

*Lessees of Lawson et al v Whitman, (1851),*

1 NSR 208

Halliburton, C. J.

[1] It appeared at the trial that the land in dispute was included in a grant which was made to Jonathan Belcher in 1773, which the lessees of the plaintiff claim by several mesne conveyances.

[2] The case therefore rests upon the defendant's claim under the statutes of Limitation.

[3] It appears that in the year 1784 a grant passed to William Sutherland, and several other grantees bounded to the south upon the north line of the Belcher grant; but it is quite clear that instead of the south line of Sutherland's grant, having been laid out upon the ground on the north line of the Belcher grant, it was placed upwards of a mile to the south of it, and that possession according to that line has been held by those claiming under Sutherland's grant for more than double the number of years requisite to give a title under the statute. This was indeed so far admitted at the argument that the plaintiffs did not claim to dispossess the defendant of that part of the land which he had actually cultivated and occupied, but as he had defended for a portion of it which was still in a wilderness state, they contended that they were entitled to a verdict for that. The defendant, however, contends that as the deeds under which he claims, contain the uncultivated as well as the cultivated land, and he or those under whom he claims have held by those deeds for upwards of 50 years that he is entitled to retain both.

[4] It has long been recognized as law that when a man without colour of title, claims to hold land under the statute against him who shows title that he shall only retain what he has actually occupied for 20 years.

[5] But the defendant maintains that when the original entry was under colour of title and possession, and was taken by metes and bounds, 20 years actual occupation of part gives the virtual possession of the whole so as to establish a title under the statute, and reference was made to several cases decided in the United States in support of this position.

[6] The situation of lands in this Province resembles that of those in the United States so much more than of those old and long cultivated lands in the mother country, that we may frequently consider with advantage the view which their courts have taken of questions of this nature. And on turning to their reports and elementary writers, I find that although they sustain the position of one who enters and holds for 20 years under color of title they have guarded it with so many reasonable exceptions that there is little danger of injuring the rightful owner in cases of conflicting constructive possession. It would occupy too much time to cite the cases at length upon this subject, they are fully detailed and ably

commented upon in Angel on Limitations (Chap. 31). See also the observations of Story, J., in *Prescott et al., vs. Nevers*, [4 Mason, 430.]

[7] Our natural sense of justice points out a strong distinction between a lawless intruder who enters upon the land of another without any pretence to claim it as his own, and one who deems he has a right to enter, but is not clothed with a strictly legal title. There can be little doubt that the object of the Legislature in passing the Statute of Limitations was rather to shield those who held under defective titles than to protect mere wrongdoers; although their object could not effectually be maintained without barring all investigation into the legal title where the owner had allowed an adverse possession to be held against him for 20 years, and thus sheltering both.

[8] If ever there was a defendant who might most conscientiously claim the protection of the statute, it is the defendant in this case. The grant to Belcher passed in 1773: after his death the title vested in the Kirbys, in 1779, who took possession of the southern portion of the land by their agent, and commenced improvements upon it, but although they were in the constructive possession of the whole tract of five thousand acres or more, no act of ownership was ever exercised by them or their agents upon the northern part of the tract, although they held the land until the year 1813, when the conveyance was made to Murphy. In 1784 long prior to this, the grant called the soldiers grant had passed to Sutherland and others, bounded southerly upon the north line of the Belcher's grant. The passing of a grant of so large a tract of land, 12,250 acres, to a numerous body of recently disbanded soldiers must have been a matter of great notoriety in the settlement, and yet there does not appear to have been any opposition given by those interested in the Belcher grant to laying out the soldiers grant by a line far to the south of that now claimed as the north line of the Belcher grant. In this state things appear to have remained until the sale to Murphy in 1813, forty years after the Belcher grant passed and I think it well worthy of remark that the plan annexed to the conveyance to Murphy indicates an acquiescence in the south line which had been run for the soldiers grant. For in the deed to Murphy there is a reservation of town lots without any other description of their position than a reference to the plan, and on that plan we find them laid down very near the north line, while the north line now claimed is nearly two miles to the southward of them. There is no proof of any attempt having been made to run the line 480 chains north from the shore, until after the sale to Murphy, nor has anything further been done than running out the lines according to the description in the grant, although the defendant and several others claiming under the soldiers grant were then living within those lines. Watt, himself, so far recognized a line of the soldiers grant farther south than that now claimed, that subsequent to the running of this north line he expressed his surprise, "said it was not his land, that it was the soldiers grant, and he did not claim the land there."

[9] While all this is permitted by the lessees of the plaintiff, and those under whom they claim, let us see what is actually done by those under whom the

defendant claims. William Sutherland, one of the grantees in the soldiers grant, it appears, drew No. 4, the lot now occupied by defendant, and on the 4th Oct., 1792, he conveyed it with all the buildings and improvements thereon, by very particularly described metes and bounds, to John Peitzsh, as a lot containing 650 acres. This deed was recorded 4th July, 1798. On the 21st April, 1798, John Peitzsh conveyed the same lots by the same metes and bounds to Hugh McDonald, the grandfather of the defendant. This deed was recorded Sept. 25th, 1798. Hugh McDonald resided on the land, cultivated and improved it, and from him it has descended to the defendant. At what precise time William Sutherland, the grantee, took possession of this lot in severalty, does not appear, but it was evidently before 1792, when he conveyed it with a dwelling house, cow house, etc, to Peitzsh. Nearly 60 years ago then the grantee sold it and it has since passed from purchaser to purchaser. It has descended from grandson to grandson, and has been held adversely to the lessors of the plaintiff and those under whom they claim, ever since Sutherland, the grantee, first took possession of it.

[10] Although the possession was originally taken erroneously there is no reason even to surmise that the error was intentional, no one who has been long conversant with the proceedings in this court will be surprised at it: grants, particularly those conveying large tracts of land, were seldom, if ever, laid out with any approach to accuracy, and though the mistake was a great one, and that south line of the soldiers grant, if established, would deprive the claimants of the Belcher grant of 2,000 acres of land; yet it was not greater than that originally committed by the officer of the Crown, who, with the intention of granting, 5,000 acres of land, described it by metes and bounds, which according to the testimony of Kent, included upwards of 8,000; such mistakes were of frequent occurrence, sometimes operating against the grantees, but more frequently in their favor.

[11] But without advertng to motives with which we have little to do, it is clear that in point of view, a grantee under the soldiers grant took possession upwards of 60 years ago of a lot of land as part of that grant which it now clearly appears had been granted to Belcher. That he conveyed it by metes and bounds to Peitzsh in 1792, that Peitzsh conveyed it to McDonald in 1798 by the same metes and bounds, and from McDonald it has descended to his grandson, the defendant, who has long occupied it and exercised the usual acts of ownership over property of that nature, and therefore without laying down any inflexible rule as to adverse possession taken by metes and bounds under color of title, I think that under the circumstances of this case, the defendant is well entitled to hold all that his grandfather bought; and therefore that the rule to set aside this verdict should be discharged.