

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Des Barres and another v. Shey, from the Supreme Court of Nova Scotia; delivered 4th December, 1873.

Present:

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from the Supreme Court of Halifax in an action of ejectment brought by the Appellant (Mr. Justice Des Barres) to recover 168 acres of land, designated as Lot 81, in the township of Falmouth, Nova Scotia.

The action was tried before the Judge in Equity, and a verdict found for the Defendant. A rule obtained to set aside the verdict and for a new trial, on the grounds "that the verdict was against law and evidence," and "for misdirection," was by a majority of the Judges of the Supreme Court discharged, and the Plaintiff thereupon brought the present Appeal.

The land is claimed by the Plaintiff as a part of his estate, called Castle Frederick Farm, an estate made up of allotments of land originally obtained under Crown grants. Lot 81 appears to have always preserved that designation, and is distant about a mile from the bulk of the estate.

The first grant put in evidence is dated the 11th June, 1761, but it appears from a recital that there had been an earlier grant to the same effect, which the grantees had surrendered on account of some alleged defects.

The grant of 1761 was made by Mr. Belcher, as President of the Council of the Province. It

declared that he had erected a tract of land of 50,000 acres into the township of Falmouth, and he granted "65 shares or rights out of 100 shares or rights whereof the said tract of land is to consist" to Denson and other grantees named in the grant. Each share was to consist of 500 acres, to be thereafter divided into one or more lots to each share.

Two "Books of Record," as they are called, viz., the proprietor's book and the allotment book, were given in evidence, and it appears from them that, as early as 1760 (and therefore before the grant of 1761), Lot 81 had been, in fact, defined and allotted. In the proprietor's book is the following entry:—

"The record of the farm lots draughted by the proprietors of the Township of Falmouth.

"November the 15th, 1760.

	NAMES.	No.
Signed at the foot.	"St. John Broderick,* granted to William Hore..	81"

ABNER HALL, Proprietor's Clerk.

* The words, "granted to William Hore," are in different handwriting and ink.

The allotment book had this entry:—

"A list of the grantees in the Township of Falmouth, with the number and contents of the respective lots drawn by or allotted to them, in the several divisions agreed on by the proprietors.

27th October, 1772."

NAMES OF GRANTEES.	FARM LOTS.	SIX-ACRE LOTS.	FARM LOTS.
"Frederick Dilkes Hore, in his own right and in right of William Hore, Simon Parry, and Samuel Baley."	5th Division, A, Nos. 4, 5, 6, and 7	1st Division, A, No. 5 ditto No. 9, 4th Division, D, Nos. 2 and 3	No. 77, 158 acres. No. 78, 158 acres. No. 79, 158 acres. No. 81, 158 acres."

The evidence afforded by the above entries, viz., that Lot 81 was a defined and separated lot before the grant on which the Plaintiff relies as the foundation of his title, is corroborated by the grant itself.

This grant, dated the 8th April, 1768, is from the Lieutenant-Governor (Mr. Franklyn), and grants to Joseph Des Barres, Esq., several shares in the township of Falmouth, including certain farm lots, and among others "Lot 81."

The next step in the alleged title of the Plaintiff is a deed dated 8th April, 1819, by which Joseph Des Barres conveyed to his four daughters (the Misses Des Barres) two-thirds of his farm and lands, called Castle Frederick Farm, in fee. It may

be observed here that this conveyance conveyed two-thirds only of the farm, and does not mention specifically Lot 81.

By deed of the 1st March, 1832, the Misses Des Barres assume to convey the entirety of Lot 81 for the price of 63*l.* to one Trenholm; and, on the 2nd September, 1846, Trenholm conveyed the lot for the same price to Mr. Justice Des Barres.

This was the documentary evidence relied on by the Plaintiff.

His evidence to show possession of the Lot is as follows: It begins only in 1830. In that year there is some evidence that a surveyor, Anson, employed by the Misses Des Barres to survey their property, surveyed Lot 81. The evidence is of the slightest kind. Anson is dead, and the only witness called to prove the alleged survey knew little of the property. He says that Anson placed stones at the corners, and "blazed" or marked some trees to show the boundaries of the lot. Old marks, he says, were then on the trees; by whom made he did not know.

The next act is this. In 1832 Trenholm, after his conveyance from the Misses Des Barres, entered on the lot, cleared a piece of land and in one day, with the help of twenty men, placed a log house on it. These acts were treated as trespasses by Messrs. Walker, the predecessors in title of the Defendant, and they at once brought an action of ejectment, in which, after a trial, they obtained judgment against Trenholm, who thereupon quitted possession, and is heard of no more in connection with the lot until he conveyed it to the Plaintiff in 1846. The effect of these proceedings in ejectment will be considered hereafter.

In 1847, after the Plaintiff obtained the conveyance from Trenholm, he personally went on the land to make a survey of its boundaries. The Walkers and their tenants were then upon the lot. The survey was forbidden by them. The Plaintiff gave notice to Ferguson, one of the Walkers' tenants, living in a house he had built on the lot, to go out; but the Plaintiff's right was denied, and the Walkers and their tenants remained upon the lot, and no step was taken to remove them.

The only other attempt by the Plaintiff to take possession was in 1855, after the Defendant (Shey)

had bought the lot. In that year he gave one Bacon leave to cut trees on it. There is evidence that this man did fell some, but he was at once prosecuted by the Defendant as a trespasser, and convicted; the conviction, however, being quashed on appeal, upon the ground that, there being a claim of right, the Magistrate had no jurisdiction.

It thus appears, on the best case the Plaintiff can make, that from the date of the grant in 1768 up to the year 1830 no proof is forthcoming of any act done or claim made under it; that, in 1830, a survey was made, but nothing more done; and that, on the only three occasions when attempts were made to obtain possession, viz., by Trenholm in 1832, by the Plaintiff himself in 1847, and by Bacon in 1855, these attempts were resisted by the Defendant and his predecessors, with the results:—That judgment in ejectment was obtained against Trenholm; Bacon was convicted of trespass; and the Plaintiff's right denied and possession held in opposition to him, after his personal demand of it, by those who defied his title and asserted one in themselves.

Their Lordship's will now turn to the Defendant's case. He also sets up title, supported, as he contends, by long possession.

It has been already shown that it is recorded in the proprietor's book, under the date of 1760, that Lot 81 was granted to William Hore.

The next document in point of time is a deed of the Provost-Marshal, conveying Lot 81 to Harris, to satisfy an execution obtained by him against Frederick Dilke Hore, reserving to the debtor the equity of redemption.

In the allotment book, under the date of 1772, F. D. Hore's name appears as the owner of the lot, probably in respect of the equity of redemption.

Deeds were then put in evidence showing that in 1773 the representatives of Harris sold and conveyed the lot to Wm. Nesbitt, and that in 1777 Nesbitt sold and conveyed it to Richard and Daniel Boyd.

The next document, dated 20th April, 1805, is a deed of exchange between John Walker and George Morrison, whereby Walker obtained lot 81 in exchange for lot 80.

There is no doubt a link wanting in this part

of the title, for it is not shown how Morrison became entitled to lot 81. It was, however, proved that Richard Boyd had married his sister.

From the time of this exchange (1805) to the bringing of the present ejection, upwards of sixty years, the Defendant's title is complete.

In 1828, John Walker by his will devised lot 81 to his son Robert for life, with remainder to Robert's sons in fee; and by three deeds made in the years 1851 and 1852, the three sons of Robert Walker conveyed their respective interests in the lot to the Defendant (Shey).

The evidence to prove possession under this title is as follows:—

Proof was given that, at least as early as 1815, and for several years afterwards, in fact during the rest of his life, John Walker (the party to the deed of exchange) cut and carried away timber from the lot in large quantities. Acts of the same character were done after his death by his son Robert, timber being then the only profit derivable from the lot.

In 1832, Trenholm, as already stated, having entered upon the lot and placed a log hut on it, Robert Walker obtained judgment in ejection against him, whereupon he left, and R. Walker took possession of his house and clearing. R. Walker afterwards let this house, and the cleared land to tenants; permitted Fergusson, one of them, to build another house; cleared further portions of the lot in sections, fenced them, and both cropped and pastured the cleared ground. During the same period he cut and gave licenses to others to cut wood, thus assuming to exercise full and actual dominion over the lot.

Robert Walker died in 1842, and after his death his sons (the devisees in remainder under John Walker's will) let portions of the lot to tenants, among others, to the Defendant, and these tenants cropped the land and cut timber, paying their rents up to the time of the Defendant's purchase in 1851 to the Walkers. The Defendant in his evidence says:—"Since that time (the purchase) I have used it as a wood lot, every year taking wood poles and brush off it (in one year as many as 1,500 poles); no man questioning my right, until about nine years ago." This refers to the cutting of wood by

Bacon, which led to his prosecution and conviction for trespass as already noticed.

There can be no doubt that this evidence is in the main correct, for it is supported by the testimony of the Plaintiff's own witnesses. Thus, Weeks, one of them, says:—

“I recollect the law-suit between Robert Walker and Trenholm, there was a good deal of talk and excitement about it. He left the land very soon after the law-suit. I know that directly after the suit he was not on the land. Robert Walker came into possession after Trenholm left. There was no one in possession between Trenholm going and Walker coming. The first thing I knew Robert Walker to do was to cut down trees along the P. Road on the lot. He fenced as he cleared.

“After Trenholm went, he cleared and fenced by sections, year after year, between the P. Road and Mill Road. His fence enclosed the land between the two roads, the whole front, and including what Trenholm had cleared. I cannot say exactly when Walker went into possession after Trenholm left. It might have been next day, but I will say positively it was within a year. This was in 1834, or about that time. I think Robert Walker was 6 or 7 years in clearing what I have mentioned, probably more. His possession was open and notorious. He took crops off. I never heard of any disturbance till the Judge and I went there. Walker pastured cattle there. That would be at least 30 years ago. He was in possession up to the time of his death. He died about 1842. After his death the widow and sons continued to use it. They did not chop as he had done, but occupied and pastured it.

“I judge the land between the two roads comprise 25 or 30 acres. This R. Walker enclosed within his fence, and he cleared it all except the piece that Trenholm cleared, and a lot of rocky hill that has not been cleared.”

Samuel Baker, another of Plaintiff's witnesses, says:—“I knew of Patterson cutting and selling oak timber off this lot. *Their cutting was all over the lot.* I never knew it to go by any other name than Walker's.”

This cutting of timber must obviously have been on the uncleared parts of the lot, beyond the 25 or 30 acres shown to have been fenced, and the last witness gives distinct evidence that it was done throughout the lot.

The proceedings in the ejectment strongly support the Defendant's case. It is true that ejectment, being a possessory action, does not conclude the right; but the judgment is, in this case, cogent evidence of the authenticity of the Defendant's title; for the action was brought by Walker relying and recovering on his title against

Trenholm, who was not a mere tenant, but was setting up the freehold title under which the Plaintiff now claims. But even technically the judgment followed by Trenholm's quitting and Walker's entering upon possession, is unanswerable evidence to establish the fact that the former was ousted from the lot. It was denied, indeed, that there was an ouster, because possession was not given under a writ of *habere facias possessionem*; but it is obvious that the effect of the proceedings in the ejectment must both in law and good sense be the same, where, without such a writ, one quits and the other enters upon possession under and in pursuance of the judgment (see *Wilkinson v. Kirby*, 15, C.B., 430).

Their Lordships can come to no other conclusion on this evidence than that, except during Trenholm's short holding in 1832, the Plaintiff and his predecessors in title never were in actual possession of any part of the lot; and, on the other hand, that the Defendant and his predecessors have been since 1815, or, at the least, since 1832, in such possession. It may be said that the evidence was for the jury, but their Lordships think that in this case they may form their own opinion on the question of possession, for the facts are in the main undisputed, and appear on the Plaintiff's own case; but assuming this not to be so, the jury have found a verdict substantially to the effect that possession has gone with the title set up by the Defendant.

Their Lordships have dealt in some detail with the evidence relating to possession, because in their view the proper conclusions to be arrived at from the consideration of it substantially dispose of the Appeal in favour of the Respondent. They are disposed to agree with the learned Judge who tried the action that both titles are defective, that is to say, neither is perfect throughout its entire course; but it appears to them they are both of such a character, that either is capable of being made good by the presumptions which ought to be made from long possession. Holding this view, they think the learned Judge declared his opinion of the invalidity of the Plaintiff's grant of 1768, and also of the Defendant's title, in somewhat too abstract a manner, and that in leaving the first question as

to possession to the jury, he did not point out with sufficient distinctness the presumptions which might be made in favour of the title of the party whom they might find to have really been in actual possession. But in the view they take of the evidence of possession, and the presumptions properly arising from it, they think that the manner in which the case was left to the jury was not really prejudicial to the Plaintiff; and further that, on the whole case, the jury ought not to have found otherwise than they have done.

It was objected to the ruling of the learned Judge that he was wrong in telling the jury that the grant of 1768 was void because of the previous grant of 1761; and it was further objected at their Lordship's bar, that the grant of 1761, being of undefined and unascertained shares in land, was itself void as against the Crown for uncertainty, and Stockdale's case, 12 Rep. 85, and other cases, were cited in support of the objection. It is not very material to consider the learned Judge's ruling on the first point in the present case, since there is clear evidence that Lot 81 was a defined and separate lot before the grant of 1768; and if this lot had reverted in the Crown (of which there is no proof, but which from possession might have been presumed) it would have passed by that grant.

The second objection is answered by the evidence, and the presumptions arising from it. Granting that the particular lands which were to be allotted to each share were unascertained by the grant of 1761, and the grant was therefore uncertain, it does not thence follow that the title of the Defendant to the specific Lot 81 is bad; for from long possession a good grant of the lot from the Crown to the predecessor in title of the Defendant, after allotment, may be presumed. A similar objection to a Crown grant for uncertainty was made in a case argued before this Committee (*Doe dem. Devine v. Wilson*, 10 Moore, 502), and it was there held that, in such a case, after long modern possession, a supplementary and confirmatory grant might be presumed.

On the other hand, if possession had been found to have gone with the grant of 1768, a presumption ought to have been made in favour of its

validity; notwithstanding there was evidence of an earlier allotment of Lot 81 to another person, and a subsequent documentary title from him.

There is no doubt that, according to the common law mode of trial, it belongs to the jury, under the direction of the judge, to make presumptions of this kind; but in this case the facts appear to their Lordships to be so much one way, and the point on the Statute of Limitations, to be presently considered, so clearly against the Plaintiff, that it would be idle to send down the case to another jury.

Their Lordships wish to observe that the ruling of the learned judge as to the validity of the grant of 1768, to which they have adverted, ought not in any way to affect the Plaintiff's title to other lands comprised therein, where possession has been consistent with it.

There is, again, another ground on which the Plaintiff's title appears to fail. In the state of the evidence as to possession, there is no satisfactory proof that Lot 81 was ever part of the Castle Frederick Farm, so that it could pass under that description by the conveyance of 1819.

But if the Plaintiff's title had been originally good, and was not open to the above objections, it is, in the opinion of their Lordships, barred by the operation of the Colonial Act relating to Limitations (29 Vict., c. 12).

The right of entry certainly accrued more than twenty years before the action; for, as already shown, Trenholm, his predecessor in title, was dispossessed in 1832, and there has been no subsequent possession under his title. They also think that the Plaintiff cannot claim the benefit of section 9; for the possession of the Defendant at the time of the passing of the Act was clearly adverse to his title. Mr. Field, indeed, contended that the possession could not be adverse unless there had been a disseisin. This contention is certainly not correct, if disseisin in its technical and confined sense is meant. This question is elaborately discussed, and numerous authorities collected in the notes to *Doe v. Nepean*, and *Taylor dem. Atkins v. Horde*, in *Smith's Leading Cases*. The result appears to be that possession is adverse for the purpose of limitation, when an actual pos-

session is found to exist under circumstances which evince its incompatibility with a freehold in the claimant. (See vol. ii, notes pp. 595, 613, 614, 6th edit.) In this case, as already stated, there is clear evidence of an actual possession in avowed defiance of the right of the Plaintiff, and with an assertion of another title.

It was urged further on this point of defence, that the Defendant could, at most, only rely on limitation in respect of any particular spots of land found to have been actually occupied by him; and that the Plaintiff, in virtue of his title, must be deemed to have seisin or constructive possession of the rest of the lot. Authorities to that effect were cited. But this doctrine is totally inapplicable to the facts of the present case. The Defendant and his predecessors always claimed title to the whole of Lot 81—the judgment in ejectment was for the whole; and the evidence shows that the Defendant and his predecessors have had actual possession and enjoyment (so far as it could be had of land of this description) of the entire lot. It has been already observed that one of the Plaintiff's witnesses (Bacon) stated—"Their cutting was all over the lot. I never knew it to go by any other name than Walker's."

For these reasons their Lordships are of opinion that the judgment of the Supreme Court, discharging the rule for a new trial is correct, and they will humbly advise Her Majesty to affirm it.