1946

*Nov. 13, 14
*Dec. 20

BETWEEN:

DOMINION ATLANTIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

HALIFAX AND SOUTH WESTERN RAILWAY COMPANY (PLAINTIFF).. } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Railway—Limitation of action—Lease of railway siding with reservation of user—Lease or licence—Adverse possession—Statute of Limitations—Owner conveying siding—Whether "lessee" acquired prescriptive title—Easement by prescription.

Respondent's predecessors in title in 1918 demised to appellant certain lands on which there was a railway siding, for the term of one year, reserving to the lessors the use of the siding in common with the lessees. Appellant continued to use the siding in common with respondent after the expiration of the term but rent was paid during the term only. In 1930 the respondent acquired title to the said lands and in 1945 brought action for a declaration of title free from any right or interest on the part of appellant. Appellant contended that, by reason of the lease, the exclusive right of occupation of the land upon which the siding was situate became vested in the appellant during the term of the demise and that, because of the continued use of the siding by appellant, the title of the respondent had become extinguished by reason of the *Statute of Limitations*. The judgment of the trial judge in favour of the respondent was affirmed by the appellate court.

*Present: Kerwin, Hudson, Taschereau, Kellock and Estey JJ.

(1) (1856) Dears. Cr. App. 656.
(2) (1915) 24 C.C.C. 54.
(3) (1906) 11 C.C.C. 207.

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Held, affirming the judgment appealed from (19 M.P.R. 22), that the appellant had not established any prescriptive title under the *Statute of Limitations*. The appellant was not, since the expiration of the term, in exclusive possession nor were the respondent and its predecessors in title during that period ever out of possession.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco,* (1), affirming the judgment of the trial judge, Hall J. (2) and maintaining an action by the respondent railway for a declaration that it was the owner of a portion of a railway siding and entitled to possession thereof.

C. B. Smith K.C. for the appellant.

J. E. Rutledge K.C. and *W. H. Jost* for the respondent.

The judgment of the Court was delivered by

KELLOCK J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia *in banco,* dated 12th January, 1946, dismissing an appeal from the judgment at trial in favour of the respondent in an action brought against the appellant, and others, for possession of certain lands in the town of Yarmouth on which there is a railway siding. In defence of the action the appellant relies upon the *Statute of Limitations.*

The paper title is admittedly in the respondent by virtue of a grant made in 1930. By an indenture of the 1st March, 1918, the respondent's predecessors in title (the Bakers) demised and leased to the appellant for the term of one year at a rental of $5.00

> the ground with track thereon and the necessary land for loading and unloading facilities and situate on property of the said parties of the first part * * * running from said Water street in a south westwardly direction three hundred and fifty feet with the necessary roadway permitting exit and egress from and to said spur. Reserving, however, the right of the said parties of the first part, their agents, employees and lessees to use said siding and track in common with said party of the second part.

The rent was paid on the 12th April, 1918, but no subsequent rent was ever paid. Some 140 feet only of this siding is the subject matter in dispute.

(1) (1946) 19 M.P.R. 22, at 37; 59 Can. Ry. and Transp. Cases 11, at 22.
(2) (1945) 19 M.P.R. 22; 59 Can. Ry. and Transp. Cases 11.

The learned trial judge found that by 1918 the siding had been kept in shape

primarily for the purpose of enabling cars to be unloaded at the Baker's coal and wood sheds

and that it continued so to be used. The trial judge also found:

I am of the opinion that from 1911 to the date of the lease only cars for the Bakers had been placed on the siding. Under the terms of the lease the Railway could place cars there for third parties to unload, paying one dollar per year to the Bakers for such privilege and could also place on it cars carrying freight and material belonging to the Railway without payment of an unloading charge. There is no evidence that the Railway Company placed cars there for its own use during the one year term or at any time since.

There was also some evidence that from time to time the appellant placed a car on the siding for the convenience of a man by the name of Allen. This was done most infrequently and was found by the trial judge to be a permissive occupation and not a continuous using as of right. These findings of the trial judge were affirmed by the full court.

Appellant takes the position that it is unnecessary to decide whether the indenture of 1918 is a lease or a licence. Appellant says that on the expiration of the term provided for by the document appellant became a trespasser upon the lands, but that by reason of the terms of the indenture the exclusive right of occupation of the land upon which the siding was situate was vested in appellant during the one year term with the result that, to quote the factum:

respondent's predecessors in title could not have occupied or used the land on which the siding is situate for agricultural, building or other purposes which would have interfered with the free and uninterrupted operation of trains by the appellant.

Counsel contends that because the use of the siding by both parties has remained the same since the expiration of the term, the title of the respondent has become extinguished by reason of the operation of the *Statute of Limitations*.

In *Lord Advocate* v. *Lord Lovat* (1) the following from the judgment of Lord O'Hagan is cited with approval by Lord Macnaghten in *Johnston* v. *O'Neill* (2):

As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and

(1) (1880) 5 App. Cas. 273, at 288. (2) [1911] A.C. 552, at 583.

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value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.

In *Leigh* v. *Jack* (1), Bramwell L.J. said:

* * * in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it * * *

The appellant has not, since the expiration of the term, had exclusive possession. The respondent and its predecessors in title were never out of possession but continued to use the lands and the siding upon it as they intended to use it.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondent: *J. E. Rutledge.*