JAMES SHERREN, JR., (DEFENDANT).....APPELLANT; 1886

AND *Oct. 26, 27.

EASTER PEARSON (PLAINTIFF).....RESPONDENT. 1887

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND. *Mar. 14.

Trespass on wild lands—Isolated acts of—Title—Statute of limitations—Misdirection.

Isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the statute of limitations, and there was no misdirection in the judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute.

To acquire such a title there must be open, visible and continuous possession known or which might have been known to the owner, not a possession equivocal, occasional, or for a special or temporary purpose. *Doe d. DesBarres* v. *White* (1) approved.

The judgment of the court below affirmed, Gwynne J. dissenting on the ground that the finding of the jury on the question submitted to them was against evidence, and further that the acts done by the defendant were not mere isolated acts of trespass, but acts done in assertion of ownership during a period exceeding 35 years, and the evidence of such acts should have been submitted to the jury and the jury told that if they believed this evidence they should find for the defendant.

APPEAL from a judgment of the Supreme Court of Prince Edward Island refusing to set aside a verdict for the plaintiff and order a new trial.

The action was brought in the court below by the respondent against the appellant for an alleged tres-

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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pass, and the declaration contained a count for trespass to land and a count in trover for trees cut upon the *locus*, which is a piece of unfenced land lying between two roads and in the declaration is described as bounded "on the north by Palmer's road." The appellant, as to the trespass, pleaded not guilty, and that the land upon which it was committed was not the respondent's land.

At the trial before Mr. Justice Hensley it appeared that in the year 1820 a road was run through a portion of the township on which the *locus* is situated, and in its course passed between the farms at present in possession of appellant and respondent; that since the year 1851 two roads exist, and that between these two roads is a piece of land upon which the respondent charges that the trespass was committed, she alleging that the road to the north of the *locus* is the Palmer road, and that inasmuch as this road is her northern boundary the *locus* is included in her farm.

The appellant admitted having cut the wood on the *locus*, (the alleged trespass) but claimed that the Palmer road ran south of the *locus*, which, if so, would include it in his farm or exclude it from respondent's.

Evidence was given on the trial of wood and timber being cut on the *locus* by the appellant and those through whom he claims for a number of years previous to the action, and the defendant attempted to set up a title by possession to the *locus*, even if it was embraced within plaintiff's leases, and asked the judge to charge the jury that such evidence was sufficient, if they believed it, to constitute a title in him by possession.

The judge refused so to charge, holding that if the plaintiff's contention as to the situation of the Palmer road was correct, and that was for the jury to say, the evidence of cutting given by defendant amounted merely to isolated acts of trespass and were

not of such an actual, continuous and visible nature as the law required to confer a title by possession.

The jury found that the north road claimed by respondent was the Palmer road, and gave her a verdict accordingly.

The defendant moved for a new trial on the ground of misdirection by the learned judge in refusing to charge the jury as requested on the trial. The rule *nisi* for a new trial was discharged and the defendant then appealed to the Supreme Court of Canada.

Hodgson Q.C. for the appellant. The judge was not justified in withdrawing from the jury evidence of defendant's possession. See *Ewing's Lessee* v. *Burnet* (1); *Prudential Assurance Company* v. *Edmonds* (2).

The defendant used the land in the only way it could be used and such user will give him a title under the statute of limitations. *Davis* v. *Henderson* (3); *Mulholland* v. *Conklin* (4); *Norton* v. *London & North Western Ry. Co.* (5).

Davies Q.C. for the respondent. The judge has to exercise a discretion in determining what evidence shall be left to the jury. *Metropolitan Ry Co.* v. *Jackson* (6). And the discretion was rightly exercised by refusing to leave to the jury this evidence of possession when the location of the Palmer Road would settle the rights of the parties. *Jones* v. *Chapman* (7).

It was necessary for the defendant to show an open, visible, continuous possession of the *locus* in order to establish a title under the statute of limitations and the evidence was entirely insufficient for that purpose. *Proprietors of Kennebeck* v. *Call* (8); *Proprietors of Kennebeck* v. *Springer* (9).

SIR W. J. RITCHIE C.J.—The great controversy at the

(1) 11 Peters (U.S.) 41.
(2) 2 App. Cas. 487.
(3) 29 U. C. Q. B. 344.
(4) 22 U. C. C. P. 372.
(5) 13 Ch. D. 268.
(6) 3 App. Cas. 193.
(7) 2 Ex. 803.
(8) 1 Mass. 483.
(9) 4 Mass. 416.

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trial of this case appears to have been as to which of the two roads, the one to the north and the other to the south of the disputed locus and adjoining each other at the eastern and western ends of the locus, or near the eastern and western ends, was the old Palmer road run in 1820, the plaintiff contending that that road was to the north of the locus, and the defendant that the south is the old Palmer road. There can be no doubt that the old Palmer road was the division line between the Sherren and Pearson farms; in fact, I understood such to be the contestation of both parties, and that the question at the trial was: Where was the Palmer road? This question the learned judge left squarely to the jury, instructing them that if they found that the north road was on the line of the road run in 1820 by Palmer to find for the plaintiff, otherwise to find for the defendant. The jury found for the plaintiff, and thereby established that the north road was the old Palmer road, which finding it cannot be said, I think, that there was no evidence to justify, and therefore the finding of the jury, and its confirmation by the court, ought not to be disturbed. But, independently of this, the defendant does not complain of, and has not appealed against, this finding of the jury, but has limited the question to be raised on this appeal to the alleged misdirection of the learned judge in withdrawing from the consideration of the jury certain acts which he claims were acts of possession sufficient to give him a title under the statute of limitations. The case submitted to this court, states that the question intended to be raised on this appeal is: Was the learned judge right in directing the jury that the sole question for their consideration was, where was the old Palmer road originally established? Or should he not, instead of withdrawing it from the consideration of the jury, also have left to them, as requested by the defendant's counsel, the question of possession and

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the evidence of the defendant's claim to the possession, and whether the plaintiff's title was barred by the statute of limitations? and with this the factums of both the appellant and the respondent agree. And the learned counsel for the appellant frankly admitted on the argument that on this appeal it was not open to him to attack the finding of the jury on the question submitted as to the Palmer Road, and complains only, as his factum does, of the ruling of the learned judge in reference to the question of possession, that is to say, in not leaving to the jury to say whether or not the defendant had such a possession of the *locus* for twenty years as barred the plaintiff's title under the statute of limitations.

Assuming then this finding to be correct, the defendant contended at the trial, and before the court below and in this court, that the evidence showed the plaintiff was out of possession of the *locus* and the defendant in possession, and assuming the north road to be the Palmer Road the plaintiff's title was barred by the statute of limitations, or at any rate, there was evidence which the judge should have submitted to the jury and he was not warranted in telling them that there was no evidence from which they could find that plaintiff was out of possession or her title barred.

To enable the defendant to recover he must show an actual possession, an occupation exclusive, continuous, open or visible and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.

I cannot discover anything in this case to indicate that the defendant or those under whom he claims at any time made an entry on the land with a view of taking possession of it under a claim of right or color of title, or with a view of dispossessing the actual owner, such as running the lines around it, spotting

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the trees, or acts of this character, assuming such would have been sufficient against the true owner, or by any other open, visible, continuous acts, and there is no evidence whatever to show that the acts relied on were done with the knowledge of the owner. The acts relied on were nothing more, as against the true owner, than isolated acts of trespass having no connection one with the other. The mere acts of going on wilderness land from time to time in the absence of the owner, and cutting logs or poles, are not such acts, in themselves, as would deprive the owner of his possession. Such acts are merely trespasses on the land against the true owner, whoever he may be, which any other intruder might commit. There was no occupation of the lot by the defendant; there was nothing sufficiently notorious and open to give the true owner notice of the hostile possession begun. An entry and cutting a load of poles or a lot of wood, being itself a mere act of trespass, cannot be extended beyond the limit of the act done, and a naked possession cannot be extended by construction beyond the limits of the actual occupation, that is to say, a wrongdoer can claim nothing in relation to his possession by construction.

Assuming then that the old Palmer road, as found by the jury, was unquestionably the true dividing line between the Pearson and Sherren lots, the possession would follow the title unless displaced by evidence of an exclusive, continuous and uninterrupted possession of twenty years by the defendant. As was said in *Doe d. DesBarres* v. *White* (1), the presumption is that the owner remains in possession of that which is not actually in possession of others until proof be given of acts of possession by the defendant. It is sufficient for the plaintiff, as owner of the fee, to show the land continued in its natural state, and uninclosed, within

(1) 1 Kerr N. B. 595.

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twenty years before action. In the case just referred to, *Doe d. Des Barres* v. *White*, which was decided as far back as 1842, Parker J., afterwards Chief Justice, says (1):—

It has already been repeatedly decided, that a twenty years' adverse possession to a part of a lot of land, by a person coming in without color of title, will not enure as a possession of the remainder; but this is the first time that I am aware of, that the question has been distinctly been brought up in this court as to what will constitute adverse possession of wilderness land. In the absence of any English case to direct our judgment, which of course could not be looked for in any of the English courts at Westminister, it is satisfactory to find that the question has frequently been discussed in the courts of the United States, and that in various independent tribunals in different States, some of which hold to the statute of James 1st. as the existing law, and others have local statutes framed after the model of the English statute, there has been a great unanimity on the subject, and a general opinion of the impropriety and inexpediency of giving any constructive effect to acts which do not of themselves clearly demonstrate the intention of the party to dispossess the owner. I shall proceed to cite several of those cases, not as binding authority, but, as was said by Justice Patteson, 6 A. & E. 837, intrinsically entitled to the highest respect; they are important to us, inasmuch as the same principles of law are applied to a state of things similar to our own, by judges of high character, learning and experience; some, indeed, of very deserved celebrity. I cite from the notes to Tillinghast's Ejectment.

[The learned judge then proceeds to cite at length a great number of American authorities, and concludes thus:—]

It is impossible not to perceive the different manner in which the rights of owner of wilderness land are affected by a person entering, enclosing and actually cultivating, who stands there in fact openly and notoriously excluding the owner from the possession, and against whom, as it was ably argued, he may immediately proceed to a legal adjudication of his title; and by another who enters, cuts down the trees here and there, taking them off the land for the purpose of using them, and often without the knowledge at the time of the owner, who may indeed remain in ignorance of the person by whom these acts are committed, and who cannot well be prepared to meet evidence of such acts, when they are brought forward as proofs of an adverse possession. If every intendment is to be made in favor of the lawful owner, in order to protect right and suppress wrong,

(1) At p. 627.

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why should the act of cutting down a tree, and taking it away, be intended as an act of possession of the land? The intent to occupy the land is not indicated by that act; in general, no such intent accompanies it. It is the commission of a wrong, not the exercise of a right; and on what principle would you extend benefit to the wrong-doer, beyond the necessary consequence of the act? He may continue such acts for years, and yet never think of possessing himself of the land; and who can say when the intent was first formed? The act indeed may be concealed until the right to maintain an action of trespass is barred by the statute of limitations, when it may be set up with impunity as a proof of possession. If however the repeated acts of cutting and taking away trees openly, notoriously and exclusively committed by one person, with the knowledge of the owner, or under such circumstances as that he cannot be presumed to be ignorant of them and without interruption on his part, will ripen into actual possession of the soil, one of two things would seem further required, namely, that the land over which the claim extends shall be defined, either by marks and bounds upon the land itself, or by some deed or instrument under color of which the party has entered; and that to make out a possession of twenty years' duration, there must have been sufficient acts of this sort committed before the commencement of that period, and not merely while it was running on. It is also material to show distinctly that all the acts of cutting relied on have been done by the party himself or by others under his direction, or that there be at least the same degree of certainty on this point as would be required to make him answerable in an action of trespass.

And Carter J. afterwards Chief Justice says:— (1).

We then have to consider what are the acts of the defendant, by which he says he has proved that he has been in the possession of this land for more than twenty years. It appeared that the land in dispute is a tract of wilderness in the rear of a piece of cultivated land, of which the defendant has been in the occupation for more than thirty years; that on several occasions, and probably whenever he had need of such things, he went to the back of his cleared land to cut firewood and poles. It is obvious and natural that in so doing he would at first merely go on the part nearest to his cleared land, and gradually extend his acts of trespass (for such undoubtedly they were at first) further and further back. Now in the absence of any other evidence, what inference is to be drawn from the mere fact of a person going on the land of another, and cutting down a few trees, and carrying them away for firewood? Surely not that he intends to take possession of the land on which the trees grew, but that he intends merely to get the wood for his own purposes.

(1) At p. 640.

Suppose he does this repeatedly, and that he ultimately cuts down all the trees, when is it that he can be said to manifest an intention to take possession of the land itself ? Granting however that repeated acts of trespass of such a nature on land may constitute a possession of the land, still it is obvious that such possession cannot be said to commence until after the last act of trespass has been committed, which will make up the amount necessary to constitute such possession. In the case of land under cultivation, suppose a person who has no title takes possession by fencing; that he begins by erecting a small part of the fence, and does not completely fence the whole in until some years have passed; his possession of the whole could hardly be said to commence until the whole of his fence was completed. Assuming that these acts of the defendant could give him a possession of the land, there is nothing in the evidence to show that such acts had extended over the whole of this tract more than twenty years before this action was commenced, or to what particular portion of the land they had extended at that time and therefore the defendant failed in proving a possession of twenty years to the whole or any part of the land in question.

Chief Justice Chipman and Mr. Justice Botsford took no part in this judgment on account of having been engaged in the suit while at the bar, but both expressed their full concurrence with their brethren upon the general principles of adverse possession.

I have cited this case at greater length than I otherwise should have done, because it has ever since been regarded and acted on as enunciating the correct principles in reference to the possession of wilderness lands. To interfere in any way with this case, or to cast any doubt on it, after having been accepted and acted on as good law for forty-two years, would be to unsettle the jurisprudence of New Brunswick and, as I understand, of the other Maritime Provinces, on this subject and lead to litigation and confusion.

The evidence as to the acts of possession is the very opposite of showing an adverse possession for twenty years of this lot, as the following extracts from the evidence of the defendant's witnesses will show.

Jos. McDonald says :—

I chopped wood on the disputed piece for Mr. Coughlan south of the Northern road. I chopped that wood 42 years ago.

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Richard Boyle:—

I know the disputed piece of land. I cut off the disputed piece of land 16 or 17 years ago. I got leave from Mrs. Sherren the grandmother of the defendant.

George Oakes:—

Live at Crapaud; aged 46; lived within 16 chains of the place; I never remember a stick being cut off on the disputed land when I first went to school.

James Hall:—

I saw young James Sherren and John McDonald and old Mr. Jas. Sherren cut down off the disputed land. I saw Sherren cut when Mr. Pearson was alive. Can't name the year. I saw George Trowsdale cutting. Might be 10 or 15 years ago.

John McDonald:—

I know the piece of land in dispute. I cut poles off it. 200 or 300 poles in 1870. In 1871 cut about 500 to 600 too. I did it for Mrs. Sherren the defendant's grandmother.

The evidence of John Sherren, uncle of defendant is much relied on. He says:—

My father cut wood on the disputed land in 1851. I went in 1852 and cut down a good bit of stuff off it, about 20, 30 or 50 trees. I suppose there never was a year in the 35 years but what I, or some of the Sherrens, cut some wood off it, except last year.

John Malone:—

Lived three and a half miles from disputed land. I never saw any cutting or trees cut on the disputed land.

James Trowsdale Sherren:—

Father of defendant James and owner of the land. Brother (that is John Sherren whose evidence is referred to above) has nothing to do with it. Went into possession in 1850 or 1851. I cut on this disputed piece of land. Commenced cutting on it 13 or 14 years ago. Before that I saw mother's servants and several men and my brother cutting poles. McDonald cut in 1870 and 1871. I saw my brother George who is dead cut on it 13 or 14 years ago. Nothing more than taking a tree now and again on it or my boy by my orders sometimes. I would take a sill, sometimes a beam off it and some hundred longers. I and my son and brother cut off it during the last 15 years.

On cross-examination he says:—

I think I cut some saw logs on this land some five years ago. I was in last fall to see this place. I think I was cutting 10 or 11 years myself more or less during that time. I saw some sticks lying there last fall.

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Then this witness who went into possession in 1850 or 1851, says:—

Five different winters I cut on that place or three winters I will say to two different winters. I did'nt cut any poles last winter that I mind of. Some poles were cut three winters ago north of the south road off the disputed piece.

James Sherren:—

I cut the wood; am 31 next May; I remember 20 years back (1866); know this piece of land; cut on it 13 or 14 years since father got it; wanted it for fence poles and saw logs; first about 14 years ago made use of it for boards and scantling; cut mostly every year; six or seven years ago I cut 600 longers off this very piece.

In this case, then, there is nothing to indicate that the party at any time made an entry on the land with a view of taking possession of it under a claim of title or any open visible acts. There is no evidence of anything but isolated acts of trespass having no connection one with the other, no evidence of any open, visible, continuous possession for twenty years, known, or which might have been known, to the owner, but simply cutting without any open and exclusive possession.

STRONG J.—The appellant himself tells us that the only question intended to be raised here is, whether the judge who presided at the trial should not have left the occasional acts of ownership exercised by the defendant to the jury as evidence of possession under the statute of limitations. As I am clearly of opinion, for the reasons already stated by the Chief Justice and which I need not therefore repeat, that these trespasses were no evidence of possession there is, in my opinion, no alternative but to dismiss the appeal.

FOURNIER J.—I concur in the reasons given by His Lordship the Chief Justice for dismissing this appeal.

HENRY J.—I also am of the opinion that the appeal in this case should be dismissed with costs. At the argument it was clearly intimated to us that the only

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question for our decision was as to the propriety of the proceeding of the learned judge at the trial who withdrew from the jury the question of the defendant's possession of the *locus*. I have come to the conclusion that the learned judge was perfectly right in adopting that course, and he was not only right, but it was his duty to do what he did. In all the provinces the law is well settled that acts of trespass cannot amount to what the law requires to give title under the statute of limitations, that is, the ouster of the true owner. An act of trespass in going on the property amounts to a disseisin for a time, but it is not an ouster; what the law requires is an ouster of the owner for twenty years. Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should continue that dissiesin so as to amount to an ouster, and that ouster maintained for the statutory period. That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of the land of which the party claims possession.

In this case the defendant got on the land. By the decision of the jury the title is in the plaintiff. That is not to be attacked; the finding of the jury is to be taken as correct. In that view of it I have come to the conclusion that there has been no ouster of the plaintiff.

I approve generally of the decision of the late Chief Justice of New Brunswick in *Doe d. Des Barres* v. *White* (1). He argues the case very fully and, to my mind,

(1) 1 Kerr (N. B.) 595.

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very satisfactorily. But when he talks about the intention of the party who goes upon the land of another and commits a trespass, I should remark that the intention of the party has nothing to do with it. If he does not do what the law says will amount to an ouster it is immaterial what his intention is. The thing necessary for him to prove is a possession for twenty years.

This is not a case of adverse possesion. That does not arise here. It is only a question as to whether or not the owner was out of possession for twenty years.

In this case the statute, so far as the evidence goes, has never, in my opinion, commenced to run. The plaintiff was never out of possession and, therefore, I think the judgment of the court below was right, and the judge was right in withdrawing from the jury a question which could only be decided in the one way. This was the only question to be determined by the jury, and it would be useless, in my opinion, for the court to send the case back for the decision of another jury on a question which, in law, could not operate to give the defendant a title to the land in dispute.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. Where was this Palmer Road was the main question at the trial. The jury found that the north road as claimed by the respondent was the Palmer road, and returned a verdict in his favor, which verdict was subsequently sustained by the full court. Now against this verdict the appellant has nothing to say. He limits his appeal as follows:

Was the learned judge justified in directing the jury that the sole question for their consideration was,—Where was the old Palmer Road originally established? or should he not instead of withdrawing it from the consideration of the jury also have left to the jury the

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question of possession, and the evidence of the defendant's claim to the possession, and whether the plaintiff's title was barred by the statute of limitations, as requested by the defendant's counsel? I am of opinion that, as held by the judge at the trial, the location of this Palmer road determined the ownership of the *locus* in contestation. This part was all wilderness. The appellant had cleared south to the Palmer road as fixed by the jury, and had fenced his land along that road from his west boundary line eastwardly some chains past where the south road, claimed by him as Palmer's, branched off from the now established Palmer road. By this open, notorious, continuous and visible act he had declared to the world the extent of his claim. Occasional acts of cutting beyond this fence and across the road, committed too without respondent's knowledge, were mere repeated acts of trespass.

It is clear law that if a man owns a farm by a good legal title the front part of which he occupies and cultivates and the rear of which he reserves in a wilderness state for firewood or other purposes, a series of independent acts of trespass committed on the rear of the land, by a wrongdoer or person laying illegal claims thereto each of them unconnected with preceding or subsequent acts, would not operate to oust the title of the legal owner. By virtue of his title he was as much in possession, in the eye of the law, of the woodland in the rear as of the cultivated land in front. To deprive him of that possession the wrongdoer entering must show dispossession of the true owner by actual, constant, visible possession for twenty years in himself.

The fact that the wrongdoer or trespasser supposes he has a claim or title to the land does not alter the character of his acts. His unfounded belief cannot diminish or destroy the legal claims of the true owners or

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deprive them of their right to treat him as a wrong-doer in entering on their land. The effect to be given to repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of wilderness lands. If the property is of a nature that cannot easily be protected against intrusions, mere acts of user by trespassers will not establish a right.

Owners of wilderness or wooded lands lying alongside or in the rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not, by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoliation.

As to Mr. Justice Hensley's charge to the jury, I do not see that the appellant's contentions can be maintained. The judge told the jury that if they found the north road to be the Palmer road the plaintiff, respondent, had constructive possession of the *locus* in litigation, and that the acts of cutting given in evidence by the defendant (now appellant) admitting them all as well and duly found, could not operate as a disseizin of the respondent, and a bar to his title. I do not see anything illegal in that charge. On the contrary, if the judge had charged the jury as the appellant contends he ought to have done, that is to say, if he had left the question of possession to them, and they had found, on that point, in favor of the present appellant, with this evidence on record that verdict, in my opinion, could not have been sustained.

GWYNNE J.—I am of opinion that this appeal should be allowed with costs, and that the rule *nisi* issued in

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the court below for a new trial should be ordered to be made absolute. The action is one of trespass *quare clausum fregit*. The plaintiff in her declaration alleges that the defendant broke and entered certain land of the plaintiff described as follows:—"On the south by "land in possession of John Stordy, on the west by "the Westmoreland river, on the north by Palmer's "road, and on the east by a stream situate on town- "ship number 29 in Queen's County," in the Province of Prince Edward Island and cut down and carried away a large number of trees growing thereon, &c.

In pursuance of an order of the Supreme Court of Prince Edward Island the following particulars were given of the years and months and days as near as could be upon which the trespasses complained of were committed, namely: In the months of February, March, April and May, 1884, and between the 1st of February, 1885 and 1st of April, 1885, and also between the months of August and December, 1883.

To this declaration the defendant pleaded not guilty, and that the land was not the plaintiff's as alleged.

At the trial the plaintiff produced and put in evidence an indenture of lease, dated the 1st of June, A.D., 1818, and made between the Right Honorable John Earl of Westmoreland and the Right Honorable Robert Lord Viscount Melville of the one part and John Pearson of the other part, whereby the piece of land next therein after described was demised to John Pearson, that is to say, all that tract, piece or parcel of land situate lying and being in the Parish of Hillsborough in Prince Edward Island, which is bounded as follows:—

Commencing at a square stake fixed in the north-east bank of the north-west branch of Westmoreland or Crapaud River, the same being the north-western boundary of William Hodson's farm, and from thence running by a line north sixty degrees east until it strikes the north-east branch of said Westmoreland river and following the

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course thereof northward to a certain road lately opened, leading from the lower or new road to the upper or old road from Charlottetown to Tryon, and from thence following the course of the said first mentioned road, until it meets the said new road from Charlottetown to Tryon aforesaid, and from the centre thereof running by a line south 60 degrees west into Westmoreland river aforesaid and following the courses thereof to the place of beginning, making a front of ten chains by a base line upon the said river and containing 90 acres of land a little more or less agreeable to a plan thereof hereunto annexed, and is part and parcel of lot or township number 29 in the said Island. *Habendum*, for 999 years.

The plan above referred to was not annexed to the lease nor was it produced, nor was any attempt made to shew that the *locus in quo* was within the metes and bounds stated in the lease, for in 1859 this lease became surrendered by a new lease which the tenant then took for a term of 900 years from the 1st November, 1859, from Lady Cecily Jane Georgina Fane, who is admitted to have then been the heir to the Earl of Westmoreland, the lessor in the lease of 1818 mentioned, and to have been then seised in fee of the lands described in the lease executed by her on the 1st of November, 1859. In that lease the land thereby demised is described as follows :—

All that tract, piece or parcel of land situate in the western moiety of township number twenty-nine, and bounded as follows that is to say :—Commencing at a stake fixed on the east side of the Westmoreland river at the south-east corner of land leased to Henry Newson, thence along Henry Newson's line to Palmer road, thence along Palmer road to the stream, thence southerly along the stream until it obtains a breadth of nine chains and twenty-four links, thence south fifty-five degrees thirty minutes west to the river, thence along the river to the place of commencement, containing by estimation ninety acres of land be the same a little more or less.

The plaintiff claimed title through the will of her husband, who died in the year 1867, and who was the lessee named in the above leases. The first question involved in the case was the site of the Palmer road as the *locus in quo*—that road being the north boundary of the land described in the lease of the 1st

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November, 1859, under which the plaintiff claimed title; and secondly a question arose whether (whatever might be the site of the Palmer road) the defendant and those through whom he claimed were not in possession of the *locus in quo* for more than twenty years before the commencement of the action. This Palmer road was not in existence when the lease of 1818 was executed; it was run first in 1820 by a person of the name of Palmer, but under the authority it would seem of the owners in fee of the land on which it was run and of their tenants; for a witness named Turnbull, aged 83, who was employed in running it under the Mr. Palmer from whom the road derives its name, says: "That the road commenced at a road called Stordy's road and ran north-east by east on the line between Newson and Pearson. It went" he says "a little more in on Pearson that on Newson. Starting from Stordy's line it ran at first straight, but when approaching a gulch it was canted in to the east on to Pearson's land. Newson's land" he says "did not run out to the old Town road; somewhere near Newson's corner (that is his eastern corner or boundary), the road" he says "took a sheer to the right to clear the gulch. This sheer to the right would" he said "be no distance at all from Newson's corner. The road then came to a brook and from thence out to the old Town road. The object of the divergence was to clear the gulch." This running of the road on to Pearson's land was no doubt with his knowledge and consent and would seem to account for the new lease given to and accepted by Pearson in November, 1859, for the Palmer road which by that indenture is made the northern boundary of the land leased to Pearson was in August, 1841, made the southern boundary of land then demised by the Earl of Westmoreland to one Coughlan through which demise the present defendant claims title. On the 27th

August, 1841, by an indenture of that date the Earl of Westmoreland demised to John Coughlan his executors, administrators and assigns, habendum for 999 years, a portion of the said township, number 29, described as follows: —

Commencing at a stake fixed on the west side of a road called Palmer or the old town road at the east boundary of Samuel Newson's farm, and running back on said line 23 chains and 50 links or until it meets the eastern boundary line of James Collbeck's farm, and thence running along said line north, 31 degrees, 30 minutes east, 16 chains, 25 links, thence in a direction south 58 degrees 30 minutes east 34 chains 50 links, or until it meets the road aforesaid, thence along the west side of said road in a direction southwest to the said state or place of commencement, containing 60 acres more or less.

Now the first question as I have said is as to the site of the Palmer road at the *locus in quo*. The *locus in quo* is a piece of land which lies on the north side of and abutting on a road which diverges to the right from a point near Newson's Corner and which after crossing a brook approaches Stordy's mill stream. Such a road, it may be here observed, accurately corresponds with the description given by Turnbull of the course which the Palmer road, as run in 1820, took, when he says that the "road somewhere near Newson's Corner," and he says again "this would be no distance at all from Newson's Corner," took a sheer to the right to clear a gulch.

Now at the time of the execution of the indenture of lease of August, 1841, which appears to have been the first which made the Palmer road a boundary of land demised, it is not pretended that there were two roads on the ground at the *locus in quo*—there were not two roads diverging to the right from the straight line which starting at Stordy's road was run as the Palmer road—there was but one such point of divergence and but one road then known as the Palmer road at the *locus in quo*, which diverging to the right from

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a straight line led to Stordy's mill stream. The material question therefore between the parties is—Where was that diverging road situate at the time of the execution of the indenture of demise of August, 1841, under which the defendant claims? for the land to the north of that road as it was then opened and travelled on was demised to Coughlan by that indenture, and that same road must be taken to be the boundary of the land demised to Pearson by the indenture of lease of November, 1859. Whatever was known and used and travelled upon the ground as the Palmer road in 1841, when the lease to Coughlan was executed, must be the road up to which the land demised to him reached, and must be held to be thenceforth the road coming under the designation of the Palmer road at the *locus in quo*, and to be the road referred to as the Palmer road in the description of the land demised to Pearson by the indenture of November 1859.

The evidence is overwhelming that the road as claimed by the defendant is the only road which was in existence and known as the Palmer road at the *locus in quo* in 1841, when the lease to Coughlan under which the defendant claimed was executed.

(His lordship then reviewed the evidence at length and proceeded as follows:)

This being the evidence, the learned judge who tried the case directed the jury that if they should find that the north road as on the ground was on the line of road run in 1820 they should find for the plaintiff—if otherwise to find for defendant. Counsel for the defendant objected to the charge and asked the learned judge to charge the jury that even if they should find that the north road was laid out in 1820 they should still consider the evidence as to possession and find whether the defendant's father and those

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through whom he claimed were not in possession of the piece of land in dispute, and the plaintiff and those through whom she claimed out of possession of it for more than twenty years before the commencement of the action. This the learned judge refused to do and he charged the jury that there was no evidence from which they could find that the plaintiff was out of possession, or that her title was barred, or that the defendant or those through whom he claimed had possession of or had any title to the *locus in quo* and that the sole question for their consideration was: Where was the line of the Palmer road run in 1820? The jury upon this charge by a majority of five to two rendered a verdict for the plaintiff. A rule was obtained in the supreme court of the Island calling upon the plaintiff to show cause why this verdict should not be set aside and a new trial granted upon the following grounds: That the verdict was against the weight of and contrary to evidence—and that the judge who tried the case charged the jury that there was no evidence from which they might find that the defendant or those through whom he claimed had obtained a title to the land in dispute.

This rule was discharged by the court and it is from the rule which discharged the rule *nisi* that this appeal is taken.

It is, I think, impossible to understand how the jury could have rendered the verdict they did if they had understood the judge's charge in the sense in which, no doubt, he intended it to be understood by them, namely, that if they should find the north road to have been the road laid out and opened in 1820 and since travelled upon as the Palmer road, from thence up to and in 1841 when the lease to Coughlan was executed, to find for the plaintiff, for this was the material question in issue. The word "run" in 1820 as

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used by the learned judge was not the most appropriate term to have used; there was no evidence, or suggestion that there was a road "run" in 1820 different from the road which was opened and travelled as the Palmer road. All the evidence was to the effect that what was run in 1820 was the road which was then opened and thenceforth travelled upon and known as the Palmer road. So that perhaps the jury did understand the learned judge's charge as they should have understood it and that the majority intended to find by their verdict that the north road was the road which was opened in 1820 and was thenceforth travelled upon and known as the Palmer road until and in 1841, when the lease to Coughlan was executed. Such a verdict, if that be what the jury meant, was utterly unsupportable upon the evidence, for it was proved beyond question that no road was ever opened on that line until 1851, and moreover the great mass of the evidence leads irresistibly to the conclusion that the south road is the true old Palmer road and which has always been known and travelled upon as such. But it is said that although the rule *nisi* for a new trial in the court below asked that the verdict might be set aside as against the evidence, no question now arises before us upon this point because the learned counsel for the appellant, resting, as I understood him, upon his objection to the judge's charge on the question of possession as sufficient for his purpose abstained from pressing his objection to the verdict upon the single point which was submitted to the jury on the ground of its being wholly against the evidence. But the fact that the learned counsel for the appellant having two points, both of which he deemed equally good and which he took and made the grounds upon which his rule *nisi* was granted, rested in his argument before us upon one of them as

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being in his judgment abundantly sufficient to entitle the appellant to a new trial, cannot deprive him of the right to insist upon all the evidence bearing upon that point, although it bears equally upon the point not pressed. The whole of the evidence in point of fact bears upon the question of possession, and therefore must be referred to in the question now before us just as if it had been the only one in contestation throughout. The objection under consideration is simply one of misdirection, namely, whether or not it was misdirection in the learned judge to have told the jury that there was no evidence before them upon which they could find that the plaintiff had been out of possession—or that the defendant and those through whom he claimed ever had possession of the *locus in quo*—and that the sole question for their consideration was where was the line of the Palmer road run in 1820, and that if they should find that the north road as on the ground, that is to say the road which the evidence showed was never opened or made until 1851, was on the line run in 1820, they should find for the plaintiff. Can any doubt be entertained for a moment that the charge opens before us the whole of the evidence as bearing upon the question whether Coughlan and his assignees had or not possession up to the south road now on the ground as the boundary between the lands in the possession of Coughlan and his assignees on the one side and the land in the possession of the plaintiff's husband in his lifetime and of the plaintiff since his death on the other? Reading this evidence I must say, with the greatest deference for those with whom it is my misfortune to differ in this case, that the learned judge's charge cannot in my opinion be supported, and that it is clearly open to the defect of misdirection and if, when given, it was misdirection it is obvious that the subsequent finding of the jury

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upon the single point so erroneously submitted to them, whether such finding be right or wrong upon that point, cannot remove the defect of misdirection and the error committed in witholding from them the other question which should have been submitted to them, and in not drawing their attention to the evidence bearing upon that question.

So far as the question of actual possession was concerned it was obviously a matter of no importance whether or not a line had been run in 1820 in the place where the road made in 1851 was made if during all the period from Coughlan's entry under his lease in 1841 until his assignment of it in 1851 he was in possession up to what is now called the southern road on the ground as his southern boundary at the *locus in quo*. Whether Coughlan did or did not enter upon the *locus in quo* in 1841, claiming it under his lease, and whether there was then on the ground any road separating the *locus in quo* and the land leased to Coughlan from that in the possession of Pearson other than the road now called the southern road on the ground, and whether Coughlan did or not thenceforth continually until he assigned to Sherren in 1851 exercise acts of ownership over the *locus in quo*, claiming it as his own property to the exclusion of all others, and without any claim to it by Pearson or any other person, were facts for the jury and the jury alone to decide and which could not be affected in their determination by any opinion which in 1885 a jury might entertain upon the question whether a line had or had not been run in 1820 at any place different from that claimed by Coughlan to be a boundary between his possession and that of Pearson from 1841 to 1851 and enjoyed by him as such. Again, whether Sherren, the assignee of Coughlan, did or not in 1851 enter upon and retain possession of the *locus in quo* in the same manner,

claiming it as his own, and whether he and those claiming under him did or not exercise acts of ownership over it, claiming it as their own property continuously from the time of the assignment by Coughlan of his lease, were likewise questions for the jury to decide, and which in their determination could not be affected by any opinion the jury might entertain upon the question whether the road claimed as the boundary between the lands in the possession of the plaintiff and defendant respectively was or not on a line run in 1820. All these were essentially questions for the jury alone to pass upon, and to say that there was no evidence to leave to them upon the question of title by possession with defendant was to ignore almost the whole of the evidence. The authorities upon this point are numerous and uniform.

Where persons are in possession of adjoining lands whose visible dividing line is a fence or a road or a river (it matters not which), and exercise acts of ownership up to such dividing line, each is deemed to be in possession of the land on his side of and up to such dividing line, although upon a survey it might be found that a piece of land of which he was seized in fee by his paper title extended across and into the land on the other side of the fence or road or river from that on which the residue of his land lies and possession up to and according to the visible dividing line will perfect a title under the statute of limitations. *Dennison* v. *Chew* (1); *Doe Dunlop* v. *Serbos* (2); *Doe Quinsey* v. *Caniffe* (3); *Doe Taylor* v. *Sexton* (4).

In the present case the jury should have been told that if they believed the evidence as to the acts of ownership and possession exercised by the Sherren's on the *locus in quo* (and as to which there was no

(1) 5 U. C. O. S. 161.
(2) 5 U. C. R. 284.
(3) 5 U. C. R. 602.
(4) 8 U. C. R. 264.

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contradictory evidence) they should find for the defendant. *Doe Shepherd* v. *Bayley* (1) is an authority to this effect.

In *Dundas* v. *Johnston* (2) Draper C.J. says:

I have always thought that as against the real owner squatters acquire title by twenty years occupation of no more land than they actually have occupied or, at least, over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass in respect of which the true owner could not maintain ejectment.

And he adds:—

We agree with the learned judge who tried this case that it must depend upon the circumstances of each case whether the jury may not, as against the person having legal title, properly infer the possession of the whole land covered by such title in favor of an actual occupant, although his occupation by open acts of ownership, such as clearing, fencing and cultivating has been limited to a portion less than the whole.

In *Hunter* v. *Farr* (3) the same learned judge says:

If without title one enters on a lot which is in a state of nature, clearing and fencing a few acres only, leaving the rest open and unimproved, the actual possession of the part will not alone in my opinion draw to it the possession of the other part. I do not say what may be the effect of continuous acts of ownership over the residue though unenclosed and uncleared, but here there is no such evidence to rest upon.

In *Heyland* v. *Scott* (4) Hagarty C.J. says:

We are not prepared to hold that unenclosed woodland in this country can never be the subject of twenty years possession; if fencing and cultivation can alone constitute a possession then title to open woodland can never be acquired against the true owner. To put an extreme case—if a man posted caretakers or sentries every day to patrol the bounds of an unfenced lot, rigidly driving off all trespassers and thus preserving the whole for the exclusive use of their employer, could it still be said that twenty years of such proceedings would not bar the true owner. If this can confer a possessory title then the question becomes one only of degree.

In *Davis* v. *Henderson* (5) citing Erle J. in *Stevenson* v. *Newnham* (6) Wilson J. delivering the judgment of the court says:

(1) 10 U. C. R. 319.
(2) 24 U. C. R. 550.
(3) 23 U. C. R. 327.
(4) 19 U. C. C. P. 172.
(5) 29 U. C. R. 353.
(6) 17 Jur. 600.

The term "possession" has no definite meaning.

And he proceeds to discuss the question—

What is there to be done to constitute possession of wild land? If the rightful owner enter upon any part of it he enters in law upon the whole of it. If after such entry another forcibly turns him off and keeps him off for twenty years and during all that time the wrong-doer lives on the land and cultivates as much of it as he requires, but leaves the half of it in a state of nature, is not this extrinsic evidence without more of a disseisin of the whole lot? So if another believing he is rightful owner enters on a lot, claiming to be the owner of it all—lives there for 20 years and clears a part of the land, leaving the rest of it as wild land, is not this without more evidence of possession of the whole lot the wild as well as the cleared land? So if a squatter who is generally understood to be a person without right or color of right, enters on land claiming the whole lot, and occupies it for 20 years cultivating part and leaving uncultivated the rest of the lot, taking his fire-wood and farm timber from it as he requires it, and using it in all respects just as the owner himself would if he were there, and just as all owners usually do use their wild land, is not this evidence of possession of the whole lot wild land and all? The instances above mentioned of the various kinds of possession show that all that is required in order to constitute possession of land is that such a seisin, enjoyment, occupation or benefit be had of the property, which the property is capable of according to its nature or character. Now how is wild land to be possessed? It is settled that it need not be enclosed—what better test can there be of its possession than the person whose possession is questioned should have used it just the same as any other owner uses his wild land—by asserting title to it, by giving licenses to cut timber from it or to pass over it—by excluding others from cutting on it or travelling over it at his pleasure—by preserving the timber upon it though he has never cut a stick himself, or by any other acts or evidence from which it may fairly be presumed he has taken the possession of the woodland as well as of the cleared. To require more or greater possession than this will be to defect the beneficial object of the statute of limitations, which was to secure peace and to put an end to litigation by extinguishing these dilatory claims.

He concludes by expressing his opinion upon the question in such cases to be submitted to a jury:—

In my opinion when any person enters on a lot or half lot or any defined piece of land, wild, or partly cleared and partly wild under color of right or otherwise, and holds possession for the statutable period the question for the jury should always be as to the wild land whether the person whose possession is in question has claimed

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or held the wild land as owner, and has used it in like manner as the owners of land who have uncleared and unenclosed portions on the lots they occupy usually use their wild lands by such acts of ownership as owners are accustomed to exercise, or whether the acts of the person in question have been the acts of a mere trespasser not done and not intended to have been done in the assertion of right, title or ownership.

In *Mulholland* v. *Conklin* (1) the Court of Common Pleas for Ontario entirely adopted the views as expressed in the above judgment.

Now in the case before us the evidence is that in the month of August, 1841, by the indenture of lease of the 27th of that month, Coughlan became possessed for a term of 999 years of a portion of Township 29 in Queen's County, in Prince Edward Island, the southern boundary of which portion was a road opened, travelled on and known as the Palmer road. There is a mass of evidence that the only road known as the Palmer in 1841 was that which is the southern road on the ground at the *locus in quo* and that Coughlan entered upon and held the land demised to him up to that southern road as his boundary, and that he continued to exercise acts of ownership upon the small piece now in dispute equally as upon the residue of the land by cutting timber thereon and using it as an owner of woodland would do until 1851 when he assigned the residue of his term and the land possessed by him in virtue thereof to one Sherren who entered upon and possessed and held the land as Coughlan had up to this same south road, claiming it to be the southern boundary of the land demised by the lease to Coughlan, and that Sherren and his assigns thenceforth during every year for thirty-five years exercised acts of ownership upon the small piece now in dispute equally as on the residue of the land by cutting timber thereon, and using and claiming right to use it as part of the land of which they were possessed

(1) 22 U. C. C. 373.

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under the demise to Coughlan and that during all that time neither the plaintiff's husband, under whom the plaintiff claims, nor the plaintiff herself, nor any person interfered with the exercise of such acts of ownership by Coughlan or his assignees the Sherrens or claimed to have any interest in the *locus in quo* adverse to them. The evidence also shows that in 1851, before the assignment to Sherren, a new road was made on the land in possession of a tenant of Coughlan, but such new road which is now the north road on the ground could not alter the character of the possession of Coughlan up to the time of its being made, nor of his assignees after it was made up to the south road as and being the boundary as claimed by them of the land in their possession. It is impossible to say that this was not evidence to be submitted to the jury or that it was not sufficient if believed by the jury to have entitled the defendant to a verdict in his favor upon the question of possession conferring title under the statute of limitations. Indeed, Mrs. Hall who was the only witness to the acts which are relied upon as acts of trespass admits that those acts were done by the Sherrens in assertion of ownership, that is to say, *animo domini*. But for a judge to pronounce acts done every year during a period exceeding 35 years in assertion of ownership to be mere isolated, desultory acts of trespass and not to be matter to be submitted to a jury as evidencing possession of the land upon which the acts in assertion of ownership were so done, is such a usurpation of the province of the jury as entitles the defendant *ex debito justitiæ* to a new trial. *Prudential Assurance Co.* v. *Edmonds* (1).

The case of *McConaghy* v. *Denmark* (2), was cited on behalf of the plaintiff, but that case has no application

(1) 2 App. Cas. 508.

(2) 4 Can. S. C. R. 609.

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whatever to the present. The action was brought in 1878 and the defendants pleaded *liberum tenementum* in themselves. They had no paper title and could therefore only prove their plea by shewing possession for twenty years, to the exclusion of the rightful owner under the statute of limitations, which statute in the province of Ontario where the land lay enacted that in case lands granted by the crown of which the grantee, his heirs or assigns had not taken actual possession by residing upon or cultivating some portion thereof, should when in a state of nature be taken possession of by some person not claiming under the grantee of the crown, the statute should not begin to run against the grantee of the crown his heirs or assigns, unless it should be shown that such grantee, &c., while entitled to the lands had knowledge of the same being in the actual possession of such other person, but should only begin to run from the time that such knowledge was obtained. The defendant, Francis McConaghy, having been examined as a witness admitted that he had never lived upon the land (he lived in fact in an adjoining township), and that he had never entered on the land until within the last few years, since 1835, except occasionally to cut some timber suitable for use in his trade as a cooper; and it appeared that even for this purpose he had not entered on the land since 1840. There was evidence to show that other persons with whom the defendants did not claim privity had been in possession of part of the land but none of these appeared to have ever seen or to have been aware of McConaghy's entrance upon the land for the purpose of cutting and of his cutting the timber upon the occasions spoken of by him—the possession which the parties who had been in possession of the land prior to 1845 lacked the essential condition to the statute of limitations beginning to run against the

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grantee of the crown, for it did not appear that such grantee or any person claiming under him had entered upon the land by residing thereon or cultivating any portion thereof or had any knowledge of any other person having taken possession thereof. In 1845 an entry was made upon the land by one acting for the grantee of the crown, and from that time down to the commencement of the action the possession was that of persons claiming under the persons through whom also the plaintiff claimed. The learned judge who tried the case alone as a jury rendered a verdict for the plaintiff, holding that upon the above evidence the defendants had not acquired title to the land under the statute of limitations, and this court was of opinion that he could not with propriety have rendered any other verdict. It is obvious that a judgment rendered upon such a state of facts as appeared in that case can have no application in the present case. The entries of Francis McConaghy upon the land in that case to cut the timber which he said he did cut had more the appearance of acts done *animo furandi* than *animo domini*.

Appeal dismissed with costs.

Solicitor for appellant: *Edward J. Hodgson.*

Solicitor for respondent: *Francis L. Haszard.*