FRANCIS McCONAGHY *et al*.....APPELLANTS; 1879

AND *Nov. 13.

GEORGE DENMARK.....RESPONDENT. 1880

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *April 13.

*Trespass—Plea of liberum tenementum—Limitations, Statute of—Possession, title by.*

In an action of trespass *quare clausum fregit* for the purpose of trying the title to certain land adjoining the city of *Belleville*, the de-

PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

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fendants pleaded not guilty; and 2nd, that at the time of the alleged trespass the said land was the freehold of the defendants, *M. E. McC.* and *L. J. McC.*, and they justified breaking and entering the said close in their own right, and the other defendants as their servants, and by their command.

The case was tried by *Armour*, J., without a jury, and he rendered a verdict for plaintiff with thirty dollars damages. The judgment was set aside by the Court of Common Pleas, and they entered a verdict for the defendants in pursuance of R. S. O. c. 50, sec. 287.

On appeal, the Court of Appeal for *Ontario* reversed this judgment, and restored the verdict as originally found by *Armour*, J. The defendants thereupon appealed to the Supreme Court.

*Held:* That the appellants (defendants), on whom the onus lay of proving their plea of *liberum tenementum*, had not proved a valid documentary title, or possession for twenty years of that actual, continuous and visible character necessary to give them a title under the Statute of Limitations; therefore plaintiff was entitled to his verdict. (*Henry*, J., dissenting.)

APPEAL from a judgment of the Court of Appeal for *Ontario* restoring a verdict as originally found in favor of respondent (plaintiff.)

This was an action of trespass *quare clausum fregit* brought by the respondent against the appellants. The trespass complained of was the breaking down of a fence erected, or in course of erection, around the said land by the respondent, and the action was brought for the purpose of trying the title to the said lands which comprise fifty acres adjoining the city of *Belleville*.

The pleas were: 1. Not guilty. 2. That at the time of the alleged trespass the said land was the freehold of the defendants, *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*. 3. "And for a third plea the defendants say that, at the time of the alleged trespass, the said land was the freehold of *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, and the defendants *Francis McConaghy*, *Sarah Ann Kennedy* and *Patrick O'Hara*, as the servants, and by the com-

mand of the said *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, broke and entered the said close and committed the alleged trespass."

The plaintiff joined issue on the defendants' pleas.

The case was tried at *Belleville* at the autumn assizes of 1878, before the Honorable Mr. Justice *Armour*, who found all the issues for the plaintiff, and entered a verdict for him for $30.

The Court of Common Pleas, composed of *Wilson* C.J., and *Galt*, J., set aside this verdict and entered a verdict for the defendants in pursuance of R. S. O. cap. 50, sec. 287.

From this judgment the respondent appealed to the Court of Appeal for *Ontario*, and the said court allowed the said appeal, and restored the verdict as originally found by Mr. Justice *Armour*.

The question to be decided on this appeal was whether the evidence shewed that the appellants had acquired a title under the Statute of Limitations.

The evidence is reviewed at length in the judgments hereinafter given.

Mr. *Hector Cameron*, Q.C., for appellants:

The plaintiff failed to prove title by possession, as he professed and attempted to do, and should not have been allowed to go into a paper title in rebuttal of defendants' possessory title. See *Doe dem. McKay* v. *Purdy* (1).

The opinion of the Chief Justice of the Common Pleas was that the title was in the Crown, and that defendants' possession was better than plaintiff's. The Court of Appeal declare that our possession was not sufficient and not according to law. I submit that it was, for there is great difference between a man who takes possession under a title and a squatter. In applying the

(1) 6 U. C. Q. B. O. S. 144.

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law to the facts, no weight has been given to defendants' title, and for this reason I contend the judgment of the Court below is erroneous.

Now, the evidence adduced at the trial shows that the defendant, *Francis McConaghy*, and one *Hugh McGuire*, in good faith and for a good and adequate consideration, purchased the south half of lot number one in the second concession of the Township of *Thurlow* from one *Alexander Chisholm*, the heir-at-law of *John Chisholm*, one of the alleged patentees, through whom the respondent professes to claim title to the lands in question, who in the presence and to the knowledge of one *Zwick*, through whom the respondent also professes to claim, was in possession and occupation of the said half lot (100 acres) as early as A.D. 1825, and who in A.D. 1831 conveyed the same, apparently in fee, by deed to them the said *Francis McConaghy* and *Hugh McGuire*. In pursuance of this purchase they went into possession and occupation of the said half lot and cleared and cultivated a part of the same, and continued so to occupy, clear and cultivate until the time of the partition of the said half lot between them, in the year 1832 or 1833, as shown by the evidence, when by the said partition the said *McGuire* was allotted the west 50 acres and the possession thereof, and the said *McConaghy* the east 50 acres and the possession thereof, (which said east 50 acres embrace the lands on which the trespasses complained of by the respondent are alleged to have been committed by the appellants). *Francis McConaghy* in pursuance of the said partition then entered into possession of the said east 50 acres, and from that time continued in uninterrupted peaceable possession of the same until the time of the said alleged trespasses, being a period of over 40 years; and if the prior joint possession of the said *Francis McConaghy* and *Hugh McGuire*, and the possession of the said *Alexander Chis-*

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*holm* were included, the period would be over 50 years, and the said partition, though not shown to have been in writing or by deed, was a good and valid partition. The contract therefore shown by the evidence being proved to have been followed immediately by a survey of the lands, for the purposes of such partition, and a change in the possession by the said *Francis McConaghy* and *Hugh McGuire*, as well as other acts of performance, so that the alleged dispossession of the said *Hugh McGuire*, even if proved, could not affect the title acquired by such length of possession, and possession under these circumstances, even if actual as to part of the lands, is in law deemed a possession of the whole, and this title is shown by the evidence to have been acquired by the appellants *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, and to have been in them at the time of the said alleged trespasses, and as they the said *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy* in their defence set up this title and the other appellants, (defendants) in their defence, justified them, and proved such justification, the judgment of the said Court of Common Pleas was correct.

The learned counsel relied also upon the following authorities:

*Davis* v. *Henderson* (1); *Dundas* v. *Johnston* (2); *Mulholland* v. *Conklin* (3); *McKinnon* v. *Conklin* (4); *Findlay* v. *Peden* (5); *Attorney General* v. *Harris* (6).

Mr. *Henry J. Scott* for respondent:

Mr. Justice *Armour*, who tried the case, found all the issues for the plaintiff. The Court of Common Pleas, under sec. 287 c. 50 Revised Stats. *Ontario*, practically retried the case. I contend that as the learned judge

(1) 29 U. C. Q. B. 344.
(2) 24 U. C. Q. B. 547.
(3) 22 U. C. C. P. 372; 8 U. C. C. P. 325; 19 U. C. C. P. 165.
(4) 13 Grant 152.
(5) 26 U. C. C. P. 483.
(6) 33 U. C. Q. B. 94.

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who tried the case found as a matter of fact that the defendants had not acquired any title by possession, such finding should not have been disturbed by the Court of Common Pleas, which did not see the witnesses and could not judge as to their credibility; nor should the Court disturb the verdict. As to the objection that the judge at the trial should not have allowed the plaintiff to prove a paper title, this objection was not taken in the Court below, and moreover, having taken a verdict in his favor in the Court of Common Pleas, he cannot now say the trial was all wrong. It is too late.

Before coming down to the substantial question between the parties, I will call the attention of the Court to this important fact—that all through these years the acts *Francis McConaghy* proved were only acts of ownership and not of possession, and these acts are stretched over a period of 30 years.

I contend that the defendant *Francis McConaghy* never had such possession of the land as is required to acquire a title under the Statute of Limitations.

In order to oust the legal owner and acquire a title under the statute, the person must be in adverse possession, which has been variously defined to be "an actual occupation and appropriation within some defined boundaries" (1); "that constant visible possession of it which could only be regarded as exclusive possession, and a shutting out of the true owner" (2) "not only an entry on the land, but a visible and notorious continuance of the possession so taken" (3). And all definitions, both in text books and in cases, recognize the fact that the possession must be such as to give notice to the world and the owner of the occupancy, and put him

(1) Angel on Limitations, s. 392.
(2) Per Robinson, C. J., in *Allison v. Rednor*, 14 U. C. Q. B. 462.
(3) Per Burton, J. A., in *Kay v. Wilson*, 2 Ont. App. R. 136.

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to assert his rights if he means to retain them, and that mere occasional acts of trespass do not give a title under the statute as they are not an adverse possession, or in fact any possession at all, and such a doctrine should be enforced more stringently in a new country, where land is continually left unoccupied by the owner.

I am quite prepared to admit that, if the appellants had been in possession under colour of title of any part, they would have the right to claim the whole. But neither the appellants, nor any one through whom they claimed, ever lived on the lot, or on any adjoining land.

The learned counsel then reviewed the evidence and claimed that it was altogether insufficient to establish the fact of the possession of the lands in dispute by the appellant *Francis McConaghy*, so as to give him a title under the Statute of Limitations, even if it stood unquestioned.

Mr. *Cameron*, Q.C., in reply;

This is an appeal from a final judgment of the Court of Appeal in which arises a mixed question of law and fact, and it is open for this Court to review the whole case as the Court of Appeal did. From the evidence it was clearly a case for the jury.

RITCHIE, C. J.:—

This was an action of trespass brought by plaintiff against defendants for entering certain lands of the plaintiff, known as lots Nos. 2, 6, 8, 10, 12, 14, 15, 16 and 17 on a certain plan of lots laid out on lots Nos. 1 and 2 in the second concession of the township of *Thurlow*, in the County of *Hastings*. He claimed one thousand dollars, and also claimed a writ of injunction to restrain the defendants. To this declaration the defendants pleaded, 1st, not guilty; 2nd, That at the time

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of the alleged trespass the said land was the freehold of the appellants, *M. E. McConaghy* and *L. J. McConaghy*; 3rd. That by command of the appellants, *M. E. McConaghy* and *L. J. McConaghy*, the other defendants, as servants, broke and entered the said close and committed the alleged trespass. The plaintiff joined issue on defendants' pleas.

This state of the pleadings threw upon the defendants the burden of shewing that this land at the time of the alleged trespass was the soil and freehold of the defendants, *Mary Elizabeth* and *Louisa Jane McConaghy*. It is not pretended that they produced any valid documentary title vesting this property in them, but they relied upon a title by virtue of the Statute of Limitations. I have gone over the evidence very carefully, and I have not been able to arrive at the conclusion that they have made out such a continuous, open, undisturbed possession of this property as would justify me in saying that the Court of Appeals were wrong in coming to the conclusion that the statutory title had not been made out.

My brother *Gwynne* has kindly permitted me to look at a judgment he has prepared in this case, and he has gone through the evidence so fully, and, to my mind, so satisfactorily, that it would only be an imposition on the patience of the court if I were to deal with the evidence more minutely. I am not prepared to reverse the judgment of the Court of Appeals in this case.

HENRY, J.:

The action in this case is trespass for breaking and entering certain lands of the respondent known as lots numbers two, six, eight, ten, twelve, fourteen, sixteen and seventeen, on a certain plan of lots laid out on lots number one and two, in the second concession of the township of *Thurlow*, in the county of *Hastings*, *Ontario*,

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by *Henry A. F. McLeod*, Provincial Land Surveyor, for the Honorable *John Ross*, duly registered, and known as the "*Lemoine* Lands," and for cutting and breaking down certain fences of the respondent thereon. The writ was issued on the 29th of April, 1878.

The pleas are: 1st. Not guilty. 2nd. Claims title in two of the defendants. 3rd. Claims title in the same defendants, and a justification for the other defendants, as their servants and by their command.

Upon the pleas issue was joined.

The trespasses are proved against all the defendants except *Patrick O'Hara*, and, under the evidence, he was entitled to have had a verdict under the first plea, and is now equally entitled to our judgment. To recover against the others, the respondent must, at the time of the alleged trespass, have been in either the actual or constructive possession of the land upon which the trespasses are alleged to have been committed. Apart from title, he had, it is clear, no possession to sustain the action, unless the entering into the land and house, formerly in possession of some of the defendants, and the putting up of the fences, partly by the materials of the house which he had pulled down, could be called so.

Without title, or some justification, these acts would themselves be trespasses which could give no right of action against *Francis McConaghy* and those claiming under him. To sustain the action therefore, title is necessary to be shown in the land as described in the declaration. The description is not by metes and bounds, but by numbers of lots "known as lots numbers two, six, eight, ten, twelve, fourteen, fifteen, sixteen and seventeen, on a certain plan of lots laid out on lots numbers one and two in the second concession of the township of *Thurlow*, in the county of *Hastings*, by *Henry A. F. McLeod*, Provincial Land Surveyor, for the

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Honorable *John Ross*, and known as the '*Lemoine* Lands.'"

A copy of a plan is in evidence, but it is not in any way proved to be a copy of the plan referred to in the declaration. It is not even signed or certified, or proved in any way as identical with any plan made by the surveyor *McLeod*. The respondent, in order to identify the land described in the declaration with that covered by his title, is bound to locate each. Without some evidence, how could any court or jury decide that the lands marked in the plan is the same as in *McLeod's* plan. This copy is but a sketch, which is useful to illustrate the contents of documents in evidence, but by itself constitutes no proof. No witness was examined who, from knowledge of the locality, was able to say that the land in the sketch was identical with the title produced by the respondent. A particular plan was referred to in the declaration, and under the general denial of the appellants the respondent was bound to show that on the identical piece of land described in the declaration the alleged trespasses were committed, and that his title covered the *locus*. Even should the respondent have shown that his title covers the eastern half of the front of lot one in the second concession, it is not shown that *McLeod's* plan by the particular numbers given it is the same land. Nor do I see how it could have been so shown unless *McLeod's* plan were produced and proved, and evidence given of the necessary identity. It would seem, however, that the plan in evidence was not objected to, and that in the case it is referred to as *McLeod's* plan, showing the sub-divisions of lots 1 and 2 in the second concession.

Admitting, however, that the serious difficulty just mentioned did not exist, has the respondent shown title to the *locus*? He relies upon title from the Crown to himself by two distinct series of con-

veyances, one through a person named *John Chisholm*, the other *Joseph Lemoine*. If the conveyances either way cover the *locus* it is sufficient. The land upon which the respondent alleges the trespasses to have been committed is what is understood as the eastern half of the southern or front part of lot one in the second concession. Let us first see if there was any title shown in the respondent through the grantee *John Chisholm*. The grant to the latter is dated 6th March, 1798. The land conveyed by it is called generally lot 1 in concession 1 and part of lot 1 in the 2nd concession. It is, however, particularly described. The line, beginning at a post in the front marked ½, is to run a course north 16° west, 125 ch. and 25 links, then westwardly parallel to the bank in front to township line; then S. 16° E., 105 ch., 27 links to the Bay of *Quinte*; then easterly along the front to the place of beginning. By the plan and survey of the surveyor *Emerson*, a witness called by the respondent, it is clearly shown that the lines, according to the description in the grant, would not only not include any part of lot 1 in the 2nd concession, but would exclude also a part of lot 1 in the 1st. concession across the lot about 4 chains in depth on the east side and 22 chains on the west. The particular description—controlling the general one—limits the boundaries of the grant. The latter does not therefore cover any part of lot 1 in the 2nd concession. The description in the deed from *Chisholm* to *Zwick* is a copy of that in the grant, and therefore covers no part of lot 1 in the 2nd concession. The title, by that branch of the conveyances, entirely fails.

The first link in the other chain of title is a grant from the Crown to *Joseph Lemoine*, dated 17th May, 1802. The evidence leaves no little obscurity as to the land covered by it. It purports to grant 450 acres, being *the rear parts* of lots numbers 1 and 2 in the 2nd conces-

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sion and lot 18 in the 7th concession. It requires the line for the former to commence at the north eastern angle of certain lands granted *Peter Vanderhyden* in the said lot number 2 second concession, at a distance of 106 chains from the front, thence N. 16 W. to the front line of the third concession; then S. 74 W. 38 chains; then S. 16 E. to certain lands granted *John Chisholm*; then north easterly along the rear boundary of said lands to lot number 2; then N. 74 E., 19 chains to the place of beginning. The position of *Vanderhyden's* north east corner is not shown. The description however places it somewhere in lot number 2 in the 2nd concession. If so, and the lines are run as in the grant, we have this singular fact, that they will surround and include the lands referred to as granted to *Vanderhyden*. If again, the third course of *Lemoine's* grant be taken from the front line of the third concession till it strikes the rear line of *Chisholm's* grant, it will come over the line between concessions 1 and 2 by about 22 chains, and then, running along the rear of *Chisholm's* lot, it will strike the side line between lots 1 and 2 in the first concession about four chains in front of the rear line of the first concession as shown on the plan, and would not, in that case, as directed by the description, come at all to number two in the 2nd concession, and therefore could not, by the course indicated, reach, as required, the point of commencement. By running the course of the side line for about 4 chains, a course not in the grant, it would strike the south west angle of lot number two in the 2nd concession, and by running from that point the course and distance indicated in the grant, it would strike the south east angle of lot number two but not the north east angle of *Vanderhyden's* grant, the point of commencement, as provided by the grant. It would be at least 40 chains south of it. The description is therefore wholly defective. Had it been shown by the

production of the grant to *Vanderhyden*, or otherwise, where his north east corner was, when *Lemoine's* grant was issued, there might have been possibly no difficulty in locating *Lemoine's* grant, but without that, any decision arrived at cannot be the result of conclusions from evidence but from assumptions that may or may not be well founded. It was the duty of the respondent to have given the evidence necessary to locate properly his own grant, upon which his right to recover is based, and if, by not furnishing available evidence, he unnecessarily leaves the location of his grant in doubt or difficulty he must take the consequences.

There is, however, a more serious and controlling difficulty. No conveyance from the grantee *Joseph Lemoine* is shown. He is not identified. In fact he is not in the slightest degree referred to. There is a deed from one *William Lemoine*, who therein is alleged to be the heir at law of *Joseph Lemoine*, late of the town of *Kingston*, deceased.

To establish title in *William Lemoine* some, even if slight, evidence of the identity of *Joseph Lemoine* was, under the circumstances, necessary. Secondly, his death; and, thirdly, that *William Lemoine* was his heir. Without evidence of all three the deed of *William Lemoine* is worthless as a conveyance under the grant to *Joseph Lemoine*. There is, therefore, as I think, no conveyance of title under the deed from *William Lemoine* to Mr. *Ross*, and consequently none transferred through him from the grantee to the respondent.

Turning then to the defence, and the evidence on both sides, we find that in 1831 (46 years before the commencement of this suit) *Francis McConaghy*, one of the defendants, and *Hugh McGuire* purchased for fifty pounds from *Alex. Chisholm*, the son of the grantee, *John Chisholm*, and received from him a deed of the front part (being 100 acres) of lot number 1, in the 2nd concession, of

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which the eastern half part is the land now in dispute. Some years previously *Alexander Chisholm* entered upon the lot—then in a wilderness state—and commenced a clearing by cutting down a piece across the front. *McConaghy* and *McGuire*, on getting the deed, immediately went into possession, cut down and jointly cleared upon the land for two or three years. They then got a surveyor and divided it between them, *McGuire* taking the western and *McConaghy* the eastern half. A line fence was put up between them and each took possession by the survey. They continued to hold possession by the division line then established between them. *McGuire* put up a house on his half and lived on it. He cultivated it and claimed it as his own until 1845, when he sold and conveyed it to *Peter O'Reilly*. The deed shews the sale was intended to convey fifty acres, being what he occupied, but it really covers the whole front of lot 1, and includes the lot now in dispute. In 1848, *Reilly* conveyed all his right to the 100 acres conveyed to him by *McGuire* to *John Ross*. By those two conveyances *Ross* is brought into priority of estate with *McGuire*, and is bound by the same estoppels as he would be. *McConaghy* had been then in possession by the purchase, and the overt act and admission, by the division, of *McGuire*, as sole owner of the east half for 12 or 13 years, and by virtue of the former statute of limitations that possession, as against *McGuire* and those claiming under him, ripened into a title in the year 1852 or 1853. After twenty years *McGuire* would be estopped from disputing the title and possession of *McConaghy*; and those claiming under him would occupy the same position. *McConaghy* was never ousted from the possession, nor did either *Ross* or any one claiming under him ever enter upon the land, except to make a survey in 1852 without the knowledge of *McConaghy*, until the respon-

dent did so in the first place by committing a trespass in taking possession of *McConaghy's* house in the autumn of 1877, and by the destruction of it and putting up a fence round the lot in the spring or summer following. *McConaghy*, under the compact with *McGuire* for the division and occupation of the land, had held it from 1832 or 1833 up to the autumn of 1877—44 or 45 years before respondent entered. The respondent, then, without title otherwise, as I have shown, than through *McGuire*, enters upon the land, commits acts of trespass thereon, claims to be in possession as against *McConaghy* and his assigns, and sues them for knocking down the fence he erected partly out of boards taken from *McConaghy's* house. This position is not taken or claimed by the respondent, but it is the one established by the evidence, and with which we have to deal.

By the pleas, however, the respondent is admitted to be in possession at the time of the alleged trespass, and the defendant under the justification by the plea of *liberum tenementum*, must show a right to enter upon the land and break down the fences.

Had the appellants denied the possession of the respondent, the latter, on the evidence, must have entirely failed; but having depended on the plea of *liberum tenementum* we must now consider if they have proved it.

They claim title under a deed from *Alexander Chisholm* in 1831 to *McGuire* and *McConaghy* of the front one hundred acres of lot one in the second concession, of which the *locus* is the eastern half part. *Chisholm* six years before had entered upon the lot and cut down a part of it in front to make a clearing. The consideration of the deed was £50. They immediately entered into the possession of the lot and commenced making improvements and clearings thereon. In 1832 or 1833

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they employed a surveyor to divide the lot from front to rear. He ran a line between them which they adopted, and ever after held by, *McGuire* taking the west and *McConaghy* the east half. From that time each occupied, according to a line fence put up between their lots on the division line run and established by the surveyor which both agreed to. *McConaghy's* possession was, therefore, under the deed and agreement with *McGuire* by the division, that of owner, and unless disseized by *McGuire*, or some one claiming through him, that possession ripened into a good title against him and them. They became estopped, after the prescribed limitation, from claiming title to or entering upon it. The only title shown in the respondent is through *McGuire*, and he is therefore estopped from disputing *McConaghy's* possession or title. But in the absence of that fatal objection, the title of *McGuire* is through the deed from *Alexander Chisholm* to him and *McConaghy*, and if *McGuire* could convey a title to his fifty acres, surely that of *McConaghy* was, as to his 50 acres, at least as good.

If that question of estoppel had not arisen, what position did the appellants occupy who had a deed of the lot from their father at the time the respondent first entered in 1877? The evidence of the appellants establishes the fact that, for forty-six years from the time *Alexander Chisholm* conveyed the lot until that time, no one but *McConaghy* had entered upon the lot as owner (except the survey made for Mr. *Ross*,) which I will hereafter refer to,) or had in any way possession of it. It is in evidence that every year *McConaghy* and *McGuire* cleared upon the lot and had previously burnt over what *Chisholm* had cut down. In the spring of 1832 they fenced round 20 acres and sowed wheat in the place fenced in. In 1833 they arranged with three men, and got them to cut down about 20 acres more,

Those 20 acres were some years afterwards ploughed and sown. It is also shown that *McConaghy* afterwards by his tenants occupied the lot at different periods, and he swears (and is in no way contradicted) that the line fence put up between him and *McGuire* was always kept up till the year before the suit was tried. It is shown that the whole lot was fenced in the ordinary way for several years. During all that time no one interfered with *McConaghy's* possession. It is true he did not live on the lot, but in the adjacent town of *Belleville*. He was a cooper by trade, and from year to year got firewood and cooper's stuff off it as he required. It is not pretended that any other party was in possession as owner or claimant of the lot at any time during that long period. The first act of possession was by the respondent, who in the autumn of 1877 took possession of a small house put up on the lot by *McConaghy*. This, without title, was simply a trespass for which *McConaghy* might have recovered damages. His next and only act of possession was in tearing down the house, and, with the boards with which it was built and other materials, putting up the fence, the pulling down of which is the trespass complained of. It is true, that the plea of *liberum tenementum* admits such a possession in the respondent as would have enabled him to sustain trespass against a wrong doer, but *McConaghy's* grantees could have maintained trespass against him for his acts in 1877 and 1878. The defective pleading of the appellants, in not contesting the respondent's possession, no doubt alters the nature and form, but not the substance, of the enquiry. Nobody will contend (successfully at all events) that if A buys, pays for, and obtains a deed of a piece of land, goes into immediate possession, clears, crops, improves it, and no one for forty-six years interferes with his manual possession of it, or in any way disturbs him, he would not have a good title against

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all the world, except, it might be, under very peculiar circumstances, the owner, through title derived from the Crown. Such, then, in my matured and well considered judgment, is the position of the appellants who set up title as the defence to this action.

In 1845, *McGuire* conveyed the whole lot of 100 acres, which he and *McConaghy* purchased from *Chisholm*, to *O'Reilly*, and in 1848 *O'Reilly* conveyed the same to *Ross*. In 1852, a judgment in ejectment was recovered on the demise of *Philip Zwick* against *McGuire*, who remained in possession of his fifty acres, and it was called in the record "the front fifty acres of lot number one in the second concession." The action was substantially that of Mr. *Ross*, who brought it in the name of *Lemoine* and *Zwick*. No writ of possession was issued, as *McGuire* became, by a lease for a year from *Ross*, the tenant of the premises, and in that lease the judgment was recited, and the lease was of the same fifty acres. The evidence shows that the front 100 acres was divided by *McGuire* and *McConaghy* from front to rear, making, consequently, two front fifty acre lots. It was the western fifty acres that *McGuire* was in possession of, and for which the action was brought to recover, and which the subsequent lease covered. No possession was attempted to be taken under the judgment of the fifty acres now in dispute, which is shown to have all along been in *McConaghy's* possession. *McGuire* occupied till his death the fifty acres under the lease from *Ross*. Under such circumstances, the recovery against *McGuire*, and his subsequent possession under *Ross*, can have no effect in regard to the possession of *McConaghy* of his lot.

As I before stated, the evidence establishes the fact of *McConaghy's* possession during the long period before mentioned. It is true some witnesses stated they knew the place at different periods, saw *McGuire*

working upon his lot, but saw neither *McConaghy* or any one else working on the eastern lot. There is nothing in this to negative the fact that *Chisholm*, *McGuire* and *McConaghy* cut down and cleared a portion of the 100 acres, and that after the division *McConaghy* yearly cut and carried away the wood and timber until the whole lot was cleared. If *McConaghy* had, like *McGuire*, been a farmer and lived on the lot, as he probably would have done, his possession would have certainly been more palpable and better known, but such was not necessary—his possession was marked by line fences; he yearly exercised acts of ownership over it *animo domini*; he had tenants on it for some years, and his possession and claim by all these circumstances must have been, and no doubt was, well known in the neighborhood. There was some evidence that *McGuire's* son-in-law raised some wheat one year on the east half. The witness who spoke of it seems rather to have known it from what that person told him than from his own observation, but if it even had been so, if done without *McConaghy's* assent, he would have been but a trespasser, and his act would not have disseized *McConaghy*.

The only other point necessary to be noticed is that of prescription.

By section 4 of chapter 108 of the Revised Statutes of *Ontario*, prescription of ten years against grantees who did not enter into possession was not to run until knowledge of the actual possession of another was shown, "but the right to bring an action shall be deemed to have accrued from the time such knowledge was obtained; but no such action shall be brought or entry made after twenty years from the time such possession was taken as aforesaid."

In the application of this legislative provision no reference need be made to the question of the know-

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ledge by the grantees, *Chisholm* or *Lemoine*, or those claiming under them, for, as I have shown, the respondent has traced no title from the Crown through them; but how will it affect him under the title derived through *McGuire*, *OReilly* and others?

The knowledge of either of them for ten years before the suit would be sufficient to bar any right of entry or action. It cannot be pretended that *McGuire* had not such knowledge, for *McConaghy* was in possession by his assent and knowledge, and as to Mr. *Ross*, we have only to consider what took place when he offered the small lots for sale, to conclude that he also had full knowledge of *McConaghy's* possession. After the sale by *Ross*, *McConaghy* posted up public notices dated October 30th, 1863, in which he claimed to be the owner of the 50 acres, alleging he had been in possession of the same by a deed for valuable consideration since 1829, and that he had been in peaceable possession ever since, and threatening to "prosecute all persons found trespassing on said fifty acres or any portion thereof, as Mr. *Ross* never had a claim or right to it." It was shown that in consequence of these notices parties who had purchased declined to complete the purchases, and the sale was abortive. We must conclude therefore from these facts, and what it is otherwise shown Mr. *Ross* was aware of, that he had full knowledge of *McConaghy's* possession and claim of title. That there being more than ten years before the suit, the right of entry or action was barred. But, claiming under *McGuire*, the respondent having no claim through a grantee, the knowledge is not at all necessary to be shown. The prescription without knowledge of another being in possession is, by the clause, limited to twenty years, and certainly the respondent's right was barred, for the right under any circumstances was limited to the latter period.

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I am of opinion the two defendants who have pleaded title have proved their plea, that the other defendants, except *O'Hara*, have established a justification under them, and that *O'Hara* should have judgment under his plea of denial—the whole with costs.

GWYNNE, J.:

This was an action of trespass, *quare clausum fregit*, brought by the respondent against the appellants for breaking and entering the lands of the plaintiff, known as lots numbers two, six, eight, ten, twelve, fourteen, sixteen and seventeen, on a certain plan of lots laid out on lots numbers 1 and 2, in the second concession of the township of *Thurlow*, known as the "*Lemoine* lands," and cutting and breaking down certain fences of the plaintiff's thereon erected, and committing other injuries upon the said lands of the plaintiff.

In this action the defendants have pleaded only: 1st, Not guilty; and 2nd, that at the time of the alleged trespass the said land was the freehold of the defendants, *Mary Elizabeth McConaghy* and *Louisa Jane McConaghy*, and they justified the breaking and entering the said close in their own right, and the other defendants as their servants, and by their command.

The case came down for trial before *Armour*, J., with a jury, when two witnesses having been called, who established the act of entry of some of the defendants, such entry having been effected by the breaking the plaintiff's fence, and a third witness, one *Reuben Jackson*, having been called for the like purpose, namely, to prove the trespass, the defendants' counsel admitted that *Jackson* was there, and that he had assisted to take down the fence in question, at the instance of the defendants.

This admission put an end to all occasion for the plaintiff to give any further evidence, and he accord-

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ingly closed his case and the defendants entered upon their defence, under the plea of *liberum tenementum*.

In the course of the trial of the issue upon the plea, the learned judge, in order to enable the plaintiff to procure the exemplification of letters patent, under which the plaintiff set up title in reply to the evidence of title offered by the defendants, discharged the jury and put the case at the foot of the list, and afterwards took up the case and disposed of it as a case tried by a judge without a jury, under the provisions of the revised statutes of *Ontario*, ch. 50, and he rendered a verdict for the plaintiff, with thirty dollars damages.

The defendants moved for and obtained a rule to shew cause why this verdict should not be set aside and a non-suit or verdict for defendants entered, the latter upon the ground that the verdict was against law and evidence and the weight of evidence. The interposition of the court to enter a verdict upon this latter ground could only be invoked or justified upon the basis that the case was properly tried by the judge without a jury. Yet, in the rule, the defendants also asked to set aside the trial upon the ground that the case was improperly withdrawn from the consideration of the jury, and that the jury was improperly discharged by the learned judge who tried the cause. The Court of Common Pleas was of opinion that the discharge of the jury was an improper act of the learned judge, but that the defendants had waived all objection upon that ground, and they made the rule absolute to enter a verdict for the defendants upon the law and evidence, treating the case as one properly tried by a judge without a jury, in which case the whole action, both on the law and evidence, comes at large before the Court. From this judgment the plaintiff appealed to the Court of Appeal for *Ontario*, which court unanimously reversed the judgment of the Court of Common Pleas,

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and restored the verdict in favor of the plaintiff which had been rendered by the learned judge who tried the cause. From this latter judgment an appeal is brought before us by the defendants, in which the sole point which arises is; Did the defendants (upon whom it is clear that the onus lay of proving their plea of *liberum tenementum*) establish that plea by showing a good title to the land in question, which appears to be admitted to be situate upon the south-east or front of lot No. 1 in the 2nd concession of *Thurlow ?*

Now this plea admits such possession in the plaintiff as entitles him to recover in trespass against every one except the defendants, who, in right of the freehold estate alleged to be vested in *Mary Elizabeth* and *Louisa Jane McConaghy*, are asserted to have had a right to the immediate possession at the time they made the entry upon the plaintiff's possession which the plea admits (1).

The plea asserts, in fact, such a title as would enable *Mary Elizabeth* and *Louisa Jane McConaghy* to recover as plaintiffs in an action of ejectment, and to evict the plaintiff. The title thus asserted could only be established by showing a good paper title, or such a possession for 20 years as under the statute of limitations would have the effect, not only of barring the title of the true original owner, but of transferring that title by force of the statutes to the defendants *Mary Elizabeth* and *Louisa Jane*, or to some person under whom they claim. In this case the defendants showed no paper title, for although it is true that a memorial was produced of a deed poll, dated the 29th June, 1831, whereby one *Alexander Chisholm* purported to remise, release and quit claim to *Hugh McGuire* and *Francis McConaghy*, their heirs and assigns, the front part of lot No. 1 in the 2nd concession of the township of *Thurlow*,

(1) *Doe* v. *Wright*, 10 Ad. & El. 763; *Ryan* v. *Clark*, 14 Q. B. 71.

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covering the land in question in this suit, and whatever might be the operation of that release as against any person claiming through *Alexander Chisholm*, if he had the fee simple estate in the land at the time of the execution of that release and quit claim, yet it does not appear, that in 1831 *Alexander Chisholm* had any title to, or estate in, the land; indeed, it is admitted now, although the releasees may at the time have believed him to have had title, that, in truth, he had none; and although there was evidence to show, that in 1825 *Alexander Chisholm* had some chopping done on the land, which, however, was never cleared off, yet there was no evidence to show that he ever occupied the lot, or had any possession of it in 1831, or at any time, unless when the chopping was being done in 1825; indeed, the evidence rather shews that he had not, and that he lived in a neighboring township, viz.: *Sydney*, of which he is described in the release. The defendants therefore could shew title in *Mary Elizabeth* and *Louisa Jane McConaghy* only by such a possession under the Statute of Limitations as would be sufficient to have vested the freehold estate of inheritance in them, or in their father, the defendant, *Francis McConaghy*, one of the releasees in the deed of 1831, and from whom, by deed executed in 1876, they claim, and the commencement of such possession can date no further back than the time when *Francis McConaghy* took possession (if ever he did take such possession as enabled the statute to operate) after the execution of the release of 1831.

Now, by a long unbroken chain of decisions extending over a period of upwards of 40 years, it has been held by the courts in *Upper Canada* that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation by some person or persons (it matters not, whether in

privity with each other in succession or not) to the exclusion of the true owner for the full period of 20 years; and that to transfer the title to the person in possession at the expiration of the 20 years such person must claim privity with the persons preceding him in the possession during the period of 20 years, unless he himself was continuously in such possession during that period. The difference being that, while any person in possession, after the title of the true owner is barred by a possession to his exclusion for 20 years, may defend successfully an action of ejectment brought by the original owner, however short may have been the possession of such defendant, and notwithstanding his want of privity with the persons in possession during the 20 years, yet no one can *recover as plaintiff* in ejectment in virtue of a *title acquired* by possession against the true owner for 20 years under the provisions of the statute, unless he himself alone or *in privity* with others in possession before him had that continous possession which was required *to bar* the true owner; and payment of taxes, or the committing of acts of trespass, by cutting timber from time to time, by a person not in actual, visible possession, will avail nothing towards establishing the possession which the statute requires (1).

The defendant *Francis McConaghy* admits that he never lived upon the land, nor, according to his own showing, does he appear to have entered upon the land (until within the last few years) for any purpose since the year 1835, except from time to time to take some

(1) *Morgan* v. *Simpson*, 5 U. C. Q. B.O. S. 335; *Doe Taylor* v. *Sexton*, 8 U. C. Q. B. 266; *Allison* v. *Rednor*, 14 U. C. Q. B. 462; *Doe Lloyd* v. *Henderson*, 25 U. C. C. P. 256; *Doe Carter* v. *Bernard*, 13 Q. B. 945; *Canada Co.* v. *Douglas*, 27 U. C. C. P. 343; *Clements* v. *Martin*, 21 U. C. C. P. 512; *Doe McDonell* v. *Rattray*, 7 U. C. Q. B. 321; *Doe Shepherd* v. *Bayley*, 10 U. C. Q. B. 320; *Young* v. *Elliott*, 23 U. C. Q. B. 424; *Doe Goody* v. *Carter*, 9 Q. B. 863; *Doe Cuthbertson* v. *McGillis*, 2 U. C. C. P. 124-150; *Randall* v. *Stevens*, 2 El. & B. 641.

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timber off the land, and if we look to the other evidence, which is more to be relied upon than his, there seems good reason to conclude that he did not even enter for that purpose subsequently to 1838 or 1839, or perhaps 1840.

*John Mulquin* says that he knows the lot, that he has seen *McGuire* and *Zwick* his son-in-law cultivating the lot, and that *Zwick worked across the whole front of it.* Witness saw *McConaghy* putting up a shanty on it *two or three years* ago.

*William Dafoe* says he knows the lot, that he lived for a long time on a farm a mile from it, that *McGuire* and *Bill Morgan* were in possession of it, that he has had conversations with *McGuire* who claimed to own it, then there was a suit, and afterwards he understood that *McGuire* had given it up to Mr. *Ross* and had taken a lease; he does not recollect ever seeing *McConaghy* there. *McGuire* worked on the south part of the west half, and his son-in-law, *Zwick*, *worked on the east half.*

*Charles Wilkins* has lived near the lot since 1844. He says that *McGuire* was in ocupation of *the front part then, and from that time until his death*, (from other evidence he appears to have died 3 or 4 years before the trial of this action). Morgan was on the rear part. Witness never knew of *McConaghy* having been in possession; witness has known *McConaghy* for a great many years, he has bought cooper stuff from witness; but witness never knew him to get timber off the lot.

*William Morgan* lived at the rear of the lot for 12 years, 25 years ago. During that time *McGuire was in possession of the front*; witness was put on the lot as care-taker for Mr. *Ross*. *He found McGuire living on the front when witness went to live on the rear.* While witness lived there, *McGuire*, with the assistance of his son-in-law, cultivated *the lot right across the front*, the

south *end of the lot all the way across.* Witness knew *McConaghy*, but witness never saw him at work there, nor did he ever to witness's knowledge get timber there.

*Philip Roblin*, now 60 years of age, has known the lot ever since he was a boy big enough to know anything. He lived across the road; he says:

> For a long time we did not know that there was any one who owned it but *McGuire*. Then it came out that *Lemoine* owned it; then the Hon. *John Ross*. A man named *Calvert* cleared 15 or 20 acres in the rear, and put in fall grain and fenced it. *McGuire* was the only man I ever saw doing so on the front. *Zwick*, *McGuire's* son-in-law, worked with *McGuire* on shares. He worked the part that *McGuire* had fenced, and part of the east *all across the front.*

Witness never knew of *McConaghy* chopping on it at any time, nor of his getting timber or cooper's stuff there. Witness has bought rails off the lot from a man there under *Ross*.

*Patrick O'Hara*, a defendant, has known the lot for 30 years. He did not see any person in possession of the east part. He never saw anybody working on it. It was in the same state as all commons. It was not cultivated. No person was living on the land. Land had been in dispute. Witness never saw *McConaghy* or any one else doing anything on it. *McGuire* had enclosed 10 or 12 acres on the west half. This was a witness called by defendants.

*James Maghar*, a witness also called by the defendants, says that he has known the property for forty years. That he lived then two lots away from it. He says that he does not know that he ever saw the east half cultivated. "It was," he says, "generally what we used to term a common." He never knew of any person living on the east half. About 30 years ago he understood that *Ross* claimed it.

*John Emerson*, a surveyor, surveyed the lot, and made a plan of the lot in dispute in 1845, for Mr. *FitzGibbon*,

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who was acting as attorney for *Lemoine*. *Hugh McGuire was in possession of the front at that time.* He does not recollect anybody else. He was on the lot several times, and he knew that *McGuire* was there all the time. He never saw any one else there except *McGuire*. Witness was a witness in the suit of *Lemoine* v. *McGuire*, for which suit the survey was made, and it was after that trial he says that the war began between the Hon. *John Ross* and *McGuire*.

From this evidence, it is apparent that at this time, in 1845, when *Emerson* entered in right of *Lemoine*, who claimed to be seized of the land, and made his survey, there was no one then having any possession which, consistently with the authorities cited, could have ever matured into a title, by virtue of the Statute of Limitations, unless it was *McGuire*, and *his* possession lacked, in so far as appears in evidence, the first essential element to have enabled *it* to have ever matured into a title; for there is no evidence that the grantee of the Crown, his heirs or assigns, their servants or agents, *had ever taken actual possession by residing upon or cultivating any portion of it*, and it does sufficiently appear that when *McGuire* and *Francis McConaghy* entered in 1831, the land was in a state of nature. It was necessary, therefore, for *McGuire*, or any person claiming in privity with him, in order to acquire and establish a title to the land in virtue of 20 years' possession, as the first step, to shew that the grantee of the Crown, or some person claiming under him, while entitled to the land, had knowledge that it was in the actual possession of *McGuire*, or of some person in privity with him, and until such knowledge should be brought home to the person entitled to the land under the grantee of the Crown the statute would not begin to run. Of such knowledge there was no evidence whatever, so that even if *Mary Elizabeth*

and *Louisa Jane McConaghy* had claimed in privity with *McGuire*, which they do not, they failed to show any title.

But further, it appears by Mr. *Bell's* evidence, who proves a lease executed by the Hon. Mr. *Ross* and *McGuire* in March, 1852, that an action of ejectment, which had been brought against *McGuire* at the suit of *John Doe* on the several demises of *William Lemoine* and *Philip Zwick* for the whole of the front 50 acres of this lot No. 1 and so including the land for trespass upon which this action is brought, had then recently been determined by a judgment in favor of the plaintiff upon the demise of *Philip Zwick*, and that a writ of possession having been issued to give effect to that judgment, *McGuire* surrendered possession to *Ross*, who had purchased all the title of *Lemoine* and of *Zwick* in the whole lot, and who thereupon executed a lease of the said front 50 acres for a year, at a rent of £7 10s., to *McGuire*, who entered thereunder, and who continued in possession thenceforth as tenant of *Ross* and his assigns, the owners of the property up to *McGuire's* death, which occurred three or four years ago, and that until his death *McGuire* retained the possession as such tenant, looking after the property and protecting it from trespass and injury in lieu of rent, and that, in fact, during such possession, Mr. *Bell*, upon the information of *McGuire*, prosecuted *Francis McConaghy*, and had him fined for trespassing on the lot and removing gravel.

From *McConaghy's* own evidence, it appears that he was aware of this action of ejectment having been brought, and from all the evidence it is apparent, that when it was brought *McConaghy* was not, nor during its pendency was he, in visible, actual occupation of the land for which it was brought, or of any part of it. The bringing of the action against the only person against whom it could be brought, namely, the person

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in actual, visible occupation, broke the continuity of any possession, if any there was, which could have matured into a title, and from the moment that *McGuire* accepted the lease from *Ross* and entered thereunder, such his entry was the entry of *Ross*, and his possession was the possession of *Ross* and of his assigns who, therefore, by *McGuire*, their tenant, have been ever since, as the evidence shows, in possession until *McGuire's* death ; the title therefore of any person claiming title by possession must commence in virtue of a possession actual and visible taken to the exclusion of *Ross* and his assigns while *McGuire* was in possession under them or since his death (1).

Now, title is shown in *Ross* and his assigns by conveyances from *Lemoine* and *Zwick*, the lessors of the plaintiff in the ejectment suit, one or other of whom was seized of the land under Letters Patent from the Crown, if ever the land has been granted by the Crown. The learned Chief Justice of the Common Pleas seems to have doubted whether the description in either of the Letters Patent to *Lemoine* or to *John Chisholm*, in virtue of which letters *Zwick* claimed, was sufficient to cover the land in dispute, although he thought there was no doubt that the Letters Patent to *Chisholm* were intended to cover the land ; but if this doubt be well founded, it will be no better for the defendants, because, if the land has not been granted by the Crown, it is plain that the freehold title, (in assertion of which the defendants justify the trespass which they admit,) was never vested in *Mary Elizabeth* and *Louisa Jane McConaghy*, and upon the trial of the issue joined upon this plea of *liberum tenementum* (if not in them) the defendants must fail upon this record, in whomsoever the title is, for the plaintiff, being in possession, was entitled to retain that

(1) *Randall* v. *Stevens*, 2 El. & B. 641; *Clements* v. *Martin*, 21 U. C. C. P. 512; *Canada Co.* v. *Douglass*, 27 U. C. C. P. 343.

possession against all the world, except against the person having title. The notice published Oct. 30th, 1863, was spoken of as a piece of evidence supporting *Francis McConaghy's* alleged title by possession, but it is plain it can have no such effect. The notice purports to be signed by *James McConaghy*. Who he is does not appear. But not to object upon that ground, and assuming it to be signed by *Francis McConaghy* himself, it could make no difference, for in 1863, it is clear that *Ross* was in actual possession, and that he was exercising very marked acts of actual ownership. He had the land surveyed into town lots, with streets laid down across it, and was offering those lots for sale, and it was to interfere with his sales, that the notice was published. At the time, then, of its being published *McConaghy*, as a fact, was not in actual possession, and by the notice what he claimed was that constructive possession and right to possession, which is incident to the title which he set up, namely: "by deed for valuable consideration from the nominee "of the Crown since the year 1829."

That he had no such title is clear, and upon the whole evidence the learned judge who tried the case could not with any propriety have rendered any verdict other than in favor of the plaintiff.

The appeal therefore must be dismissed with costs.

STRONG, FOURNIER and TASCHEREAU, J. J., concurred.

*Appeal dismissed with costs.*

Solicitor for Appellants: *M. A. Dixon.*

Solicitor for Respondent: *W. H. Ponton.*