

1958 NELLIE GATZ (*Plaintiff*) APPELLANT;

*Oct. 27, 28
Dec. 18

AND

HARRY KIZIW (*Defendant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Whether registered title protects purchaser against claim by adjoining owner based on prior adverse possession—The Land Titles Act, R.S.O. 1950, c. 197, ss. 23(1)(c), 28(1)—The Limitations Act, R.S.O. 1950, c. 207, ss. 4, 15.

The defendant who became the owner of parcel A in 1940 erected a fence to separate his property from parcel B. The fence was erected on parcel B and since that time the defendant has remained in continuous and open possession. Ownership of parcel B was obtained by the plaintiff in 1952. Neither party was a first-registered owner under *The Land Titles Act*.

The trial judge gave judgment in favour of the plaintiff, but this judgment was reversed by the Court of Appeal on the ground that s. 28 of *The Land Titles Act* did not override the *Limitations Act*.

Held: The appeal should be allowed. The plaintiff was entitled to a judgment for possession of the strip of encroachment.

Section 28(1) of *The Land Titles Act*, which provides against the acquisition of title by adverse possession, is not, in this case, subject to an exception under s. 23(1)(c) of the Act. Clause (c) of s. 23(1) refers to a title by possession which the adjoining owner "has acquired" not "may" or "shall" acquire. It appears in Part III of the Act dealing with first registration. The scheme of the Act protects those possessory interests of adjoining owners which may be in existence at the time of first registration and prohibits their subsequent acquisition. Therefore, s. 23(1)(c) protects only possessory titles in existence at the date of first registration and s. 28(1) expressly prevents their subsequent acquisition, and the principle of *Belize Estate and Produce Co. Ltd. v. Quilter*, [1897] A.C. 367, has no application in the interpretation of the Ontario Act.

As s. 28(1) prevents the acquisition of the rights here in question, the terms of s. 4 of *The Limitations Act* are negated thereby.

APPEAL from a judgment of the Court of Appeal for Ontario¹, reversing a District Court judgment. Appeal allowed.

Miss M. A. M. Fraser, Q.C., for the plaintiff, appellant.

W. B. Williston, Q.C., and *J. D. Taylor*, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The judgment under appeal holds that s. 28 of *The Land Titles Act*, R.S.O. 1950, c. 197, which provides against the acquisition of title by adverse possession, is subject to an exception under s. 23(1)(c) of the Act where the possessory interest arises between adjoining owners. Although this is the first judicial consideration in Ontario of the interrelation of s. 28 with the other sections of the Act and with ss. 4 and 15 of *The Limitations Act*, R.S.O. 1950, c. 207, the prevailing opinion was, I think, expressed by Armour when he said in the *Law of Real Property*, 1st ed. 1901, p. 431, and 2nd ed. 1916, p. 467:

Where land is registered under the *Land Titles Act* no length of possession will defeat the registered title. The intention of this legislation is to make the entry in the books of the office the only and the absolute evidence of title.

There is no dispute that the claim to a possessory title by the respondent arose after the first registration under *The Land Titles Act* of the properties involved in this litigation.

¹[1957] O.W.N. 313, 8 D.L.R. (2d) 292.

1958
 {
 GATZ
 v.
 KIZIW

 Judson J.

The respondent became the owner of parcel 3306 in 1940. The appellant became the owner of parcel 3617 in October 1952. Her certificate of ownership is in the usual form and states that her title is in fee simple with an absolute title, subject to the exceptions and qualifications mentioned in *The Land Titles Act*. But in the spring of 1940 the respondent had fenced in a strip of land adjoining his easterly boundary, a strip of land which is part of the land described in parcel 3617, and since that time he has remained in continuous and open possession. If it is possible to acquire a possessory title against the title registered under the Act, he has done so.

Section 28(1) reads:

A title to or any right or interest in any land adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession.

The underlined words were added by amendment made in 1952. I agree with the reasons of the Court of Appeal¹ that the 1952 amendment has no bearing upon the decision of this case. Moreover, if the defendant had acquired a possessory title, it was complete by 1950, two years before the amendment.

The only expressed exception in the Act to the principle stated in subs. (1) of s. 28 is in subs. (2) of the same section. It reads:

This section shall not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of such first owner took place.

I turn now to a consideration of s. 23(1)(c) of the Act which the Court of Appeal has held to import another exception to s. 28(1). It reads:

23. (1) All registered land, unless the contrary is expressed on the register, shall be subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed encumbrances within the meaning of this Act:

(c) any title or lien which, by possession or improvements, the owner or person interested in any adjoining land has acquired to or in respect of the registered land;

¹[1957] O.W.N. 313, 8 D.L.R. (2d) 292.

1958
 GATZ
 v.
 KIZIW
 Judson J.

Clause (c) is only one of many groups of “liabilities, rights and interests” that are listed and which are not deemed to be encumbrances. They have sometimes been referred to as “overriding interests”—interests which are enforceable against the owner of the land, although their existence is not apparent on the title. This case is concerned only with the nature of the interest defined in cl. (c). The question is whether it relates only to the possessory title of the adjoining owner at the time of the first registration under the Act or whether it also includes a possessory title subsequently acquired. The Court of Appeal¹ has held that it includes a subsequently acquired possessory title, and in my respectful opinion this is where the error lies in the judgment under appeal.

The clause refers to a title by possession which the adjoining owner “has acquired” not “may” or “shall” acquire. It appears in Part III of the Act dealing with first registration. It is followed by s. 24, which enables the applicant for registration to get a certificate free from this and certain other overriding interests on following a certain procedure. The next three sections, 25, 26 and 27, deal with mortgages and encumbrances or leases existing at first registration, and the concluding section of Part III, s. 28—the one under consideration here—is prospective in operation and provides that a possessory title “shall not be acquired by any length of possession.” The scheme of the Part seems to me to be complete and logical in its dealing with the possessory interests of adjoining owners. It protects those in existence at the time of the first registration and prohibits their subsequent acquisition. Consequently, the “overriding” interest to which a transfer is expressed to be subject by s. 41 of the Act, is the one mentioned in cl. (c) of s. 23(1), namely, the possessory title of an adjoining owner at the time of first registration and not one subsequently acquired.

I do not take *Farah v. Glen Lake Mining Co.*² to indicate any contrary interpretation of the Act. This case holds that an adverse claim to title founded upon rights alleged to have arisen before the land was registered was not included in the list of overriding interests in s. 23(1)

¹[1957] O.W.N. 313, 8 D.L.R. (2d) 292.

²(1908), 17 O.L.R.1.

1958
 GATZ
 v.
 KIZIW
 Judson J.

because it was not within subs. 23(1)(c), not being an interest which an owner of adjoining land had "acquired to or in respect of the registered land by reason of possession or improvements." It was, in fact, a claim under an alleged prior patent. There is, further, nothing in the reasons to lead to the conclusion that an overriding interest could be a possessory interest acquired subsequent to registration.

The case of *Belize Estate and Produce Company v. Quilter*¹, cited by the Court of Appeal in support of its conclusion, cannot be applied to the interpretation of the Ontario Act because the Honduras Act there under consideration had no provision expressly exempting lands registered under the Act from the operation of the law of limitations. There was nothing in that Act corresponding to s. 28 of the Ontario Act. Before *The Limitations Act* could be held not to apply, it had to be found as a matter of plain implication that the Honduras Act excluded the operation of *The Limitations Act*. Such an exclusion by implication was impossible. But in the present case it is not a matter of implication. There is an express exclusion of the application of *The Limitations Act* by s. 28 of the Ontario Act.

It is significant as emphasizing the effect of s. 28 in the Ontario Act, that in Alberta, where there is no corresponding section, the acquisition of possessory interests after first registration has secured some degree of recognition. A possessory title may be acquired under the Alberta Act against the registered owner although it may be defeated after its acquisition by a registered transfer from the registered titleholder unless in the meantime the necessary steps for its protection prescribed by the Act are taken. The foundation for this law, which is to be found in *Harris v. Keith*² and *Boyczuk v. Perry*³, is the *Belize* case. On the other hand, in Manitoba the *Belize* case was distinguished because the section corresponding to s. 28

¹[1897] A.C. 367.

²(1911), 3 Alta. L.R. 222, 16 W.L.R. 433.

³[1948] 2 D.L.R. 406, 1 W.W.R. 495.

of the Ontario Act was held to exclude in express terms the operation of *The Limitations Act*; *Smith v. National Trust Co.*¹.

1958

GATZ

v.

KIZIW

Judson J.

Therefore, my conclusion is that s. 23(1)(c) protects only possessory titles in existence at the date of first registration, that s. 28(1) expressly prevents their subsequent acquisition and that the principle of the *Belize* case has no application to the interpretation of the Ontario Act.

The respondent's alternative argument was that even if s. 28(1) of *The Land Titles Act* is effective to prevent the operation of s. 15 of *The Limitations Act* so that the title to the land in question remains in the appellant, s. 28(1) does not negative the terms of s. 4 of *The Limitations Act*, with the result that the appellant, although still remaining the owner of the land, cannot make an entry or bring an action to recover it. He urged that the position he seeks to assert involves no conflict with s. 28(1) because extinction of the appellant's right to make an entry or to bring an action of ejectment does not connote acquisition of title by the respondent. This argument really never gets under way. The contest here is between two adjoining owners. If one has extinguished the right of the other to oust him or to disturb his possession, his rights against the other are commonly and accurately described as a title by possession. The section prevents the acquisition of such rights.

I would allow the appeal and restore the judgment of the learned trial judge. The costs of this appeal will be in accordance with the order made on the application for leave to appeal. The appellant is entitled to her costs in the Court of Appeal and at the trial.

Appeal allowed.

Solicitors for the plaintiff, appellant: Carmichael, Bennett, Hamilton & Nixon, Sault Ste. Marie.

Solicitor for the defendant, respondent: I. A. Vannini, Sault Ste. Marie.

¹ (1911), 20 Man. R. 522; affirmed 45 S.C.R. 618, 1 D.L.R. 698.