Judgment of the Lords of the Judicial Committee on the Appeals of Dame Adelaide Catherine Aubert de Gaspé and others v. *Bessener and others (six consolidated Appeals), from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 5th December* 1878.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE Appeals of which their Lordships have now to dispose were preferred to Her Majesty against the judgments of the Court of Queen's Bench in Canada, in six different suits. The case of the Plaintiffs, the relief prayed by them, the evidence given,—with some slight variations in that given on the part of the different Defendants,—and the *ratio decidendi* of the Court of Queen's Bench, being substantially the same in all the causes,—the Appeals were consolidated by the order of Her Majesty, and have accordingly been heard together upon one case for the Plaintiffs, the Appellants, and one common case for all the Defendants.

These six suits were possessory "actions on "disturbance" within the meaning of and governed by the 946th, 947th, and the 948th sections of the Code of Civil Procedure for Lower Canada. They were actions which correspond with the *complainte en cas de saisine et de nouvelleté* of the old French law, whereby the persons disturbed in the possession of immovable property sought to be maintained in such possession, and to put an end to the dis-

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turbance. The Plaintiffs are the heirs of the late M. de Beaujeu, and as such are the owners of a considerable quantity of land, chiefly forest, situate in the fourth range of the township of Newton; and the material averments of their declaration in each suit are the following:— 1st. "That during more than a year and a day "before the disturbances or forcible acts of "which they complain, the Plaintiffs had been "the sole, true, and lawful possessors *animo* "*domini*, and as such in possession peaceable, "public, and continuous of lots Nos. 14, 15, 16, "and 17, in the fourth range of the township "of Newton." 2dly. "That the Plaintiffs had "been in the possession of the said lands since "the death of M. de Beaujeu, to whose pos- "session they had succeeded; that he had "always possessed them up to the time of his "decease; so that the possession which they "and their predecessors in estate had of these "lots went back for a considerable number of "years, and was in fact immemorial." 3rdly. "That the Defendant, without any right (*sans* "*aucun droit quelconque*), and with the avowed "and malicious object of disturbing the Plaintiffs "in their possession, had unlawfully and forcibly "entered upon the lots in question in the course "of December 1868, and about the 23rd of that "month, and had there, with others, his ac- "complices or persons employed by him, com- "mitted all kinds of acts of violence and depre- "dations upon the said lots; and in particular "had thrown down, destroyed, and broken down "a fence which was upon those lots, and *sepa-* "*rated them in their frontage from the public high* "*road*, and had demolished a house or building "which the Plaintiffs were causing to be erected "upon one of the lots, and had taken and "carried off the materials of this fence and "building, in order to appropriate them to

" himself." It may be mentioned that this particular lot here spoken of was No. 17.

The declaration states other trespasses, which it is unnecessary to set forth particularly, because they are all of later date than that above stated; and it is hardly in dispute that, supposing the possession of the Plaintiffs to have been such as they assert it was, they had been disturbed in that possession. The declaration further alleged that the Plaintiffs had sustained damages to the amount of $1,000; and the relief prayed was, that the Plaintiffs might be declared to have been and to be the sole, true, and lawful possessors of the said lots of land Nos. 14, 15, 16, and 17, in the fourth range of the said township of Newton, and that the Defendants might be forbidden and restrained for the future from troubling or disturbing the Plaintiffs in the peaceable possession of the said lands, and might also be condemned to pay to them damages and costs.

In each suit there was a demurrer with which we need not trouble ourselves, and also a plea, of which the only allegation that need be noticed is, that the alleged line of demarcation upon which the Plaintiffs relied to distinguish the third from the fourth range in the said township of Newton never legally existed; that there never had been a demarcation sufficient to determine with certainty the extent of the respective possession of the parties in this cause. There is no particular allegation in the declaration to which this allegation of the plea seems expressly to point, unless it be that which may be implied from the words " which " separated them in their frontage from the " high road," that are contained in the statement of the principal trespass. Mr. Fullarton, however, argued (and perhaps he is right) that the allegation in the plea was principally intended

to show that the possession claimed was of an uncertain portion of land, and that the true remedy of the Plaintiffs, if they were entitled to any relief, was by action of *bornage*. But, however that may be, the Plaintiffs put in a replication to the plea, and then stated that the line of division between the third and fourth ranges of the said township was well marked and defined by a public road which had been duly authorized and established by the municipal authority of the place, and of which the existence went back to a period of more than thirty years; that the public road which separated the respective lands of the parties in this cause, and which served them as a *chemin de front*, had always been the sole limit, known and apparent, of their respective possession.

Therefore, the case of the Plaintiffs, as made by their declaration and the replication, may be taken to be that they were in such possession as the law requires of lots Nos. 14, 15, 16, and 17, in the fourth range; that those four lots went up to and were bounded by the line of the public road; and that they having been disturbed in their possession of the lots as so defined had a right to bring their action in order to be maintained in it.

It is convenient here to state shortly the position of the different Defendants. The township of Newton was divided into different ranges, and these were sub-divided into different lots. Their Lordships will have occasion to refer more particularly to the letters patent by which that was done. The lots may be taken for the present to have been so numbered that the lots of the fourth range fronted lots of the third range, having the same numbers, and were only divided from the latter by whatever may have been the boundary between the fourth and the third range. Each of the Respondents

holds or claims to hold a small portion of land in one or other lot of the third range. Lortie holds land in lot 14; Asselin in lot 15; Zavier Levac and Joseph Marcou in lot 16; and Louis Adam, under the arrangement, of which so much has been said in the argument, with Honoré Sauvè, an admitted holder of land within lot 17 of the third range, claims so much only of the land belonging to Honoré Sauvè as is in dispute; that is, so much of Honoré Sauvè's land as Honoré Sauvè may be entitled to on the south side of the public road. Antoine Bessener holds land in No. 18, and is only charged, therefore, with having taken part in the trespasses upon the Plaintiff's alleged land in lots 14, 15, 16, and 17, there being no question in these suits as to lot 18 of the fourth range.

The first case that was tried was that against Asselin; and on the 30th June 1871 Mr. Justice Beaudry, as the Judge of the Superior Court, gave judgment in the Plaintiff's favour. That judgment is at page 81, and it is obvious from it that the learned Judge took the view which their Lordships have already expressed to be their view of what was to be tried in the cause. The judgment, after mentioning and disposing of the demurrer, says:—"And dealing "with the merits of the claim, considering that "the Defendants have sufficiently proved that "they were in open, public, and peaceable "possession of lots 14, 15, 16, and 17 of the "fourth range of the township of Newton, and "that in the year and a day immediately "preceding the bringing of the action in this "cause the Defendant troubled them in their "possession; considering also that the Defen-"dant has not proved a contrary possession. "declares that the Defendants are the legitimate "possessors of the said lots 14, 15, 16, and 17 "in the fourth range of the said townsnip of

" Newton, as bounded by the public road of " the third range of the said township, and in " consequence restrains the Defendant from " troubling them in their possession, and " condemns him in costs."

The Defendant appealed from that judgment, and on the 23rd June 1873 the Court of Queen's Bench allowed his appeal, and dismissed the Plaintiff's suit with costs; the then Chief Justice, Chief Justice Duval, dissenting.

The other five cases were heard in the Superior Court by Mr. Justice Johnson, on the 28th February 1873, and by consent the evidence taken for the Plaintiff in Asselin's case was read as the Plaintiffs' evidence in all the five causes. The Defendant in each produced evidence on his part which varied in some slight particulars in each case. Mr. Justice Johnson, in each case, gave a judgment corresponding with that of the Superior Court in Asselin's case. The Defendants appealed, and their appeals were heard by the Court of Queen's Bench in September 1874. The constitution, however, of the Court had, since 1873, been greatly changed. The only Judge who heard both the appeal of Asselin and these other five appeals was Mr. Justice Taschereau. The latter were heard in the first instance before the four puisne Judges, Mr. Justice Taschereau, Mr. Justice Ramsay, Mr. Justice Sanborn, and Mr. Justice Mackay. They were equally divided; the appeals with the factums of the parties were thereupon by consent referred to those Judges with the addition of Chief Justice Dorion; and on the 21st December 1874, final judgment was given in favour of the Appellants, the present Respondents, reversing the judgment of the Superior Court, and dismissing the Plaintiffs' suits with costs. Two of the Judges, Mr. Justice Ramsay and Mr. Justice Mackay, dissented.

The material *motif* of these last judgments was precisely the same as that of the judgment of the 23rd June 1873. It is in these words:—"Considering that the Respon-" dents"—the present Appellants—"have failed " to prove the principal allegations of their " declaration, and particularly that during the " year and a day before the 23rd December 1868— " the date at which they allege the disturbances " and acts of violence which they impute to the " Appellant began—they, the Respondents, had " been the only true and lawful possessors " *animo domini* in peaceable, public, and con- " tinuous possession of the piece of land (*de* " *l'étendue de terre*) upon which they allege that " the Defendant has disturbed them, and com- " mitted the acts of violence set forth in their " declaration."

The broad question then to be determined upon these appeals is whether the Plaintiffs did in fact prove a possession of the land on which the trespasses are said to have been committed sufficient to support their possessory action according to the law of Lower Canada.

It will be convenient here to consider shortly what are the requisites of such a possession. Their Lordships have heard very long and very learned arguments on each side touching the nature of this possessory action, but they do not think that in this case it will be necessary to wander *inter apices* either of the old French law or of the French law as it now exists in Canada.

The first proposition upon which the Respondents counsel insisted was, that the object of such an action must be definite and certain, and, if a piece of land, must be capable of being distinguished by known, if not visible, metes and bounds, or by some description within the 52nd section of the Code of Procedure of Lower Canada. The Plaintiffs do not dispute

the applicability of this section, but contend that the description which they have used in their declaration is authorised by the following provision which forms part of it: "If the im- " moveable forms part of a parish or township, " the lots in which are numbered, it is sufficient " to state its number." The next proposition contended for by the same learned counsel was, that the possession to be proved by the Plaintiff must be a possession capable of being the foundation of a title by prescription; and, therefore, to use the words of the 2193rd Article of the Civil Code of Canada, continuous and uninterrupted peaceable, public, unequivocal, and "*à titre de propriétaire*," a phrase which is used throughout the Code and in many of the French treatises in opposition to the phrase "*à titre précaire*." Their third proposition was that such possession must have been of at least a year's duration before the act of disturbance complained of; that is, to use the French phrase, that it must have been *une possession annale*. And they showed very conclusively that if the Plaintiff failed to bring himself within the rules defining the nature of the possession required to support a possessory action, his action would be dismissed, and he would be left either to an action of *bornage*, if the question between the parties was really a question of boundary, or to a petitory action in which he might recover upon proof of title.

The two latter propositions were more or less contested by Mr. Bompas on behalf of the Appellants. He argued at some length that it was not necessary to prove a peaceable possession, and he cited authorities on that point. His argument, as their Lordships understood it, came however at last to this, that "peaceable possession" must be taken merely to mean a possession which had not commenced with

violence. He also disputed—though he did not argue that point at much length—the necessity of the *possession annale.* It does not seem to their Lordships to be material for the determination of the present case to consider the last of these objections, because if the Appellants have made out that they were in possession of this land at all within the meaning of the term possession as used in the Code with respect to possessory actions, they were in such possession for considerably more than a year before the trespass.

Their Lordships do not propose to go at length into the law applicable to the case or the consideration of the various authorities which have been cited. It will be sufficient to remark that the propositions above mentioned, which seem to have been accepted as sound law throughout the proceedings in Canada, appear to them to be established.

The declaration is framed consistently with them. They are assumed to be the law governing the case by the judgments both of the Superior Court and of the Court of Queen's Bench.

Moreover, it seems reasonable that the party who relies upon mere proof of actual possession, and does not show a possession commencing with title, should prove a possession from which title may be presumed, and therefore a possession which, if continued during the period of prescription, would ripen into a title by prescription.

Some of the French commentators, and particularly M. Troplong, treat possessory actions as designed for the protection of such a possession when disturbed before the period of prescription is completed.

Their Lordships have now to apply these principles to the facts of the case. The first piece of evidence with which they will deal is the letters patent of 1805, by which the town-

ship of Newton was first created. These are material, not only as evidence of title which cannot be tried in these actions, but as evidence upon the question of possession. The Plaintiffs' contention is that their Lots 14, 15, 16, and 17 in the 4th range have always been bounded by the public road or by a line corresponding with the direction of that road. If they could establish that proposition, they would go far to prove their possession of the land in dispute; because, being in admitted possession of those lots of the 4th range, they would be presumably in possession of whatever, according to the original delimitation of them, was included in them.

The letters patent begin by reciting the creation of this township out of the wild waste and forest lands of the Crown, and in particular that M. Bouchette, who was the then surveyor-general, had made a careful survey, and had laid out the boundaries of the whole township, as follows: "The first boundary beginning at a post or "boundary erected on the province line"—that is, the line dividing the provinces of Upper and "Lower Canada—"at the distance of 17 chains "from the boundary of the seigniory of New "Longueuil marking the south-west angle of "the said township of Newton, running from "thence magnetically north 17 degrees 30 mi-"nutes east along the province line 586 chains "25 links to the south-west boundary of the "seigniory of Rigaud, which boundary marks "the north-west angle of the said township of "Newton, then south, 50 degrees 45 minutes "east 794 chains along the division line between "the said seigniory of Rigaud and the said "township of Newton, to a post erected for "the north-east angle of the said township of "Newton; thence south 19 degrees west 158 "chains along the division line between the "seigniory of Sonlange and the said township

" of Newton, to a post erected on the north-
" easterly line of the said seigniory of New
" Longueuil marking the south-east angle of
" the said township of Newton; thence north
" 36 degrees 45 minutes west 368 chains along
" the division line between the seignory of New
" Langueuil and the said township of Newton,
" to a post erected on the division line between
" the said township of Newton and the said
" 1,000 acres granted to the Honourable Joseph
" de Longueuil; thence south 59 degrees west
" 580 chains to the place of beginning, con-
" taining about 17,193 acres and the usual
" allowance of 5 per cent. for highways." Hence it appears that the township, as a whole, was defined and bounded in exact conformity with the plan which was annexed to the letters patent, and has been the subject of so much discussion at the bar, with one exception only, viz., that the first line mentioned was not exactly the line which appears upon the plan. It ran in the direction of north 17 degrees 30 minutes east, instead of being, as put in the plan, parallel with the south-easterly boundary, which ran south 19 degrees west. The letters patent then go on to state the creation of this tract of land into a township to be called Newton, and that applications for grants of land within it had been made and assented to, and then follows this material recital:—" And whereas in obedience
" to our said royal instructions, and by virtue
" of the aforesaid warrant of survey to him
" for this purpose also directed, our said
" surveyor-general hath surveyed and divided
" the said township of Newton, as nearly as
" circumstances and the nature of the case would
" admit, into eight ranges or rows at equal dis-
" tances of 73 chains 5 links, numbered from
" the north towards the south, from No. 1 to
" No. 8 inclusive, and hath subdivided the said

" ranges or rows into lots of 28 chains 75 links " in breadth, numbered from the west towards " the east; that is to say, the first range into " six lots; the second range into 13 lots; " the third range"—and this is material—" into " 21 lots; the fourth range into 26 lots; the " fifth range into 19 lots; the sixth range into " 11 lots; the seventh range into six lots; and " the eighth range into three lots; making " together 105 lots, containing 200 acres each, " and the usual allowance for highways, save " always and except the irregular lots which are " bounded and abutted as follows." The irregularity of certain lots was of course occasioned by the irregularity of the boundaries of the whole township; and the letters patent contain an elaborate description of each of such irregular lots. To some only of these is it necessary to refer. This is the description of lot 17 in the third range: "Lot No. 17 in the third " range is bounded and abutted as follows; " that is to say, beginning at a post standing " on the division line between the third and " fourth ranges marked 16, 17, being the " division line between the lots Nos. 16 and 17, " running from thence north 19 degrees east till " intercepted by the north-east line of the said " township of Newton, thence south 50 degrees " 45 minutes east, till intersected by the divi- " sion line between the lots Nos. 17 and 18; " thence south 19 degrees west till intersected " by the division line between the third and " fourth ranges, and from thence north 71 " degrees west to the place of beginning, " containing about 179 acres, including the " usual allowance for highways." Again, the following is the description of lot 17 in the fourth range: "Lot No. 17 in the fourth " range is bounded and abutted as follows; " that is to say, beginning at a post

" standing at the extremity of the south-west " line of the said township of Newton on the " division line between the third and fourth " ranges, running from thence south 71 degrees " east, till intersected by the division line " between the lots Nos. 17 and 18, thence south " 19 degrees west till intersected by the south- " west line of the said township of Newton, and " from thence north 36 degrees 45 minutes west " to the place of beginning, containing about " 48 acres, including the usual allowance for " highways." A comparison of these descriptions clearly shows that the two lots, and therefore the two ranges at that point, were divided by a line at right angles to the longer sides of lot No. 17 in the third range, and that those sides, like all the perpendicular lines in the plan dividing the lots, were intended to be parallel to the boundary line dividing the township of Newton from the seigniory of Soulanges. The last-mentioned fact appears conclusively from the following description of lot 27 in the fourth range: " Lot No. 27 in the fourth range, bounded " and abutted as follows; that is to say, beginning " at a post standing on the division line between " the fourth and fifth ranges, marked 26, 27, " being the division line between the lots Nos. 26 " and 27, running from thence north 19 degrees " east, till intersected by the north-east line of " the said township of Newton; thence south " 50 degrees 45 minutes east along the said line " to a post marking the north-east angle of the " said township of Newton, thence south " 19 degrees west along the division line " between the seigniory of Soulange and the " said township of Newton, till intersected by " the division line between the fourth and fifth " ranges."

It is also material to observe that the passages read by Mr. Fullarton show that there was,

under the letters patent, a lot numbered 21 in the third range, which was actually granted *eo nomine* to one Nicholas Graw; and further, that according to the delimitation of lots made by these letters patent there was no lot No. 16 in the fourth range, by reason of the angle made by the two southernmost boundaries of the township at the spot where such a lot would otherwise have been. The general conclusions which their Lordships draw from these letters patent, taken by themselves, are the following: First, that the regular and normal lots were a succession of rectangular parallelograms, formed by the intersection of lines drawn parallel to the boundary between the township and Soulange, the direction of which was south 19 degrees west, with the lines dividing the ranges, which last, being at right angles to the former, were in the direction of south 71 degrees east; the dimensions of each such lot being 73 chains 5 links by 28 chains and 75 links, and their superficial area being about 200 acres. Secondly, that the northerly boundary of lot 17, and the other lots in question in the fourth range, and therefore the southerly boundary of the corresponding lots in the third range, was the before-mentioned line in the direction of south 71 degrees east, which was, therefore, a continuous straight line in that direction, dividing the two ranges. Thirdly, that there was no lot 16 in the fourth range, as originally demarcated; and fourthly, that the copy of the plan referred to and annexed to the letters patent is substantially a correct representation of the lots demarcated, as they were described and granted by the letters patent of 1805.

The subsequent history of the township, so far as the evidence goes, is almost a blank until 1852, when the public road, which has been the occasion of these disputes, was first authorised. The proceedings in the Municipal Council begin

at page 139 of the Record, and their Lordships refer to them only because they do not seem conclusively to state that the road was necessarily to follow throughout its course the line dividing the ranges without any deviation. At page 143 the Municipal Council adopt as their own the *procès verbal* of M. Ranger, who seems to have been the deputy grand-voyer, and say that it is to be the *procès verbal* of the *chemin de front* between the third and fourth ranges of the township, and of the cross-roads (*chemins de descente*) in the third range, which were to come down and join that *chemin de front*. The *procès verbal* of M. Ranger had proposed *un chemin de front*, between the fourth and third ranges of the said township, to be made upon the lots of the third range from the line which separated the said township from the seigniory of Rigaud, up to and including an augmentation of the township of Newton, of which there is no evidence. This road was to be made, repaired, and kept up by all the proprietors of land and occupants of land in the said third range and of the said augmentation; and then there follows a provision as to the bridges. The term *chemin de front primâ facie* supports the inference that the road was intended to run along the whole line of the boundary between the two ranges. And this, if its *terminus a quo* were one point in the boundary line between the township and the seigniory of Rigaud, might have been accomplished consistently with the letters patent and the plan. But the terminus of the road is not at that point. And here their Lordships repeat the regret which they have already expressed, that the Plaintiffs should have brought their case into Court without showing by some plan what is the actual direction of this road, and what is the land in question, and how it is occupied. Of course, the omission to do this is not the fault of those who conduct the

appeal, and the Plaintiffs, if their case suffers from it, have only themselves to blame.

All the evidence, however, agrees in this, that at some point this road follows a line, which it is impossible to reconcile with the boundary delineated on the plan. There is great discrepancy among the witnesses as to the precise point of divergence, but there is a general agreement that at some point or other, which, upon the evidence, may be safely put as lying westward of Lot 14, the road does diverge, and proceeds either in a curve or a straight line to its terminus, in a northerly direction, and at an angle with that which appears upon the plan to be the dividing line between the third and fourth ranges. The place upon which the trespasses are said to have been committed, and the land in possession of which the Plaintiffs seek to be maintained, lies between the line of the road and that line upon the plan.

Their Lordships have already intimated that when dealing with this plan and the letters patent, they mean to give no judgment on that which is not before them, viz. the title to the lands; but that if the Plaintiffs could have proved that their lots as originally granted did go up to the line of the road, by showing that that contention was consistent with the letters patent and the plan, they would have given strong and almost conclusive proof of the possession necessary to maintain their action. That they have failed in this seems to their Lordships to be mathematically demonstrable. Mr. Bompas in his reply has dwelt upon certain alleged discrepancies in the written figures as to the contents of the different lots which are to be found on the plan; and has thence argued that the plan is not to be depended upon. It is not, however, the plan alone which he has to meet. It is impossible, without re-writing, as

it were, the whole of the careful and elaborate description of the different lots which is contained in the body of the letters patent and define the subjects of the subsequent grants, to reconcile the line thence appearing to be the boundary between the ranges with a line going off from it at an angle, whatever that angle may be. It is further to be observed that, in order to support the contention that the line of the road was the original boundary of the ranges, it is necessary, first, to account for the existence in the fourth range of a lot No. 16, of which the letters patent make no mention, and for the disappearance from the third range of lot No. 21, which was described and granted as part of that range by the letters patent.

The Plaintiffs then have to make out by evidence other than and independent of the letters patent, that their lots did go up to this alleged boundary. They rely strongly upon the testimony of Daoust and Biron, and others, who speak to the line of the road having followed the old posts of demarcation between the lots which had existed from the time at which the lots were first defined. There is a want of evidence as to the present existence of those posts; but it may nevertheless be true that up to the point of divergence the road, and the ditches which belong to it, did follow the original boundary between the third and fourth ranges as demarcated by such posts. But this evidence, so far as it relates to the line of the road after it makes the admitted crook, is, in their Lordships' opinion, far too loose to be set against the clear inferences to be drawn from the letters patent and the plan. Their Lordships then must hold that the Plaintiffs have failed to establish that the line of the road was the original boundary of their lots Nos. 14, 15, 16 and 17.

It has, however, been argued that the Plaintiffs have at least proved such actual possession and enjoyment of the disputed gore of land as leads to the inference that the line of the road has become the reputed and acknowledged boundary of their lots; and have thus substantially established the truth of the allegations in their pleadings.

In support of this argument a good deal of reliance has been placed upon certain leases granted by them or their ancestor to various persons, and in particular to one Wattier. Of the leases granted to him, the first is dated the 28th September 1865, the second the 30th November 1866. There is also a lease of the 17th November 1866 granted to Abraham Sauvé, and one of the 9th March 1867 granted to Paul Arsenau. It may be remarked of those leases that they only profess to deal with the lots 14, 15, 16, and 17, in ranges four and five, and that in the description of those lots the three first speak of their being bounded in front by the "cordon," which separates the fourth from the third range, a description which seems to refer to the line of delimitation as originally laid down.

The lease to Arsenau speaks of the boundary as "*par devant au trait quarré.*" We do not exactly know what is the precise significance of that term, but it seems to point to some line at right angles with another, and certainly not specifically to the road. The last lease, which is that to the Monpetits, and which was granted when the dispute was hot, and almost immediately before the trespass, is the only one in which the land is expressly said to be "*tenant* "*en front au chemin de front actuellement pratiqué* "*du troisième rang du dit township.*" That does, no doubt, specifically mention the public road as the boundary.

The evidence of what was done under these leases is far from satisfactory. Wattier's leases were to cut wood within the limits described in them, and he does, no doubt, swear that he has cut wood on a portion of the land in dispute, but it does not clearly appear to what extent he went. He says that he did not go up to the road, but that he went within an "*arpent et un quart du chemin en question.*" A witness however on the part of the Defendants says that Wattier did not go within four or five arpents of the road. The evidence of what was done by the other lessees is not more satisfactory, and, such as it is, is met by evidence on the other side that during the currency of the leases certain acts were done on the part of the Defendants which were apparently done *animo domini*, so that the possession cannot be said to have been unequivocal or undisputed. In weighing the evidence of both sides, the nature of the land in question must be considered. It is clear on the evidence that it is only partially cleared forest land, and it is impossible, therefore, to expect that kind of proof of possession which we should have, supposing the land were all settled and in the occupation of tenants cultivating it and paying rent to one party or the other.

Then there is the evidence of Biron, a sort of agent or head forester, and of his subordinate foresters, speaking no doubt to a considerable period of time, as to their treating people who came upon this land as trespassers, thus asserting the rights claimed by M. de Beaujeu and his family, as they say, up to the road. This evidence would be of greater weight if the piece of land in dispute was not admittedly contiguous to the other large tracts of land of which the Plaintiffs hold undisputed possession. For if the Beaujeu family had put these people

on the disputed land as foresters to watch and protect only that particular piece of land, that might be an act implying an ostensible taking of possession; but it is obvious that this establishment of foresters was kept up for the whole of their estate, and therefore the mere existence of such an establishment ceases to be very material. Those witnesses no doubt speak of treating persons who came upon the land from the third range as trespassers, but their testimony is met by evidence on the other side to the effect that many of the acts which the Plaintiffs treat as trespasses and other acts of user and occupancy were done under a claim of a right. Moreover, they themselves admit that the Defendants or these under whom they claim have done such acts as the digging of rude wells, the establishment of an oven on the south side of the road, the erection of pigsties, the pasturing of cattle and the like, and even the running of fences upon what the Plaintiffs say was their land in order to keep in their cattle; which latter act may have been really intended to prevent the cattle from straying beyond what their owners asserted to be the boundary of the third and fourth ranges. If the land in question had been clearly shown to have been in the undisputed possession of the Plaintiffs, these acts might have been explained in the way the witnesses seek to explain them by saying that they did not seriously affect the Plaintiffs' interests and were therefore permitted to take place. But when it is, to say the least, extremely doubtful whether the land in question was not originally in the third range, such acts of ownership become very material as showing that the occupants or owners of the third range did them *animo domini*, having never abandoned the right of possession which may have originally belonged to them.

A distinction has been taken by Mr. Bompas in his reply between the actions against Adam and those against the other Respondents. It is founded upon the action which in 1857 was commenced by one Gatien Beauchamp, who was then in possession of lot No. 17 of the third range against the late M de Beaujeu, claiming to have the boundaries between his lot and lot No. 17 of the fourth range defined. It was an action of *bornage*. The declaration alleged that the parties were contiguous proprietors; that there was no clear boundary between their lands, and that the Plaintiff wished to have such a boundary laid down. The Defendant pleaded that the heritages described in the declaration were not contiguous, but that a public road and the land for a public road divided them; adding that such land for a road existed as well by virtue of the letters patent erecting the said township as by the *procès verbal* of the Municipal Council of the 13th December 1852; and treating the land over which the road passed as the land, not of the Plaintiff, but of the municipality of the township, he insisted that there was no ground for an action of *bornage*. The Plaintiff's action was dismissed, and so far it may be said that the public road was incidentally treated as the known boundary between the lots. It does not appear what evidence was taken in the cause, but the judgment was in these words: "Considering that the "Plaintiff has not proved his allegations, and that "it is well known that there exists there a road "sanctioned, separating the properties of the "Plaintiff and the Defendant whereby they are "completely separated, the Court dismisses the "action." After that the property was sold in execution, and passed to Honoré Sauvé. Honoré Sauvé, as already has been stated, was in possession of so much of lot 17 in the third range as is north of the road, and he has transferred all

rights which he may have to land south of the road to the Defendant Adam.

These proceedings are no doubt, some evidence against Adam, but their Lordships do not think that they are conclusive upon the question of the Plaintiffs' possession of the land claimed by them as part of their lot No. 17 as by way of estoppel; and on the other hand they find in the evidence of the witnesses for the Defendant that not only had Sauvé exercised acts of ownership of the kind already described on the land south of the road, but that Beauchamp himself had done so, and therefore that there had been throughout a disputed possession. Moreover, their Lordships think that it is scarcely possible in these actions to distinguish so much of the land as is said to belong to lot 17 from the residue of the disputed gore of land. They are of opinion that, if this were done, there would no longer be that clear definition of the object of the demand which the 52nd section of the Code of Procedure requires; and therefore that the case against Adam must stand or fall with the other cases.

Their Lordships do not think it necessary to go at greater detail into the evidence; it is sufficient to say that upon a review and careful consideration of it during the long time which the argument of this case has occupied, they have come to the conclusion that there is no ground for disturbing the finding of the Court of Queen's Bench, namely, that the Plaintiffs have failed to prove such a possession of the land in question as is sufficient to maintain a possessory action. Accordingly their Lordships must advise Her Majesty to dismiss all the Appeals and affirm the judgments of the Court of Queen's Bench, with costs.