Date: 19981119 Docket: C.A. 142822

NOVA SCOTIA COURT OF APPEAL
Cite as: Partington v. Musial, 1998 NSCA 191
Pugsley, Hallett and Cromwell, JJ.A.

BETWEEN:

KATRINA PARTINGTON, CHARLES and MARY MUSIAL, MIKE and EDNA MUSIAL, MIKE and LENORA MERRIGAN, GREGORY and ANNE MUSIAL, ARCHIE and BERTHA MacDONALD, CONRAD and HAZEL MUSIAL, ISABEL MUSIAL and SUE MUSIAL	)	Reginald A. Cluney, Q.C. for the Appellants
	)	Anthony J. Magliaro for the Respondent Valentino Scattalone
Appellants	)	
- and -	)	
CHARLES MUSIAL, VALENTINO SCATTALONE, THOMAS MacNEIL, MARY MacNEIL, READY GARDINER and THE ATTORNEY GENERAL OF THE PROVINCE OF NOVA SCOTIA	)	
Respondents	)	Appeal Heard: October 1, 1998
	)	Judgment Delivered: November 19, 1998

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Pugsley and Cromwell, JJ.A. concurring.

HALLETT, J.A.:

The appellants brought an action under the **Quieting of Titles Act**, R.S.N.S. 1989, c. 382 claiming a certificate of title to a property consisting of approximately five acres in the Ryan River area in the County of Cape Breton. The property is bounded on the west by Seaside Drive, formerly the Union Highway, on the north by the respondent Donald Gardiner's property, on the east by Lingan Bay and on the south by the property of Charles Musial, one of the appellants. Attached as Schedule "A" is a description of the lands claimed by the appellants which I will refer to as the lands in dispute.

The appellants claim: (i) that they have good paper title to the property; (ii) that they and their predecessors in title have been in constructive possession for over 50 years; and (iii) that they have not been dispossessed by the respondent Scattalone and his predecessors in title.

The respondent Scattalone denies the appellants allegations. He claims he owns the major portion of the lands in dispute as grantee in a deed from Mary Ann MacDonald and her brother Francis MacDonald dated October 29th, 1964 and registered at the Registry of Deeds in Cape Breton in Book 751, p. 702. The description of the lands claimed by Scattalone is attached as Schedule "B". The lands he claims are the same as those claimed by the appellants with the exception that Scattalone does not claim a lot measuring 150 x 150 at the northwest corner of the lands in dispute. The respondent Scattalone claims under colour of title and that

he and his predecessors in title have been in exclusive possession of the lands he claims for a sufficient period that, pursuant to the provisions of the **Limitations of Actions Act**, R.S.N.S. 1989, c. 258, the appellants' action is barred.

The respondent Donald Gardiner in his Defence asserts that the appellants are not entitled to a certificate of title with respect to a portion of the lands in dispute that are adjacent to Donald Gardiner's southern border line. This land is shown as "lawn encroachment" on a Plan of Survey of the lands in dispute prepared by Robert Lovell. The respondent Gardiner also asserts that the appellants are not entitled to a clear certificate of title over lands known as the "upper driveway" which passes through the lands in dispute. Donald Gardiner asserts he has a right-of-way by prescription. The upper driveway is shown on a plan prepared by Garnet E. Wentzell dated April 6th, 1981, and revised April 11th, 1996. A copy of this plan is attached as Schedule "C". This plan shows the lands in dispute in a manner that would be more intelligible to the reader than is shown on the plan prepared by Mr. Lovell.

As previously noted, the lands claimed by the appellants include the 150 x 150 foot lot at the northwest corner of the lands in dispute which lot is also claimed by the respondents, Thomas MacNeil, Mary MacNeil, and Ready Gardiner, the heirs of Duncan Gardiner. They did not file a defence.

The appellants claim title through a quit claim deed in 1939 from the Municipality of the County of Cape Breton to M.A. Musial. The deed conveyed three large parcels of land (several hundred acres). The lands conveyed by the Municipality to M.A. Musial had been owned by C.E. Pillsbury. Apparently he was in arrears of taxes and the properties were put up for tax sale pursuant to the provisions of the **Assessment Act**, R.S.N.S. 1923, c. 86. There were no bidders at the sale or at the adjourned sale. In accordance with the provisions of the **Assessment Act**, the Municipality then applied to a judge of the County Court for District No. 7 for an order vesting title in the Municipality. In 1929 the order was granted. Ten years later the Municipality executed the aforesaid quit claim deed to M.A. Musial. Under this deed the Musial family claims title to properties on both sides of the Union Highway. The appellants claim through the heirs of M.A. Musial and his wife Bertha Musial.

The respondent Scattalone claims title through the Daniel MacDonald family. Mary Ann MacDonald was the daughter of Daniel MacDonald. She obtained a conveyance of land from her father which she conveyed to Donald Gardiner in 1969.

Mary Ann MacDonald, it is asserted, acquired her interest in the lands in dispute in 1958 in a deed from her brothers and sisters as heirs at law of Daniel MacDonald. In 1964 she conveyed the major portion of the lands in dispute to

Scattalone.

Scattalone asserts that the Daniel MacDonald family was in possession from 1929 for a sufficient period of time that the appellants' action is barred by reason of the **Limitations of Actions Act**.

The respondents Thomas MacNeil, Mary MacNeil and Ready Gardiner claim through Duncan Gardiner who was the grantee in a deed from Mary Ann MacDonald dated December 11th, 1969 and registered in the Registry of Deeds for Cape Breton in Book 832, page 635. They claim that the 150 x 150 foot lot is included in this conveyance.

The respondent Donald Gardiner acquired the property he occupies by a deed from Mary Ann MacDonald dated December 11th, 1969, recorded in Book 832, page 632. This property is immediately to the north of the lands in dispute. However, Donald Gardiner claims possessory title to the lawn encroachment area plus a right-of-way, both of which are located on the lands in dispute.

The appellant Charles Musial claims an interest in the lands in dispute as one of the heirs of Bertha Musial. He is also named as a defendant in the action brought under the **Quieting of Titles Act**, presumably because he owns the lands immediately south of the lands in dispute and is, therefore, an abutter.

The trial was held before Mr. Justice Edwards. In a written decision he denied the appellants' claim to a certificate of title to the lands in dispute.

He ordered that Scattalone should receive a certificate of title to the lands in dispute excluding the 150 x 150 foot lot but subject to a right-of-way over the so-called upper driveway to serve Donald Gardiner's property to the north and subject to the so-called lawn encroachment by Donald Gardiner on the lands in dispute.

In paragraphs 3 and 4 of the Order, the trial judge ordered that Donald Gardiner:

> ...shall be entitled to the continued use, enjoyment and right of way over the existing "upper driveway" extending from the Union Highway, Gardiner Mines to his residence, as described by Deed recorded at the Registry of Deeds, Sydney, Nova Scotia in Book 832, Page 632. Said right of way to be in favour of the said Donald Gardiner, his heirs, executors and assigns;
>
> IT IS FURTHER ORDERED that the defendant Donald Gardiner shall receive a Certificate of Title for lands described as "lawn encroachment" on the plan of survey of Horace R. Lovell, dated January 14, 1992;

The trial judge further ordered:

> ..... that the estate of Duncan Gardiner shall receive a Certificate of Title for a lot of land measuring approximately 150' x 150', said lot being located in the north western corner of lands shown on the plan of survey prepared by

> Horace R. Lovell, dated January 14, 1992. Said Certificate of title to be subject to and not include the right of way detailed in paragraph 3 herein, and the area of "lawn encroachment" detailed in paragraph 4 herein;

The appellant has discontinued the appeal against that part of the Order granting a right-of-way to Donald Gardiner over the upper driveway and the granting of a certificate of title to Donald Gardiner with respect to the lawn encroachment area which, like the upper driveway, is located on the lands in dispute.

The respondent Scattalone takes no issue with the right of Donald Gardiner to use the upper driveway nor the right of Donald Gardiner to possession of the area marked as "lawn encroachment" on the Lovell plan. The respondent Scattalone does not claim ownership of the 150 x 150 foot lot at the northwest corner of the lands in dispute.

The Appeal

The appellants raise two issues which are intertwined. They assert Justice Edwards erred in law in failing to find that the appellants had good paper title to the lands in dispute and secondly, that he erred in concluding that the acts of occupation of Scattalone and his predecessors in title, the Daniel MacDonald family, were sufficient to bar the appellants' action. The appellants assert that the trial judge's finding that Scattalone and his predecessors in title had been in exclusive possession sufficient to bar the appellants' claim to title was against the weight of

evidence.

Counsel for the appellants correctly conceded in oral argument that whether or not the trial judge erred in granting a certificate of title to the estate of Duncan Gardiner for the 150' x 150' lot at the northwest corner of the lands in dispute will turn on this Court's decision on the issues raised on appeal with respect to the finding by the trial judge that Scattalone's predecessor's in title had been in exclusive possession of the property for sufficient time to bar the appellants' claim to a certificate of title.

Specifically, the appellants' assert that their predecessor in title, M.A. Musial, had acquired good title in fee simple free from encumbrances to the lands in dispute by reason of a quit claim deed M.A. Musial obtained from the Municipality in 1939 which in their opinion extinguished any possessory title claim Daniel MacDonald may have had at that time. They further submit that the acts of possession by the Daniel MacDonald family and their successors in title in the period from 1939 to 1997 were insufficient to establish possessory title that barred the appellants' claim.

The Trial Judge's Decision

In view of the issues raised on the appeal, it would be appropriate to

review in some detail the decision of the trial judge. After referring to the conveyance to Michael A. Musial in 1939, the trial judge correctly recited that M.A. Musial bequeathed all his property to his wife the late Bertha Musial who died intestate in 1965. The appellants are her heirs in law. The trial judge made reference to the fact that title to the lands in dispute had vested in the Municipality as a result of a vesting order dated June 8th, 1929, recorded in Book 301, p. 754. I will have more to say about the vesting order when I deal with the appellants' argument that Justice Edwards erred in failing to find that the appellants had good paper title.

As noted, the abstract of title filed by the appellants at trial indicates that the lands in dispute were at one time owned by C.E. Pillsbury. Several Pillsbury properties consisting of large acreages were put up for tax sale in or about 1927. The abstract of title makes reference to the Order of the County Court for District Number 7 vesting title to the Pillsbury properties in the Municipality of the County of Cape Breton. The Order recites that as there were no bidders at the tax sale, the Municipality made application to the Judge of the County Court for a vesting order as provided for in the **Assessment Act**, R.S.N.S. 1923, c. 86. As previously noted, the Order was granted and, as a consequence, title to the Pillsbury properties vested in the Municipality which some ten years later quit claimed its interest in these properties to Michael A. Musial. The surveyor, Lovell, testified that the lands in dispute were a part of the lands conveyed to Michael A. Musial in 1939. There is virtually no evidence as to how he came to this conclusion. His opinion was not

contradicted by any expert evidence called by the respondents. However, the respondents, too, claimed paper title. They claimed through the Will of a William Gallant.

While it is impossible from a reading of the descriptions in the 1939 quit claim deed to ascertain whether the lands in dispute were part of the lands conveyed by the Municipality to Michael A. Musial, it is likewise impossible from a review of the trial record, to ascertain where Gallant obtained title to the lands through whom the MacDonald family claim. It is also impossible to ascertain what was devised to Daniel MacDonald by Gallant's Will as the devise is merely described as "100 acres of land bounded as follows: joining Andrew MacNeil lands on the east".

After referring to the background information respecting the vesting order, the trial judge stated:

> In 1929, the property was occupied by Daniel MacDonald. In fact, I am satisfied that Daniel MacDonald occupied the property for some years prior to 1929. In Will Book No. F/294 dated June 27, 1891, is the Will of one William Gallant. In that Will, Mr. Gallant bequeathed 100 acres to Daniel MacDonald. It is difficult to be certain whether that 100 acres included the land in question but I think that it did. In any event, it is possible that any paper title held by Daniel MacDonald was extinguished by the 1939 Deed from the Municipality to Michael Musial. For reasons I will explain, I do not have to determine the paper title issue.

For reasons which I will develop, this finding that Daniel MacDonald occupied the property in 1929 is an important finding of fact relevant to the disposition of this appeal.

The learned trial judge then recited the law applicable to property disputes in which claims of possessory title are raised. He correctly stated that there is a presumption that the party having a good record title to a piece of property is, in fact, the true owner. He then recited from Justice Jones' decision in **Afton Band of Indians and Perro v. Province of Nova Scotia**, (1979) 29 N.S.R. (2d) 226 where at p. 240 Justice Jones quoted with approval a passage in **13 Canadian Encyclopaedic Digest**, 2nd edition at pp. 20-23:

> Possession must be considered in every case with reference to the peculiar circumstances. The acts constituting possession in one case may be wholly inadequate to prove it in another. Possession is a question of fact and such matters as the character and 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, are to be taken into account in determining the sufficiency of a possession. The existence of a fence is evidence of occupation but it is not conclusive evidence that such occupation as exists is exclusive. Nor is the roaming of cattle over the land a sufficient act of possession. The possession of land necessary to bar the title of the true owner must be actual, constant, open, visible and notorious occupation, by some person or persons, not necessarily in privity with each other in succession but to the exclusion of the true owner, for the full statutory period; the

> possession must not be equivocal, occasional, or for a special or temporary purpose. Satisfactory proof of a possession answering in all respects these conditions is required. A person cannot invoke the aid of The Statute of Limitations unless he, or those under whom he claims have been in possession, or what is equivalent to it.

There is no question that this is a correct statement of the law relevant to the adverse possession claim of the respondents.

The trial judge then made reference to a decision of Justice Glube dated November 18th, 1980. This decision was rendered in an action brought by the appellants against Rita Gardiner for a declaration that the appellants were owners in fee simple of lands to the south of those lands then and now owned by Charles Musial. The Charles Musial lands are south of the lands in dispute. Rita Gardiner had claimed possessory title to this parcel of land.

With reference to Justice Glube's decision in the 1980 lawsuit, Justice Edwards stated in his reasons:

> .....Madam Justice Glube states:
>
> > I find that on the preponderance of evidence that the 1939 Deed to Mr. M.A. Musial did, in fact, grant the property to him in fee simple; that, under the provisions of s. 178 of the *Assessment Act*, valid title to the property was vested in Mr. M.A. Musial and, subsequently, to the heirs, who are the plaintiffs, and that there have been no acts of possession sufficient to satisfy

> either constructive possession or actual possession by the defendant such as to allow the defendant to claim ownership by colour of right or otherwise.

Justice Edwards then identified the issue before him:

> The issue here is whether there has been exclusive continuous open and notorious possession by the MacDonald family which over time ripened into title. I am satisfied that the overwhelming weight of the evidence resolves that question in the affirmative.

The trial judge then made the following analysis:

> The 1939 Deed from the Municipality to Michael Musial does not appear to have had any bearing on the subsequent use of the property by the MacDonald family. Exhibit 5 is a survey plan of Garnet E. Wentzell dated April 6, 1981, and revised on April 11, 1996. Although Mr. Wentzell did not testify as to the accuracy of the plan, most of the witnesses gave evidence in relation to it.
>
> In particular, Mr. Charles Musial gave evidence with respect to the foundation remains of Daniel MacDonald's house and barn. He agreed with the positions of the two structures indicated on the plan though he believed they were in reverse order. In other words, the barn is shown where the house should be and vice versa. He and all other witnesses were in general agreement with the position of the roadway going from the Union Highway east toward Lingan Bay (Bridgeport Basin). Charles Musial did take issue with the roadway shown running in a northerly direction from the previously mentioned roadway to the Donald Gardiner property. I am satisfied, however, that the northerly running roadway

(hereinafter referred to as the upper driveway) did in fact exist and that its position is accurately plotted on the Wentzell plan. Mr. Gardiner [Donald Gardiner] and Mr. Scattalone, as well as a number of witnesses called on Mr. Gardiner's behalf, established beyond doubt that the upper driveway was, prior to 1975, the only means of accessing the property now owned by Donald Gardiner from the Union Highway.

As mentioned, Daniel MacDonald continued to live on the property after the Vesting Order in 1929 and after the Quit Claim Deed to Michael Musial in 1939. Until the early 1940's, he resided there in the old home indicated on Exhibit 5 with his daughter Mary Ann and his son Francis. In or about 1940, because of the condition of the old home, Daniel MacDonald moved into a smaller dwelling near the Union Highway and immediately to the south of the roadway running from the Union Highway to Lingan Bay. At around the same time, his daughter Mary Ann and son Francis moved to a smaller dwelling they had constructed on or near the northerly border of the property in question. I am satisfied that the dwelling Mary Ann and Francis constructed straddled the border between the subject property and the lands deeded to Donald Gardiner by Mary Ann in 1969 (Book 832, Page 632). I am satisfied that the lawn encroachment and driveway shown on Exhibit 3, the plan of surveyor Horace Lovell, dated January 14, 1992, is the area where the Mary Ann MacDonald residence was located.

Daniel MacDonald died in the early 1940's. The small house near the Union Highway was apparently then taken over by his housekeeper, Ms. Mary MacNeil. Ms. MacNeil allowed one Alec MacAskill to reside in the property for some years thereafter. The house was still in existence in 1969 when it and the 60 x 100 piece of property on which it stood was conveyed by Roderick MacNeil and his wife Frances MacNeil to Valentino Scattalone. Mr. Scattalone testified

that although this property was included in the deed he obtained from Mary Ann MacDonald in 1964, he wished to purchase it from the MacNeils in order to avoid conflict and, specifically, to have the residence demolished. The residence by 1969 was quite unsightly and Mr. Scattalone had the local fire department burn it down.

The sequence with respect to the Dan MacDonald home near the highway is confusing but a significant transaction did occur in 1960. In Book 591, Page 505, is a deed dated July 20, 1960, and recorded August 5, 1960, from Mary MacNeil, widow, to Charles Musial. Mr. Musial testified that he purchased this piece of land (which included the Dan MacDonald home) from the subject property for $50.00 because Ms. MacNeil needed the money. The transaction is significant because it demonstrates that Mr. Musial was recognizing a proprietary interest in the subject property by the successors of Daniel MacDonald. In 1995, three years after the commencement of this action, Mr. Musial quit claimed the 60 x 100 piece to the estate of Bertha Musial.

Mary Ann MacDonald continued to occupy the dwelling near the northern boundary of the property from the early 1940's until approximately 1972. During that time, the only access to her dwelling from the Union Highway was the previously described upper driveway. Any vehicles visiting her residence did so by using the upper driveway. She heated her residence with coal. The coal hauler made coal delivery via the upper driveway. On Exhibit 5, the Wentzell plan, there is a well indicated between the foundation remains of the house and barn. Mary Ann MacDonald continued to get fresh water from that well during her residency on the property.

Of interest also is southern boundary of the subject property which forms the northern

boundary of the Charles Musial property. Charles Musial built his residence on the property immediately to the south of the subject property in the early 1940's. He received a deed to the property from his parents, Michael Musial and Bertha Musial, by deed dated April 1, 1943, recorded June 13, 1943, in Book 401, Page 752. Mr. Musial testified that he himself prepared the description for the deed. That description reads in part as follows:

> "BEGINNING at the south west corner of a fence on property at present occupied by Daniel MacDonald and running south east parallel with the road for 240 feet;
>
> THENCE turning in an easterly direction and running parallel with the aforesaid MacDonald's fence a distance of 450 feet to the shore;
>
> THENCE in a northwesterly direction and running parallel with the shore for a distance of 240 feet to the south eastern corner or MacDonald's fence the place of beginning."

[Note: The northern boundary of this property was erroneously omitted from the description.]

The description clearly shows that Mr. Musial recognized that Daniel MacDonald was in possession of the property immediately to Mr. Musial's north. Despite the submission to the contrary by Mr. Musial's Counsel, the description is a clear acknowledgement by Mr. Musial (and indeed by his mother and father) that Daniel MacDonald continued in exclusive possession of the subject property even after the 1939 deed from the Municipality. In addition, Charles Musial testified that he maintained the fence which formed the northern boundary of his property and the southern boundary of the MacDonald

property.

Prior to 1960, that is, 21 years after the Quit Claim Deed to Michael Musial, there is no evidence that the Musial family in any way interfered with or questioned the continued occupation of the subject property by the MacDonald family. There is no doubt but that by 1960, the MacDonald family had been in adverse possession of the subject property for more than 20 years following the Quit Claim Deed to Musial in 1939. That adverse possession was exclusive, continuous, open and notorious. By 1960, that possession had ripened into title.

By deed dated October 20, 1964, and recorded in the Registry of Deeds on November 9, 1965, in Book 751, Page 702, Mary Ann MacDonald and her brother Francis conveyed a parcel of land including the subject property to the Defendant Valentino Scattalone. During his testimony, surveyor Lovell outlined in red on Exhibit 3 the area conveyed to Mr. Scattalone. The conveyance to Scattalone does not include a 150 foot wide lot in the north west portion of the subject property. I am satisfied that this lot was included in the 1969 conveyance by Mary Ann MacDonald to Duncan Gardiner, father of the Defendant, Donald Gardiner (Book 832, Page 635).

In 1965, Mr. Scattalone hired a contractor to bulldoze the alders from the southern portion of the subject property. The Musial family obtained an injunction to prevent Mr. Scattalone from doing further clearing. Mr. Scattalone testified that he had finished what he had intended to do. In view of what I have already said, this act of ownership by the Musials was too late. By the time of the 1964 conveyance to Scattalone, Mary Ann and Francis in their own right and as successors in title to Daniel MacDonald had already established possessory title to the entire subject property. [By deed dated May 16, 1958, recorded in the Registry of Deeds on August 22,

> 1958, in Book 629, Page 525, the heirs of Daniel MacDonald had quit claimed their interest in the subject property to Francis and Mary Ann.] Mr. Scattalone therefore acquired good paper title to the property in the 1964 conveyance.
>
> Bertha Musial MacDonald, Gregory Musial and Charles Musial testified. They described very sporadic activity on the property such as berry picking. Their evidence establishes neither adverse possession by them nor an attempt to interfere with the exclusive possession and control of the property being exercised by the MacDonald family.

The trial judge then, in dealing with the claim of Donald Gardiner for a certificate of title, concluded that when Donald Gardiner received the deed in 1969 from Mary Ann MacDonald to the property adjacent to the north boundary of the lands in dispute, that Mary Ann MacDonald had well-established adverse possession to the lands in dispute including the area indicated as lawn encroachment on the Lovell plan. The trial judge found that Donald Gardiner has maintained this lawn encroachment area since 1969. He then dealt with the right-of-way over the lands in dispute; the so-called upper driveway. He concluded that between 1975 and the “present time” (I presume, 1997), Donald Gardiner continued to make use of the upper driveway having had exclusive access to his property via the upper driveway between 1969 and 1975.

The trial judge then set out his conclusions that are reflected in the order to which I have already made reference.

Disposition of the Appeal

The appellants submit that the trial judge erred in law in not finding that M.A. Musial acquired good title in fee simple free from encumbrances by reason of the quit claim deed from the Municipality to M.A. Musial in 1939, and that the deed extinguished any possessory claim of the MacDonald family by reason of the provisions of s. 155 of the **Assessment Act**, R.S.N.S. 1923, c. 86. In my opinion, the argument must fail as it is based on a fundamental misunderstanding of the facts and a misapplication of the law. In short, M.A. Musial did not purchase the lands at a tax sale and did not obtain a tax deed that had the benefit of s. 155 of the 1923 Act. Section 155 provided as follows:

> **155** Such deed shall be conclusive evidence that all the provisions of this Chapter with reference to the sale of the land therein described have been fully complied with, and every act and thing necessary for the legal perfection of such sale have been duly performed, and shall have the effect of vesting the said land in the grantee, his heirs or assigns, in fee simple, free and discharged from all encumbrances whatsoever.(emphasis added)

Section 155 of the 1923 **Act** is now s. 161 of the 1989 **Act**.

The words “such deed” in s. 155 of the 1923 **Assessment Act** is a reference to a tax deed made in favour of a purchaser who bids in a property at a tax sale. While under the present **Act**, R.S.N.S. 1989, c. 23, a municipality may bid in at a tax sale and if it does, the municipality has the benefit of s. 161 of the 1989

Act, it did not have the benefit of the identical section (155) of the 1923 **Act** when the Pillsbury properties were put up for sale some time in either 1927, 1928 or 1929. The legislation in effect in 1929 provided for a different scheme for sales of real property for arrears of taxes than appeared in more recent **Assessment Acts**.

In view of the reliance by counsel for the appellants on the statement made by Justice Glube in the 1980 decision as to the effect of s. 178 of the 1967 **Assessment Act** (the successor section to s. 155 of the 1923 **Act**) on the 1939 quit claim deed to M.A. Musial, I will review the history of the **Assessment Act** and the amendments to it.

The **Assessment Act**, R.S.N.S. 1923, c. 86 provided, pursuant to s. 144(1), that if there were no bidders at a tax sale, the sale could be adjourned to another date, readvertised and again put up for sale. Section 144(2) provided that if there were still no bid to purchase the property for the full amount of the arrears of taxes, interest and expense due, the municipal clerk, if directed by council for the municipality, was authorized to apply to the County Court Judge for a vesting order and subject to the right of redemption for one year by the owner of the land whose property had been put up for sale for tax arrears, the vesting order “shall effectually vest the land” in the municipality.

Section 144(2) stated:

> **144.** (2) If directed by the council, and the clerk may apply to the county court judge for the district in which such lands lie for an order vesting in the town or municipality in which such lands lie, any lands that have been put up at public auction more than once, and which the clerk has failed to sell for the full amount of the arrears of rates and taxes, interest and expenses due in respect thereto. Such order shall effectually vest the lands in such town or municipality, subject to the right of redemption within one year from the date of such vesting order, on the same terms and within the same time as in the case of lands sold.

Section 147 provided that the clerk, after selling the lands for arrears of taxes, was required upon payment of the balance of the purchase money to give a certificate under his hand to the purchaser.

Section 147(2) stated:

> **147.** (2) The certificate shall also state that a deed conveying the same to the purchaser, his heirs and assigns, will be executed by the warden or mayor and clerk on his or their demand, on payment of two dollars at any time after the expiration of one year from the date of the certificate, if previously thereto such lands have not been redeemed under the provisions of this Chapter.

Section 149 provided that upon receiving the certificate, in addition to the rights conferred under the certificate, the purchaser, subject to the rights of redemption of the true owner would, until he obtained a deed of the lands, be deemed the first mortgagee of the lands.

Section 150 is relevant, particularly with respect to the interpretation of s.

144(2). Section 150 spells out the financial obligations of a person who redeems the property. Section 150 states:

> **150.** If any person who, at the time of such sale, has such an interest in any lands sold under the provisions of this Chapter as would in the case of an ordinary mortgage thereof entitle such person to redeem the same, or if the heirs, executors, administrators or assigns of such person, representing such interest in such lands, at any time within one year from the date of such sale, pays to the clerk the amount of purchase money for which such lands were sold, together with interest, at the rate of six per centum per annum from the day of such sale, and if necessary, on demand of the clerk, in addition, a sum which will leave in the clerk's hands, after paying over to the purchaser, his heirs or assigns, the said purchase money and interest at the rate aforesaid, an amount sufficient to fully discharge all arrears of rates and taxes against the said lands, together with interest to the day of such sale, and the expenses incidental to such sale, such person shall be entitled to receive from the clerk a receipt in the form U in the second schedule to this Chapter.

Section 151 of the 1923 **Act** provided that upon obtaining a receipt, the person who redeemed the property shall have vested in him all the right, title and interest of the person whose lands were sold subject, however, to a lien in favour of the person who had acquired the property at the tax sale for expenses that the purchaser had properly incurred on the lands.

Section 154 is relevant to the interpretation of s. 155:

> **154.** (1) If the land is not redeemed within the period of one year so allowed for its redemption, the clerk, on the demand of the purchaser or his assigns, or other legal representatives, at any time afterwards, and on payment of two dollars, shall cause to be prepared and executed a deed to such purchaser of the land sold.

> (2) Such deed shall be in the form V in the second schedule to this Chapter, and shall particularly and fully describe the land conveyed. It shall be signed by the warden or mayor for the time being and the clerk, and shall be under the seal of the municipality or town.

In summary, s. 150 provides for the financial terms that apply to a person interested in the property who redeems it within the one year period. Section 154 deals with the situation where, if the lands are not redeemed, the purchaser at the tax sale is entitled to have a deed executed in his favour and the deed shall be in form V of the Schedule. Section 155 provides that "such deed" shall have the effect of vesting the said land in the grantee in fee simple free and discharged of all encumbrances. The deed referred to in s. 155 is a Tax Deed to which a purchaser at a tax sale is entitled to received if the lands purchased had not been redeemed within one year of the tax sale.

The appellants submit that the provisions of s. 144(2) (which subsection applies in circumstances where the Municipality has obtained a vesting order), gives the same effect to the vesting order as if it were a tax deed to a purchaser at the tax sale as provided for in s. 155 of the 1923 **Assessment Act**. I disagree. The words of s. 144(2) must be interpreted in context, the result being that the order does effectually vest the lands in the Municipality subject to the right of redemption within one year from the date of the vesting order. However, the words "on the same terms and within the same time as in the case of land sold" do not refer to the nature of the vesting order but to the terms and time frames that a person who wishes to

redeem the property must comply with as provided in s. 150 and s. 151.

A perusal of Form V referred to in s. 154 of the 1923 **Act** is further clarification that the deed referred to in s. 155 is a tax deed that is executed in favour of a purchaser who has acquired a property at a tax sale.

Therefore, I am satisfied from a reading of the 1923 **Assessment Act** as a whole that s. 155 did not apply in circumstances where a municipality obtains a vesting order from the County Court. It only applied with respect to tax deeds to persons who successfully bid in the property at the tax sale.

Between 1923 and 1929 there were some amendments to the **Assessment Act** which would indicate that all was not well with respect to the sales of real property for arrears of taxes. But in this period, the provisions of the **Act** relevant to the effect of a vesting order were unchanged.

There was a major revision of the **Assessment Act** by Chapter 2 of the **Acts** of Nova Scotia 1938. What was s. 155 of the 1923 **Act**, and is now s. 161 of the 1989 **Act** with respect to the effect of tax deeds, appeared as s. 157 in the 1938 **Act** . Chapter 2 of the **Acts** of 1938 effected a change in procedure with respect to the rights of a municipality at a tax sale. Section 163 provided that if the sale was adjourned because no bids were received and if no bids were received at the

adjourned sale, the Municipality could bid in the property (subject to the redemption rights of the defaulting taxpayer). Prior to this, there was not a procedure which authorized a municipality to bid at a tax sale. Section 161 of Chapter 2 of the **Acts** of 1938 provided that, in such an event, title vested in the municipality in a like manner and to the same extent as such lands would have vested in a person who had received a certificate under the provisions of s. 149. By reason of the amendment, the Municipality, for the first time, was authorized by the Legislature to bid in the property at the tax sale. Prior to this, the legislation simply provided that title would be vested in the Municipality upon obtaining a court order following a sale where no one bid in the property.

Section 164 of the 1938 **Act** required that a certificate be filed in the Registry of Deeds and further provided that if the owner did not redeem, title to the property vested in a municipality <u>just as if it were a purchaser at the tax sale</u>.

The **Assessment Act**, R.S.N.S. 1954, c. 15 continued the provisions as contained in Chapter 2 of the Acts of 1938 with respect to title vesting in the municipality free from encumbrances if the municipality bid in the property at the tax sale (ss. 164-166).

There were major amendments to the **Assessment Act** by Chapter 3 of the **Acts** of Nova Scotia, 1966. However, nothing of significance changed with

respect to the municipality's power to bid in at a tax sale. Section 164 of the 1938 **Act** was continued as s. 188 of the 1966 **Act**.

In R.S.N.S. 1967, c. 14 of the **Assessment Act**, s. 180 is the same as s. 188 of the 1966 **Act.**

Section 178, R.S.N.S. 1967, c. 14, R.S.N.S. is the section which is in the current **Act** as s. 161 and is the same as s. 155 of the 1923 **Act** which I have previously quoted in this decision.

Section 178 of R.S.N.S. 1967, c. 14 is the section that Justice Glube made reference to in her decision in the 1980 lawsuit between the appellants and Rita Gardiner. It appears as s. 161 in the 1989 **Act**.

There is nothing in the 1938 **Assessment Act** which expressly states that the Legislature intended that s. 157 of that **Act** was to be applied retroactively to vesting orders made before the 1938 **Act** came into force.

If the Legislature had intended that s. 157 of the 1938 **Act** was to apply to a quit claim deed executed by a Municipality subsequent to having obtained a vesting order under the 1923 **Act**, the Legislature would have so stated. Such a legislative intention cannot be inferred from the scheme of the **Act** as amended.

That aside, the Court order obtained in 1929 clearly vested title to the lands in dispute in the Municipality. For the purpose of this decision it is not necessary to decide if a vesting order extinguished a claim of a person in actual possession of the property in question.

The purpose of the 1938 amendments, re: tax sales, was to create a whole new regime which allowed municipalities to bid at tax sales and have the benefit of s. 157 of the 1938 **Act**. Even if it could be said that s. 157 could be applied retroactively to the vesting order so that the municipality would have the benefit of that section, such an interpretation would not stop time from beginning to run in 1929 against the Municipality of the County of Cape Breton or any subsequent owner under the **Limitation of Actions Act** with respect to bringing an action to dispossess the MacDonald family.

There is nothing, either expressed nor from which it can be reasonably inferred, that the Legislature intended that the 1938 amendments that authorized a municipality to bid in at tax sales and have the benefit of s. 157 of the 1938 **Act** would apply to the title obtained by M.A. Musial under of the quit claim deed from the Municipality in 1939. <u>The 1939 sale of three large parcels of land by the Municipality to M.A. Musial was not a tax sale</u>. The fundamental error in the appellant's submission is the failure to recognize that the quit claim deed obtained by M.A. Musial was not a tax deed.

In summary, the 1939 quit claim deed from the Municipality to M.A. Musial did not have the benefit of s. 161 of the **Assessment Act**, R.S.N.S. 1989, c. 23 or any of its predecessor sections including s. 155 of the 1923 **Act**, s. 157 of the 1938 **Act**, and s. 178 of the 1967 **Act**. It was a quit claim deed that followed upon the Municipality obtaining the vesting order in 1929. The quit claim deed was not obtained as a result of M.A. Musial having bid in the Pillsbury properties at the tax sale. The quit claim deed was not a tax deed as referred to in the legislation. The 1938 amendments to the **Assessment Act** and its successor sections do not have any application to the transfer of title by quit claim deed from the Municipality to M.A. Musial in 1939.

Counsel for the appellant relies on Glube, J.'s statement in the 1980 decision to support his position that any possessory claim of the MacDonald family was extinguished by the 1939 quit claim deed to M.A. Musial.

With respect to the action heard by Glube, J. in 1980, it is abundantly clear from a review of her decision that the acts of possession by Rita Gardiner and her predecessors in title to the lands south of the Charles Musial property were insufficient to support a claim to either constructive possession under colour of title or actual possession so as to bar the claim of the Musial family in that action.

Section 178 of the 1967 **Act** which was in force when Glube, J.'s decision

was rendered, had no application to the quit claim deed obtained by M.A. Musial in 1939. A reading of Justice Glube's decision as a whole, and in particular her reference to a decision of Justice Hart in a 1975 action between the appellants and Donald Gardiner, indicates that she simply assumed that s. 178 of the 1967 **Assessment Act** applied to the 1939 quit claim deed. The effect of the 1939 quit claim deed was not relevant to her decision which really turned on the obvious insufficiency of the acts of possession of the defendants in that case to have acquired title against the true owner. As the decision is not reported, I have attached the relevant part as Schedule "D".

In my opinion, the appellants' argument, that any title the MacDonald family had to the lands in dispute was extinguished by the quit claim deed in 1939, is based on an erroneous assumption that somehow the quit claim deed from the municipality had the benefit of the provisions of s. 155 of the 1923 **Assessment Act**, or s. 157 of the 1938 **Assessment Act**. With respect to the sale of the Pillsbury properties for arrears of taxes in the late 1920s, the effect of the legislation in place at that time was to vest title in the municipality. However, there was nothing in the applicable legislation that would have the effect of extinguishing in 1939 the proprietary interest of the MacDonald family, if any, in the lands in dispute by reason of the Municipality in 1939, executing the quit claim deed to Michael A. Musial. Nor would the Legislation stop the running of the limitation period.

The evidence supports the finding of the trial judge that the MacDonald family was in occupation of the old house, barn, etc., on the lands in dispute between 1929 and 1939.

It is clear from a review of Justice Edward's decision that he seemed to be relying on the comments made by Justice Glube in the 1980 action with respect to the effect of the successor section to s. 155 of the 1923 **Assessment Act** when he stated that it is possible that any paper title that the Daniel MacDonald family may have had was extinguished by the 1939 quit claim deed. A reading of s. 155 of the 1923 **Assessment Act** in context makes it clear that the section only applied to persons who purchased at tax sales.

Justice Edwards did not err in failing to conclude that the 1939 deed established the starting point for title and that M.A. Musial, as the grantee in that deed, had good title in fee simple to the lands in dispute by reason of the provisions of s. 157 of the 1938 **Act** or its successor sections. In my opinion, 1939 is not the starting date for the possessory title claim of Scattalone. This is so because Daniel MacDonald, as found by the trial judge, was occupying the lands in dispute in 1929. The MacDonald family lived on the lands in dispute. Therefore, the MacDonald family was in open and exclusive occupation, adverse to the interest of the Municipality which in 1929 owned the property, by reason of the vesting order. Therefore, the time within which the true owner (the Municipality or a successor in

title) could bring an action of trespass against the MacDonalds or their successors in title started to run in 1929.

I do not agree with the appellants' further argument that the trial judge erred in failing to decide the paper title issue.

While it is clear that he did not decide that issue, and that the evidence at trial, such as it was, would support a finding that M.A. Musial acquired good paper title in 1939, it is equally clear that the outcome of the action would be determined on Justice Edwards' assessment of the sufficiency of the acts of possession by the MacDonalds and their successors in title in determining whether the appellants' claim to title was barred by reason of the provisions of ss. 10 and 11(a) of the **Limitations of Actions Act**, R.S.N.S. 1989, c. 258. Those sections provide:

> **10** No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. (emphasis added)
>
> **11** In the construction of this Act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:
>
> (a) where the person claiming such land or rent, or some person through whom he claims, has, in respect to the estate or interest claimed,

> been in possession or in receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; .....

The right to bring an action in trespass against the MacDonalds first accrued to the Municipality in 1929 when title vested in the Municipality and the Daniel MacDonald family was in possession of the lands in dispute. As previously stated, I reject the appellants' argument that the effect of s. 155 of the 1923 **Assessment Act** or any of the successor sections was to eliminate, in 1939, any prior claim to possessory title by the MacDonald family. I would also note that Justice Edwards did not decide that the 1939 quit claim deed from the Municipality to M.A. Musial eliminated the prior possessory title of the MacDonald family. Justice Edwards said only that the 1939 deed may possibly have extinguished any paper title of the MacDonald family. Therefore, I reject the appellants' argument that in the absence of a cross-appeal concerning the validity of the 1939 deed we should not consider any acts of possession of the MacDonalds between 1929, when the Pillsbury properties vested in the Municipality, and 1939 when the Pillsbury properties were conveyed by the Municipality to M.A. Musial.

This leads to the second issue as to whether the trial judge's finding that Scattalone and his predecessors in title, the Daniel MacDonald family, had

exercised sufficient acts of possession over a sufficient period of time to oust the appellants, was against the weight of the evidence.

The scope of appellate review from a trial judge's findings of fact and the drawing of conclusions from those findings is limited. The law has been crystalized by the Supreme Court of Canada in a number of recent decisions. In **Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at p. 121 MacLachlin, J., stated:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P.(D.) v. S.(C.),* [1993] 4 S.C.R. 141, at pp. 188-89 (*per* L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (*per* Wilson J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8 (*per* Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

In **Schwartz v. The Queen**, [1966] 1 S.C.R. 254, the Supreme Court of Canada stated that failure of a trier of fact to consider certain evidence is the type of error that can and will justify a reassessment of the balance of probabilities on factual issues but that in order to disturb the trial judge's findings of fact the appellate court must come to the conclusion that the evidence in question and the error by the trial judge in disregarding the evidence were overriding and

determinative in the assessment of the balance of probabilities with respect to the factual issue.

The Supreme Court of Canada reaffirmed this view in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010.

I have set out in some detail the trial judge's findings of fact. In my opinion they are supported by the evidence. The evidence supports the finding that between 1929 and 1940 the Daniel MacDonald family occupied the lands in dispute. In that period they lived in the main farm house located in the center of the property. There was a barn and a well located in the general area where the main house was located. Both Bertha Musial and Charles Musial remember the MacDonald family occupying the old house. There is no evidence to suggest that the MacDonald family was not in occupation between 1929 and 1939. The evidence is undisputed that in the early 1940s Daniel MacDonald moved to a small house near the highway. The main house was in a state of dilapidation thus dictating the move. At the same time, Mary Ann MacDonald and her brother Francis constructed a small home, either on the property eventually sold to Donald Gardiner or on a location that the trial judge found straddled the line between the Donald Gardiner property to the north and the lands in dispute. Counsel for the appellants states that this finding of fact was not supported by the evidence. He points out that Donald Gardiner and Myles Gardiner as well as Greg Musial, Bertha MacDonald and Charles Musial

testified that the small home built by the MacDonald children was upon the lands eventually conveyed to Donald Gardiner and did not straddle the line. Under direct examination Donald Gardiner had marked the location of Mary Ann MacDonald's dwelling on the Wentzell plan. He showed it as straddling the line. It is in answer to a general question put to him on cross-examination that he said her dwelling was on the land she conveyed to him. There is undisputed evidence that Mary Ann MacDonald lived in this small house from 1940 until the early 70s. The area marked lawn encroachment on the Lovell plan was kept cleared by Mary Ann MacDonald and by Donald Gardiner. Even if the small house did not straddle the boundary line, the evidence supports a finding that Mary Ann MacDonald and her successor in title, Donald Gardiner, clearly exercised open and continuous possession of the lawn encroachment area adverse to that of the Musial family from 1940 to 1997. This area is adjacent to the house and on the lands in dispute.

The only means of vehicular access to the MacDonald children's small home from 1940 until the mid 1970s was through the upper driveway so-called, which was used for coal deliveries to the home. She used the well which was located near the old homestead. There is no evidence that there was any other well to which she had access. It is clear from the evidence that in 1943, when Charles Musial obtained a deed to the property south of the lands in dispute, that he recognized the southern boundary of the lands in dispute was occupied by the Daniel MacDonald family as indicated in the excerpts from Justice Edwards decision that I have quoted.

It is of interest to note that in Glube, J.'s decision in the 1980 action relating to the parcel of land south of the Charles Musial lot, she stated at p. 9:

> George MacNeil is seventy-six years old and, between 1932 and 1936, he lived on the piece of land where Charles Musial's house is now located. He intended to buy that property and thought it was owned by Mr. MacDonald. On checking the Registry of Deeds, he found that there was no recorded deed of the land into Mr MacDonald. He had built a house and, when he moved, he removed the house. When he lived there, he said there was a line fence between the land he was occupying and the MacDonald property. The MacDonalds had cleared land north of the land that he wanted to buy. He stated he never saw the MacDonalds or anyone else use land to the south of the piece he occupied (now occupied by Charles Musial).

And at p. 9 she stated:

> Charles Musial acknowledged that Mary Ann and her brother, Francis, MacDonald had lived to the north of his property. They had kept some cows and pigs. Charles Musial claimed that he maintained the fence between his property and the MacDonald property since 1940.

It is clear from Justice Edwards' decision that he considered the evidence adduced by the appellants that they did not observe any significant acts of possession exercised by the MacDonald family in the relevant time period. The trial judge also considered their evidence as to the limited use they made of the lands in dispute.

Daniel MacDonald lived in the small house adjacent to the roadway and

just south west of the area where the old farmhouse was located from 1940 until his death which was likely some time between 1946 and 1948 and that his housekeeper stayed on in the house following his death.

In 1964 Mary Ann MacDonald conveyed the lands described in Schedule "B" to Scattalone. He has paid the taxes on these lands ever since. While it is true that the Musial family were assessed for taxes from 1939 to the present time for several large parcels of land (the Pillsbury properties) which in the opinion of Surveyor Lovell included the lands in dispute, it is equally clear from a review of the evidence that double assessments were not uncommon in the Municipality. Therefore, the fact that both claimants paid property taxes is of no great consequence in this case.

As previously noted, in the early 70's the Musials claimed title to the property that had been conveyed by Mary Ann MacDonald to Donald Gardiner in 1969. This property is just to the north of the lands in dispute in this lawsuit. In a short oral decision dated November 28, 1975, Justice Hart found that the Musial claim to title to that property was barred by the provisions of the **Limitations of Actions Act** as the MacDonald family had acquired possessory title to that property. Justice Hart stated:

> Having heard the evidence, I do not feel it is necessary for me at this point to really decide what the effect of the Deed was in 1939 from the Municipality to the Plaintiffs. I would assume at

> this stage that that Deed did convey in fact good title to the Plaintiffs at the time and extinguish any title which was held by the MacDonald family prior to that period. But, I am further satisfied that certainly since 1950 and in all likelihood since before that time that Mary Ann MacDonald did, in fact, occupy the premises which are in dispute here openly, continuously and notoriously and that the alleged owners of the title knew of her occupation. I am satisfied this occupation continued for a period of more than twenty years. .....

Like Justice Glube, he did not find it necessary to consider the paper title issue. His decision, like that of Justice Glube in the action she heard, turned on the evidence as to the MacDonalds', and their successors', acts of possession. Justice Hart simply assumed that the 1939 deed conveyed good title to M.A. Musial and extinguished any title the MacDonald family had prior to that date. He was not required to consider the effect of the quit claim deed for the purposes of his decision with respect to the lands north of the lands in dispute.

The appellants have argued that the use of the lands in dispute by Mary Ann MacDonald from 1940 onward was <u>equivocal</u> and, therefore, insufficient to found a valid claim to possessory title. Counsel suggests that her use of the driveway and the well would, at the most, support some sort of claim to rights-of-way. I disagree with this submission as one must start a review of the possessory title claim in 1929 and look at all of the evidence of possession by the MacDonalds. I would note in particular that the southern side line of the lands in dispute was marked by a fence which was maintained by the appellant Charles Musial after he

acquired the property to the south of the lands in dispute in 1943. Furthermore, there is evidence that Daniel MacDonald lived on the lands in dispute from 1929 until his death in the mid 40's; the MacDonald children's occupation was not confined to the small area to the south of the Donald Gardiner property. They had lived in the old home from before 1929 until the early 1940s when they moved to the small house they constructed. Mary Ann MacDonald lived there until she left in the early 1970s. While she lived in the small house, she continued to use the well and driveway on the lands in dispute as well as the lawn encroachment area as shown on the Lovell plan. In short, the members of the MacDonald family were in visible occupation of the lands in dispute from 1929 into the early 1950s and beyond. In this period their occupation was continuous and extended from the southern boundary to the northern parts of the land in dispute. Their occupation was not equivocal.

Considering the nature of the lands in dispute in this lawsuit, the usage that was made of the land in the period from the 1930s through to the 1970s, the close proximity of the Musial family homes to the lands in dispute, their knowledge that the MacDonald family lived on the lands in dispute and considering all of the circumstances, Justice Edwards did not err in concluding that the possession of the MacDonald family to the lands in dispute was adverse to that of the true owners and was open, continuous, exclusive and notorious; this finding of fact ought not to be disturbed. The time to bring an action against the Daniel MacDonald family began when the Municipality acquired the property in 1929.

Counsel for the appellants submits that as true owners of the lands in dispute, the Musials were at law deemed to be in possession. As a general proposition, a true owner is deemed to be in possession. But in this case, the evidence conclusively proves that the MacDonalds were in exclusive and notorious possession of the lands in dispute when M.A. Musial acquired title in 1939. The evidence is equally clear that the MacDonald family continued in possession thereafter.

Charles Musial testified that an action had been commenced at one time under, as best he could remember, the **Tenants Sufferance Act**, to obtain possession of lands in dispute. He testified that the Musials won at trial but lost on appeal on the technicality that the proceeding had been brought under the wrong Act. There is no such Act; possibly the proceedings were under the **Tenancies and Distress for Rent Act** or the **Overholding Tenants Act**.

Charles Musial could not say when the proceedings were started. He could only say that it was some time before 1975.

Greg Musial testified, on direct, that he could not be sure when the proceedings were brought but that he thought the proceeding was commenced before 1960, “maybe closer to 1950".

There is no reliable evidence as to when this alleged proceeding was brought. Nor were any court records produced to show that an attempt had been made by the Musials to get the MacDonalds off the lands in dispute. Therefore, there is no credible evidence that the Municipality, Michael Musial, his wife Bertha Musial, or their successor in title (the appellants), ever made an entry or exercised acts of ownership between 1929 and 1950 that constituted an interference with the MacDonald family's possession of the property.

The evidence satisfies me that as early as 1950 the Musials' claim to the lands in dispute was effectively barred by the provisions of the **Limitations of Actions Act**.

The Deed from Mary MacNeil to Charles Musial dated July 20th, 1960, conveying a parcel of land 60 x 100 feet (where the Daniel MacDonald small home stood near the highway), was ineffective to convey anything to Charles Musial as the grantor did not have title.

The evidence supports the trial judge's decision to refuse a certificate of title to the appellants and to grant the certificate of title to Scattalone to the lands described in Schedule "B".

Counsel for the appellants concedes that if the appellants fail on the

issues raised on the appeal then the finding that the estate of Duncan Gardiner was entitled to a certificate of title with respect to the 150 x 150 foot lot must stand. Aside from that, I am satisfied that the description in the conveyance to Scattalone makes it abundantly clear that it did not include this lot even though the description in the conveyance to Duncan Gardiner makes it impossible for anyone to determine if the conveyance to him included the 150 foot lot. However, it is logically part of the land that the Daniel MacDonald family had been in occupation of from 1929. Justice Hart found in the action he heard in 1975 that the Daniel MacDonald family had been in possession of the lands to the north of the lands in dispute in this lawsuit. This indicates to me that the Daniel MacDonald family was in occupation of the lands extending in a northerly direction to what is now Donald Gardiner's north line and extending in a southerly direction to Charles Musial's north line.

I am satisfied on the evidence that the trial judge did not err in granting the Certificate of Title to the estate of Duncan Gardiner as it was clearly intended to be conveyed to Duncan Gardiner as it was excluded from the lands conveyed to Scattalone. Furthermore, the respondent Scattalone is not making a claim to this lot.

In short, I would dismiss the appeal with costs to Scattalone in the amount of $1,000.00 plus disbursements. The respondent Donald Gardiner did not take part in this appeal.

Hallett, J.A.

Concurred in:

Pugsley, J.A.

Cromwell, J.A.

C.A. No.142822

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

KATRINA PARTINGTON, CHARLES and MARY MUSIAL, MIKE and EDNA MUSIAL, MIKE and LENORA MERRIGAN, GREGORY and ANNE MUSIAL, ARCHIE and BERTHA MacDONALD, CONRAD and HAZEL MUSIAL and SUE MUSIAL Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
CHARLES MUSIAL, VALENTINO SCATTALONE, THOMAS MacNEIL MARY MacNEIL, READY GARDINER and THE ATTORNEY GENERAL OF THE PROVINCE OF NOVA SCOTIA Respondents	)	HALLETT, J.A.