

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Macdonald v. Lambe (No. 47 and No. 60 respectively), from the Court of Queen's Bench of Lower Canada: delivered 12th July, 1867.*

Present :

LORD CAIRNS.

LORD JUSTICE TURNER.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD T. KINDERSLEY.

THE actions in which these Appeals are brought were petitory actions to recover possession of two pieces of ground in the fifth range of Russeltown, in the Seigniory of Beauharnois.

These pieces of ground have been styled in the papers, and in the arguments, Lots 16 and 17 ; but it is clear that the whole formerly went by the description of Lot 16, and that the division into two lots did not take place until some time about the year 1834, at which time the division was made by Livingstone, the agent of the Seignior, in his own plans.

It was admitted in the argument before us on behalf of the Respondent, that the land in question formed a part of the Seigniory of Beauharnois, as originally granted in 1729 by the French King ; and one of the points in dispute in the Court below has thus been removed.

The Judgment delivered in the primary Court of Lower Canada by Mr. Justice Smith in favour of the Respondent proceeds upon the principle that the Respondent and Goodwin, his predecessor, had been in possession of this land from 1807, and that

this possession must be taken to have been by permission of the Seignior, and that, therefore, the Seignior could not eject the Respondent, but only claim from him rights and dues such as a tenant should render to his Seignior. This view of the case was again pressed in argument upon these Appeals, but their Lordships are of opinion that, although there may be some facts appearing in the evidence which would form a ground for such an argument, the pleadings between the parties render the argument inadmissible. The Appellants in both the Appeals allege in their Declaration that the Respondent wrongfully, and without any title, took and obtained possession of the land, and has kept illegal possession of it, and pray delivery of the land. The Respondent, on the other hand, after certain objections to the Plaintiffs' title, which are now out of the case, alleges a seisin of the lands in 1807 by Goodwin, a transfer in 1833 from Goodwin to the Respondent, and that the land has been peaceably, openly, and uninterruptedly possessed and enjoyed by Goodwin and the Respondent, *animo Domini*, from 1807 to the present date, and that the Respondent has a right to be declared proprietor and owner of the land.

Their Lordships are of opinion, with the Court of Queen's Bench of Lower Canada, that the case is thus put on both sides as one of adverse possession, and that what the Respondent has undertaken to prove is not a tenure, express or implied, under the Seignior, but a title by prescription, for thirty years and upwards, against the Seignior.

The first question, therefore, is one of fact: in whom has the possession of the land—meaning thereby Lots 16 and 17 (formerly styled Lot 16)—been for thirty years prior to 1855? If possession has been *de facto* in Goodwin and the Respondent, that possession is admitted to be an adverse possession.

The piece of land which, before the year 1834, had been known as Lot 16, had on the north and east, or more accurately on the north-west and north-east, the natural boundary of the Black River and English River. On the west, or south-west, it was bounded by Lot 15, and on the south it extended, according to the evidence, to the line called the Hemmingford Line. Taking the parol evidence

in the case, and more particularly that of Stafford, Allard, and Porcheron, it appears that one Levy Petty was in possession of the lot in 1807, in which year Goodwin took possession of it; that a house was built upon it in Petty's time, which Goodwin at first occupied, but afterwards built a house for himself; that there was a pretty large clearing when Goodwin came; that Goodwin laboured and cropped the land, and was a married man living with his family; that Goodwin paid the bridge-tax for the lot; that when a road crossing Lot 16 was projected by the inhabitants Goodwin was asked, and upon certain conditions consented, to give the land required for it; and that the whole of the lot from the north end of it to the Hemmingford Line was known as No. 16, and as the Goodwin Lot.

The possession of the whole by the Respondent from 1833 is still more clearly proved, and was, in fact, little, if at all, disputed.

There is, however, a piece of evidence coming from the Seigneur himself, or his agents, which their Lordships look upon as still more conclusive on the fact of possession. It appears that in the year 1828 steps were taken, upon the death of Mr. George Ellice, the former Seigneur, to require from the persons then holding the lands an exhibition of the titles under which they held. A list is given of the persons then found in possession of the lots in Russeltown on whom circular notices from the agents of the Seigneur were served, and the name of David Goodwin is there entered as the person in possession of Lot 16 of the third section; service being stated to have been made by delivery of the circular to his wife, and speaking to himself afterwards. His possession is treated as a possession of the whole lot, for a distinction is made in other cases where a lot is possessed in halves by different persons; and the proceedings in 1828 are upon the footing of the persons mentioned in the list having been in possession for some time. The result of these proceedings is, for this purpose, immaterial; but what has been stated is evidence of the most satisfactory description that the agents of the Seigneur in the year 1828 found Goodwin in possession of the whole lot (then known as 16), and this evidence, coupled with the testimony in the

case, establishes to the entire satisfaction of their Lordships a possession by Goodwin and the Respondent of the whole lot for upwards of thirty years.

The other questions in the case are questions of law. Goodwin gave up possession to the Respondent in 1833, making over his title by the following document:—

“Russeltown, September 21<sup>st</sup>, 1833.

“This may certify that I do this day sell, convey, and give up all my right, title, and clame that I have or ever had to the lot of land that I now reciede on, to James Lamb, beining lot No. sevenet-neth in the third section.

(Signed) “DAVID GOODWIN.

(Signed) “JAMES RICHARDSON, } Witnesses.”

“PATRICK MAHON, }

It is admitted on both sides that it must be taken that the word “seventeenth” is in this document to be read as “sixteenth,” but it was contended that the document was insufficient to connect the possession of Goodwin with that of the Respondent: First, because it was a document *sous seing privé*, and therefore without date as regards third parties; and, secondly, because it was not an instrument amounting to a conveyance and *translatif de propriété*. Both these objections were overruled by the Court of Queen’s Bench, and, as their Lordships think, rightly. The first of the objections, viz., that the document is *sous seing privé*, was little argued by the Appellants; and their Lordships do not think it necessary to add anything to the reasons for disallowing it given by Mr. Justice Meredith.

As to the objection that the paper is not a conveyance *translatif de propriété*, it would, their Lordships think, be somewhat remarkable if, where the real object is to show that an incoming occupier claims under and by way of direct continuation of the occupation of an outgoer, and where at the time there is no real title to be conveyed, an instrument adapted to pass a real title should be required. Their Lordships think, however, as did the Court below, that there is no foundation for this objection in any of the authorities which have been cited. The authorities speak of a predecessor and successor, of

the successor claiming by contract or by will, and of a legitimate continuation of possession; and they are careful to negative as a sufficient connection the mere fact that one possession has immediately preceded the other, and they do no more than this. There is in the present case ample proof from the paper, and from the parol testimony, of a *bonâ fide* sale from Goodwin to the Respondent, and of possession taken and continued under that sale; and this, in their Lordships' opinion, is sufficient.

The Appellants contended, however, that inasmuch as under the Act 6 Geo. IV, cap. 59, Mr. Edward Ellice, the Seigneur, had, by the surrender of the 20th October, 1832, vested the Seignior and the ungranted lands thereof, including, as was said, those now in question, in the Crown, to be re-granted in common socage, there was an interruption in the prescription, since no prescription would run against the Crown. Their Lordships do not think it necessary to consider how far under any circumstances this argument could be maintained, inasmuch as in the present case they find that no acceptance of the surrender by the Crown was made until the grant of the 10th of May, 1833, so that the land was surrendered and re-granted *uno flatu*, and merely as a mode of converting the tenure, and there never was any possession or ownership of the land by the Crown.

Their Lordships have assumed, as was ultimately conceded by the Counsel for the Appellant, that the case falls to be decided, so far as any question of law is concerned, by French law. But if principles of English law were to be applied, the prescriptive title of the Respondent would not, in their Lordships' opinion, be less strong.

Their Lordships will humbly advise Her Majesty that both these Appeals should be dismissed with costs.

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1875  
The following is a list of the names of the persons who have been admitted to the membership of the Society since the last meeting of the Council, held on the 15th of the month of January, 1875.

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