C. The respondent could not have a better position than his *auteur* Ross, who never deprived appellant McCaffrey of the possession to enable him to collect dues.

The case of *Ball v. McCaffrey* (1) virtually holds that the appellants are bound to maintain the booms, and that McCaffrey has the right to collect from all others except Ball, the respondent, if so they must have the possession of the booms.

Laflamme Q.C. and *Martel* Q.C. for respondent contended upon the deeds that they did not give to the ap-

pellants any such rights of usufructuary or depositary as alleged in their declaration of the booms in question. They were new booms made by the respondent and his *auteurs*, and the chains were also new and not those in use in Mayrand's time. The appellants moreover were estopped by their conduct from disturbing the respondent's possession of the same for a period of more than three years.

The following statutes and authorities were cited by respondent's counsel: C. C. arts. 443, 457, 463, 468, 479, 2268; 42 & 43 Vic. ch. 18 s. 1 (P.Q.); R. S. Q. art. 5623; Boileux (1); Dalloz, Rep. de Jurisprudence (2).

The judgment of the court was delivered by:—

TASCHEREAU J.—This case arises out of the same facts that were under consideration in *McCaffrey v. Ball* (3). The same Francis McCaffrey is also here the appellant with the assistance of O'Shaugnessy. In the previous case he claimed from Ball the boomage on the logs passed by him through the booms in question. Now he claims by *saisie-revendication*, the very booms themselves, with the necessary materials, chains, &c., that form part thereof. His action has been unanimously dismissed by the two courts below, and that no other conclusion could be reached is unquestionable. He has no claim whatever to the possession of these booms. They belong to the defendant, which he cannot deny and he admits that they have always been in the defendant's or his *auteurs'* possession. He, McCaffrey, has a right to the boomage from all other parties than Ball, but that does not make him an usufructuary and as such entitled to the possession of these booms. Neither is O'Shaugnessy a depositary by the deed of June 15th, 1877, by Mayrand to him. Both McCaffrey

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(1) 2nd vol. on art. 617 C. N. (2) Vo. Usufruit nos. 94, 95.

(3) 20 Can. S.C.R. 319.

1892 and O'Shaugnessy are precluded by their conduct and
 O'SHAUG- acquiescence from disturbing Ball in the exercise of
 NESSY his rights on these booms as they claim to be entitled
 v. to do in this case. I need on this point but refer to
 BALL. the remarks I made in the previous case.

Taschereau
 J.

Appeal dismissed with costs.

Solicitor for appellants: *M. Honan.*

Solicitor for respondent: *P. N. Martel.*
