1893
*Nov. 30
1894
*Feb. 20.

ALLAN PARKS (DEFENDANT).....APPELLANT ;

AND

WAITY CAHOON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Disseisin—Adverse possession—Paper title—Joint possession —Statute of limitations.

A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's County, N.S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg Co., which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land and in 1866 he conveyed the whole to a son of C., then about 24 years old who had resided with C. from the time he took possession. Both deeds were registered in Queen's. The son shortly after married and went to live on the Queen's Co. portion. He died in 1872, and his widow, after living with C. for a time, married P. and went back to Queen's Co. P. worked on the Lunenburg land with C. for a few years when a dispute arose and he left. C. afterwards, by an intermediate deed, conveyed the land in Lunenburg Co. to his wife.

On one occasion P. sent a cow upon the land in Lunenburg Co. which was driven off and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for such entry the title to the land was not traced back beyond the deed executed in 1856.

Held, affirming the decision of the Supreme Court of Nova Scotia, that C.'s son not having a clear documentary title his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him ; that neither he nor his successors in title ever had actual possession of the land in Lunenburg Co. ; that the possession of C. was never interfered with by the deeds executed ; and having continued in possession for more than twenty years C. had a title to the land in Lunenburg Co. by prescription.

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*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiff.

The material facts of the case are stated by the trial judge as follows :—

"This action is brought to recover damages for trespasses committed on a lot of about five acres in the occupation of the plaintiff, which lot is in the county of Lunenburg and to the north-east of and adjoining the county line between that county and Queen's County."

"It was proved that one John Ryan occupied the locus and also the property adjoining in Queen's County about forty years ago. Between thirty-five and forty years ago Benjamin Cahoon moved into the house and lived there and occupied the locus until his death in 1888, and the plaintiff, who was his second wife, has occupied it ever since."

"When Benjamin Cahoon moved on to the locus his son Leander, who was then a boy, went with him and continued to live with him, and worked with him on the place until his marriage in 1868. Before his marriage he commenced a new house on the Queen's County side of the line, and when it was finished he and his wife, who up to that time had lived with his father and mother, went to the new house and continued to live there until his death in 1872."

"His wife who, before her marriage, had lived with Benjamin Cahoon and his wife, returned to this house on the locus, and lived there with them until she married the defendant about 1875, when she and her husband returned to the house in Queen's County, which her first husband had built, and have lived there ever since."

(1) 25 N. S. Rep. 1.

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"Benjamin Cahoon and the defendant, after his marriage, worked on the property together until about eight years ago, when they had some dispute, and Benjamin after that worked on the locus and the defendant on the property in Queen's County."

"On the 14th October, 1856, John Ryan gave a deed of all his interest in the property at East Port Medway, containing a hundred and twenty-six acres, to Stephen Mack. It was contended that this deed did not cover the locus but only the property in Queen's County, but I am of opinion that it was intended to cover and did cover the locus. In January, 1866, when Benjamin Cahoon was in possession of the locus, Stephen Mack, who is not proved to have been in possession at any time, conveyed all his interest in the property to Leander Cahoon, son of Benjamin, using the same description as in the deed from John Ryan to him, excepting a part sold to Edward Ryan."

"And in April, 1871, Leander Cahoon conveyed to Jerusha Cahoon an undivided right in two-thirds of the lot conveyed to him by Stephen Mack, reserving the new house he had built and then lived in. Jerusha Cahoon was his mother, Benjamin's first wife; she left four children surviving her, one of whom died without issue before his father. Leander Cahoon left two children who are still living, and defendant and his wife, their mother, are their guardians duly appointed. None of the deeds above mentioned are recorded in the county in which the locus is situated, but in the county of Queen's only."

"On the 7th October, 1881, Benjamin Cahoon conveyed the locus by deed to William Smith (the father of the plaintiff), who by deed dated the 29th September, 1882, conveyed the same to the plaintiff, the consideration being natural love and affection, and $50, which amount the plaintiff proves that she paid in cash out

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of her own money. These deeds were recorded shortly after their respective dates in the county of Lunenburg, in which the land in question is situated. The trespass of cutting and removing the hay is admitted, the defendant alleging that he did it in exercise of his authority as guardian of Leander's children, who are under age and who are entitled to an undivided interest in the property, as tenants in common with other owners."

Upon these facts judgment was given at the trial in favour of the plaintiff and was affirmed by the court *en banc*. The defendant appealed.

McInnes for the appellant. Leander Cahoon, having the documentary title, and being on the *locus* while living with his father, the latter could not acquire title by possession. *Doe d Thomson* v. *Barnes* (1); *Dettrick* v. *Dettrick* (2); Washburn on Real Property (3).

Borden Q.C. for the respondent, referred to *Philipps* v. *Halliday* (4); *Boston, etc., Railroad Co* v. *Sparhawk* (5); *Bradstreet* v. *Huntington* (6).

FOURNIER J.—I am of opinion that this appeal should be dismissed.

TASCHEREAU J.—The only question for argument in this case is whether the respondent and her late husband, Benjamin Cahoon, had been in exclusive possession of the property described in respondent's statement of claim for upwards of twenty years at the time when the acts of the appellant, which respondent claims to be trespasses, were committed.

On this question of fact Mr. Justice Ritchie, who tried the case, has found in favour of respondent, and

(1) Stockton's Bert. [N.B.] Rep. 633.
(2) 2 U.C.Q.B. 153.
(3) 4 ed. vol. 3 p. 128.
(4) [1891] A.C. 228.
(5) 5 Met. 469.
(6) 5 Peters 402.

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his decision was supported on appeal by the Supreme Court of Nova Scotia *in banco*.

Mr. Justice Ritchie says :—

Between 35 and 40 years ago Benjamin Cahoon moved into the house, and lived there and occupied the locus until his death in 1888, and the plaintiff, who was his second wife, has occupied it ever since.

This is not a case in which we should disturb the findings of the trial judge.

McCall v. *McDonald* (1); *Arpin* v. *The Queen* (2); *Warner* v. *Murray* (3); *Schwersenski* v. *Vineberg* (4); *Lambkin* v. *South Eastern Railway Co.* (5); *Kershaw* v. *Kirkpatrick* (6); *North German Steamship Co.* v. *Elder* (7); *Ghoolam Moortoozah Khan Bahadoor* v. *The Government* (8).

GWYNNE and SEDGEWICK JJ. concurred in the dismissal of the appeal.

KING J.—This is an action of trespass to land brought by the respondent. The land in question consists of about five acres in the county of Lunenburg, N.S., and is part of a larger tract lying principally in the county of Queen's. The facts are succinctly stated by Ritchie J., the trial judge.

It appears that one John Ryan was in occupation of the entire lot in or about 1850, living in a house then and now on the *locus in quo*. He occupied it for some years, and when he moved out of the house Benjamin Cahoon, the now deceased husband of the plaintiff, moved in. The exact time of this does not appear but it was found by the learned judge to have been between 35 and 40 years before, *i.e.*, between 1851 and 1856.

(1) 13 Can. S.C.R. 247 pp. 256-7.
(2) 14 Can. S.C.R. 736.
(3) 16 Can. S.C.R. 720.
(4) 19 Can. S.C.R. 243.
(5) 5 App. Cas. 352.
(6) 3 App. Cas. 345.
(7) 14 Moo. P.C. 241.
(8) 9 Moo. Ind. App. 456.

Benjamin Cahoon continued to live in the house with his family and to do work upon the land in question until his death in 1888, and the plaintiff (who was his second wife) continued the occupation afterwards.

At the time that Benjamin Cahoon went into occupation his son Leander (through whom appellant claims) was a young child, and was brought up by and continued to live with his father, working with him upon the place until his marriage in 1868, when he and his wife, who up to that time had also lived with Benjamin Cahoon, moved into a new house which he, Leander, had built on the Queen's county part of the lot, and continued to live there until his loss at sea in 1872 or 1873. After that the widow went back to live with her father-in-law, and remained there until she married Parks, the appellant, when they went to the house on the Queen's county part and have lived there since, Cahoon and Parks working on the property together until about 1882 or 1883, when a dispute arose, and Cahoon afterwards worked upon that part of the lot in Lunenburg county (the land in question), and Parks on the part in Queen's county.

In 1882 Parks put a cow upon the land in question and Cahoon turned it off, and Parks did not further interfere until the act of trespass complained of which was entering, cutting hay and carrying it away. This was in 1890, after Cahoon's death.

The claim of Parks (as guardian of the infant children of Leander) is based upon an alleged possession under the conveyances to be now referred to. I again follow substantially the statement of Mr. Justice Ritchie.

On the 14th October, 1856, John Ryan gave a deed of the entire lot to one Stephen Mack. It is not clear whether Ryan was then in possession or not, but Mack

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never went into nor had possession. This deed was recorded in Queen's County, but not in Lunenburg County.

Ten years afterwards, viz.: In January, 1866, Cahoon being still in possession, Mack conveyed all his interest in the property to Leander Cahoon, then, as before stated, living with his father. This deed also was recorded in Queen's County but not in Lunenburg.

In April, 1871, Leander conveyed to his mother Jerusha Cahoon what is expressed by the learned judge to be "an undivided right in two thirds of the lot conveyed to him by Mack, reserving the new house he had built and then lived in."

(Was it this or an undivided two thirds interest ?)

This deed, like the others, was recorded in Queen's County only.

On 7th October, 1881, Benjamin Cahoon conveyed the *locus in quo* by deed to the plaintiff, his second wife, through an intermediate conveyance. These deeds were registered in the County of Lunenburg.

There are well reasoned judgments of the learned judges, Townshend, Graham and Meagher JJ., (the latter dissenting) resulting in affirmance of a judgment given by Ritchie J. for plaintiff.

All the parties to the above conveyances are dead and it is not possible to be very positive as to the real facts.

If one might surmise it might be supposed that the conveyance from Ryan to Mack, which was, I should judge, about contemporaneous with Cahoon's first possession, was made in Cahoon's interest, and that Mack's conveyance after the lapse of nearly ten years to Cahoon's son Leander, then living with his father, was in pursuance of a desire to avoid holding the legal title.

But the matter has to be determined apart from surmises.

If Leander had had a clear documentary title there could be no question that he would, under the circumstances, have been in constructive possession of the whole lot included in his deed, but, not having clear documentary title, his possession is limited to such part as is proved to be in his actual possession (by himself or others) and in that of those succeeding to him.

Benjamin Cahoon was in undoubted possession of the whole lot from the time he went upon the land, until 1886. The value of possession is stated anew by Lord Herschell, in *Philipps* v. *Halliday* (1).

Then how was his possession affected by what afterwards took place?

There may be much reasonableness in the conclusion of Meagher J. that Cahoon knew in 1866 of the deed from Mack to his son, and of the deed in 1871 from the son to his mother, but it is only an inference, and to affect Cahoon's possession it requires another inference, viz., that Benjamin Cahoon recognized these conveyances as passing title and subordinated his own possession to them, holding thereafter under his son. All the circumstances are to be regarded in determining whether the character of Cahoon's possession changed. The deeds referred to did not of themselves give right of possession; and the actual possession under them, what was really done under them, has to be regarded, for looking at them as explanatory of the facts of possession it is not immaterial that all the parties receiving these conveyances treated them as applying to the land in the county of Queen's and not to that in the county of Lunenburg for they were recorded in the former but not in the latter county. Then, Leander's house was built in Queen's. I fail to see upon the whole evidence that it sufficiently appears that Benja-

(1) [1891] A.C. 231, 234.

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min Cahoon's possession of the *locus in quo* was interfered with or intended to be interfered with; I do not see that the son manifested any intention of taking possession of the whole lot, or that the father manifested any intention to treat his own possession as a possession under his son. In 1882 Parks put his cow in upon the land in question and Benjamin Cahoon turned it off, and the possession of Benjamin Cahoon was not again disturbed during his life, nor (after his death) until 1890. Leander's possession, if such it was, had begun only in 1866, and therefore, in 1882, his heirs had acquired no title by possession, and their possession of the *locus in quo* was terminated by the above act of Benjamin Cahoon, who thereafter continued in exclusive possession (in right of his wife) until his death. The separate possession of Benjamin Cahoon was apparently recognized by Parks himself after 1882.

In my opinion the proper conclusion is that Cahoon's possession of the *locus in quo* was never otherwise than in him in his own right (or that of his present wife since the transfer to her) and on his own and her account, and that, at any rate, he had an exclusive possession thereof after 1882 and up to the time of the trespass complained of.

I agree, therefore, with the learned judges Townshend and Graham JJ. and think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *F. B. Wade.*

Solicitor for respondent: *Arthur Roberts.*