C.A. No. 106187

NOVA SCOTIA COURT OF APPEAL
Cite as: Conrad v. Nova Scotia (Attorney General), 1994 NSCA 218

Matthews, Jones and Pugsley, JJ.A.

BETWEEN:

DELMER E. CONRAD	)	
	)	C. Richard Coughlan, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Allen C. Fownes
	)	Richard Freeman
	)	for the Respondents
THE HONOURABLE THE ATTORNEY	)	
GENERAL OF THE PROVINCE OF NOVA	)	
SCOTIA, MILFORD'S GARAGE LIMITED	)	
HAROLD RAMEY and BARBARA RAMEY	)	
	)	
Respondents	)	Appeal Heard:
	)	November 16, 1994
	)	
	)	
	)	Judgment Delivered:
	)	December 14, 1994
	)	
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	)	

THE COURT: Appeal allowed with costs on the appeal in the amount of $1500.00 plus disbursements, the cross-appeal dismissed, and the order and certificate of titles in the trial court set aside per reasons for judgment of Jones, J.A.; Matthews and Pugsley, JJ.A. concurring.

JONES, J.A.:

This is an appeal from a decision and order in an action under the **Quieting Titles**

Act.

The appellant claimed title to approximately 100 acres of woodland located at Wellington, Queens County. The original grant to Barnabas Freeman in 1828 contained some 200 acres. The land was subsequently divided into two 100 acre lots running northwesterly from the old Wellington Road. Although not shown on the original grant the land was in fact divided by Beavertail Lake and included an island in the lake.

The land in this action in fact comprised 46 acres on the northwesterly side of the lake, 60 acres on the southeastern side of the lake and the island. The appellant has been granted title to the lot on the northern side of the lake. Title to the southeastern lot and the island is still in dispute in the action.

The title to the 100 acre parcel was conveyed on February 2, 1920 to Albert Ramey from Lawrence and Estella Hanley. Albert Ramey conveyed the land on May 19, 1933 to Elmer Ramey. By deed dated July 6, 1959 Donald Wade Wile and Mary Elizabeth Wile conveyed the following lands to the appellant Delmer E. Conrad:

> "All those lands and premises which were conveyed to one Roger Cross by Deed from Elmer Ramey dated August 21st, 1956, and in said Deed bounded and described as follows: All the one-half (western) of that certain lot, tract, piece or parcel of land situate at Wellington in the County of Queens, being the land granted by the Province of Nova Scotia on the 28th day of July A.D., 1828, to one Barnabus Freeman, of Milton, and which said lot of land contained two hundred acres, and which said lot of land was conveyed by the said Barnabus Freeman to Michael Seamond by Deed duly recorded in the Office of Registry of Deeds at Liverpool on the eighth day of September A.D., 1846, in Book 14 Page 36, one hundred acres having been sold by said Michael Seamond to Benjamin Hubley and James Finton, as by their deed duly recorded in the Office of Registry of Deeds, Liverpool, July 12th, 1912, in Book 52 page 470 and 471 being the land conveyed by the said Lawrence Hanley and Estella Hanley to the said Albert Ramey by Indenture dated the 2nd day of February A.D., 1920, the lot hereby conveyed being the same lands and premises as were conveyed by Albert Ramey to Elmer Ramey by Deed dated May 19th, 1933 and recorded in the Office of the Registry of Deeds at Liverpool, N.S., in Book 72 page 95-96, and being the same lands as conveyed to the male Grantor herein by deed from Roger Cross and Marlene Cross, his wife, dated the 2nd day of March, A.D., 1959."

The description refers to deeds from Elmer Ramey to Roger Cross dated August

21, 1956 and from Roger and Marlene Cross to Ronald Wile dated March 2, 1959. These deeds were not recorded in the Liverpool Registry of Deeds. To correct the title a quit claim deed dated November 12, 1969 was executed by Elmer and Helen Ramey to Delmer E. Conrad and recorded on June 29, 1969. The deed stated that the lot conveyed was the same land and premises as were conveyed by Albert Ramey to Elmer Ramey by deed dated May 19, 1933. This chain of title formed the basis of the appellant's claim to the 100 acres.

On February 20, 1946, Albert Ramey gave a maintenance deed to Harold and Barbara Ramey containing the following description:

> "All the undivided half of the lands conveyed to the said Albert Ramey from Lawrence Hanley and Estella Hanley his wife, by indenture bearing the 2nd day of February, A.D., 1920, recorded in the Registry of Deeds office at Liverpool, Queens County, N.S. in Book 69 pp. 672-3; and the portion hereby intended to be conveyed is the portion on Molega Lake and lying between said lake and the lands of Nathaniel Croft, the remaining undivided one-half of said lot being now owned by Elmer Ramey."

On September 16, 1949 Harold and Barbara Ramey gave a mortgage of the lands conveyed to them by Albert Ramey to Milford's Garage Limited. The same lands were conveyed by Sheriff's deed on May 31, 1952 to Lester Turner who in turn conveyed the lands to Milford's Garage Limited on July 22, 1952. By virtue of this last conveyance Milford's Garage Limited claimed title to the lands on the southeastern side of the lake. It also claimed that it had exclusively occupied the lot since the conveyance in 1952. Harold and Barbara Ramey claimed title to the island by virtue of the maintenance deed and adverse possession.

The action was tried before Mr. Justice Haliburton. Survey plans prepared by Mr. Errol Hebb,P.L.S. were filed. He testified that he prepared the plans after visiting the site with Delmer Conrad and Mr. Elmer Ramey on July 12, 1989. The lot was the easterly portion of the Barnabas Freeman grant. They started on the westerly boundary of the lot on the northwestern side of the lake. They followed the boundary to the northwest corner and then proceeded northeasterly to a pile of rocks. The boundary was clearly marked. They

then followed the northeastern boundary until it came to Beavertail Lake. They then proceeded to the southeasterly side of the lake. They found an area occupied by cottages on the northwesterly side of the 60 acre lot. That area is not included in the claim. Mr. Hebb was advised that Mr. Conrad had not sold the land occupied by the cottages. Mr. Hebb proceeded along the power line until he was in the vicinity of the eastern side of the island. There he found the easterly boundary to the lot which was in accordance with Mr. Ramey's directions. Mr. Hebb subsequently traversed the eastern boundary which adjoined Crown land and was well marked to the Wellington Road. The western boundary from the Wellington Road was marked by a survey marker and a blazed line.

The only evidence of occupation was a cottage road through the lot, the power line and the six or seven cottages on the side of the lake. There was no evidence of logging on the lot on the southeastern side of the lake. There was no evidence of occupation of the island except for camping. Mr. Hebb stated that the lots run more northerly and southerly than in any other direction.

In rebuttal evidence Mr. Hebb stated that he cruised the southeastern lot and did not find any evidence of cutting. In fact he stated there was no evidence of cutting in the previous 40 years. There were no hauling roads.

Kathryn Crossland is the appellant's daughter. In 1970 she went to the property with several others including her father. They went to the lot on the north side of the lake. They then walked to the southeastern side of the lake where there was a small beach. She visited the lake in succeeding years until 1973. In 1976 she went to the lake and discovered the cottages on the shore. She went home and brought her father back to the site and showed him the cottages. He was shocked when he saw the cottages.

Sherry Nodding worked for her father, the appellant, after 1979. She produced the notices of assessment for the property for 1989 and 1993.

Harold Ramey was called by the defence. He testified that his grandfather, Albert

Ramey owned the one hundred acres. Albert Ramey gave him 50 acres and Elmer Ramey the remaining 50 acres. Elmer Ramey got the lot on the northwest side of the lake. Harold got the lot on the southeastern side by the maintenance deed. Harold Ramey stated that he and his grandfather cut firewood on the lot over several years. He also testified that he logged the island and went out to the island about three times every summer. The island was included in the maintenance deed by the inclusion in the deed of all other lands owned by Albert Ramey. He acknowledged that the logging occurred before he received the maintenance deed. He claimed he paid taxes assessed on the island. When Harold Ramey gave the mortgage the maintenance deed prohibited any conveyance of the lands while the grantors were still alive except with their consent. He informed Milford's Garage Limited of this condition when he gave the mortgage. Apart from camping and visiting the island there was no other occupation.

Elmer Ramey was called as a witness. He was 82. He testified that he bought 100 acres of land which he stated was on the western side of the lake. He said Harold and Barbara got the other hundred acres when they moved in with his father. He acknowledges signing the quit claim deed to Delmer Conrad. He said he did not know what it was for but signed because the land was not his and he was paid for it. He did not read the deed. He denied that he had shown the property to Mr. Hebb.

Eldridge Ramey testified that he sold the cottage lots. He bought the land from George Milford. He also cut 80 or 90 cords of wood on the lot for George Milford. That was around 1960.

Lester Turner is president of Milford's Garage limited. He originally purchased the land when the mortgage was foreclosed. He testified as follows:

> "A. It must have been '50, late '50's I would say or '60.
>
> Q. And what have you done in relation to the land from that time forward?

A. I haven't done hardly anything. I cut a few, some cord wood onto it for firewood.

Q. Un hum. Have you had to keep the lines up?

A. No, somebody run the lines for me.

Q. Even back then?

A. No then, no later on.

Q. What other things would you have done to the land, if anything?

A. I hunted onto it.

Q. How often would you do that?

A. In the fall. And I had Eldridge when he was living around there, he worked for me and he used to go out that way and he'd go back onto it once in awhile, drive through it. See if anybody was cutting on it.

Q. Did you ever observe anyone trespassing on the land or doing anything in relation to the land?

A. No, I didn't.

He also stated:

Q. Yeah. So it's Milford's Garage cutting and your rabbit hunting...

A. Right

Q. ...are the only use to which you've put that land?

A. Rabbit hunting and deer hunting.

Q. And any, and the cutting that took place on that land took place when it was, when the, when Milford's Garage was owned by George Milford, is that correct?

A. Right.

Q. And you say you've done some cutting within the last year?

A. Within the last year and a half, yes.

Q. What have you done?

> A. Cut hardwood on it.
>
> Q. How much?
>
> A. I put a, probably 10 or 12 cord. I put in a wood furnace in my house, and I went and cut wood on it."

Barbara Ramey is married to Harold Ramey. She testified that they received the maintenance deed from Albert Ramey. After Albert passed away in 1952, Harold visited the island. Her daughter camped on the island. Mrs. Ramey picked cranberries on the island. They also were assessed and paid taxes on the island.

After reviewing the evidence the trial judge concluded:

> "I did find the evidence of Harold and Barbara Ramey credible insofar as their occupation of the island was concerned. They have exercised their proprietorial right under a conveyance from Albert Ramey which they believed to be valid. With respect to the Island, Harold and Barbara Ramey entered into possession of it in an open and notorious manner and have arguably established themselves on a preponderance of evidence to be the only occupiers. I accept that during the early 1950's, Harold Ramey cut and sold the logs from the island. Their continuous though intermittent use of the island is consistent with its character and with the use which a true owner would make of the property. ...
>
> Using it as a campground, consistently paying the municipal tax levy on the island and their regular seasonal visits in the context of having 'colour of title' amounts in total to something more than disjointed acts of trespass. It results in a claim of which any conscientious owner should have become aware and, therefore, results in the dispossession of the title holder. Harold and Barbara Ramey will, accordingly, have a Declaration of Title with relation to the island."

With respect to the appellant's claim he stated:

> "Applying the provisions of the **Registry Act** makes it clear that the Plaintiff has a superior paper title. The conveyance from Albert to Elmer Ramey recorded in 1936 conveyed 'all' the interest of the father in the property in question. The description was identical with that he had received. Section 27 of the **Act** makes it clear, then, that a subsequent

> conveyance from Albert to Harold of a portion of those lands was of no effect. The evidence of Elmer Ramey as to the understanding between him and his father cannot by any stretch of the imagination satisfy the heavy onus cited by MacDonald J.A. from **Smith v. Hemeon** (above). In view of the frailty of Elmer Ramey's evidence, I am not persuaded that there is any reliable evidence as to what he acquired from his father or 'intended' to convey to Cross as opposed to what was described in that Deed. I do not find the clear and convincing evidence that would permit the rectification of a contract made 50 years ago for the benefit of the present owner who had no interest whatever in the original contract."

He concluded that the paper title in accordance with the **Registry Act** belonged to the plaintiff. However, he went on to conclude:

> "While I find that the superior paper title rests with the Plaintiff, I am satisfied that with the assistance of colour of title, Milford's Garage has established that they and their predecessors have exercised such continuous, open, notorious, and exclusive possession as to exclude the owner from his normal rights."

In the result he found that the appellant's claim was barred by the Statute of Limitations and that the respondents were entitled to certificates of title under the **Quieting Titles Act**. The appellant has appealed from that decision. A cross-appeal was filed on behalf of Harold and Barbara Ramey.

The appellant has raised five grounds of appeal. They are essentially covered in the first two grounds which are as follows:

> "(1) As a matter of law, the Learned Trial Judge erred by failing to apply the correct test to determine adverse possession.
>
> (2) As a matter of law, the Learned Trial Judge erred by misinterpreting the effect of the doctrine of colour of title in establishing title by adverse possession so as to dispossess the true owner of real property."

The cross-appeal contends that the trial judge erred in holding that the appellant had the superior paper title and in failing to permit rectification of the deed from Albert

Ramey to Elmer Ramey.

In **Sherren v. Pearson** (1888), 14 S.C.R. 581 and **Wood v. LeBlanc** (1904), 34 S.C.R. 627 the Supreme Court of Canada dealt at length with the type of possession necessary to extinguish the title of the true owner. In **Wood v. LeBlanc**, Davies J. stated at p. 633:

> "...The nature of the possession necessary to do this in the absence of colourable title was fully considered by this court in the case of **Sherren v. Pearson** 14 Can. S.C.R. 581. It was there decided that isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title under the statute.
>
> In the carefully reasoned opinions of the judges in that case statements on the point are made which do not seem to leave the matter open to any doubt. Chief Justice Ritchie formally approved of the law as laid down in **Doe d. DesBarres v. White** 3 (N.B. Rep.) 595 and at page 585 goes on to say:
>
> > 'To enable the (trespasser) to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose."
>
> And in another place he says,
>
> > 'the trespasser to gain title must as it were "keep his flag flying over the land he claims."
>
> Strong J. and Fournier J. concurred. Taschereau J., (now the Chief Justice of this court, said (pp. 594-5):
>
> > The fact that the wrongdoer or trespasser supposes he has a claim or title to the land does not alter the character of his acts. His unfounded belief cannot diminish or destroy the legal claims of the true owners or deprive them of their right to treat him as a wrong-doer in entering on their land. The effect to be given to

> repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of wilderness lands. If the property is of a nature that cannot easily be protected against intrusion, mere acts of user by trespassers will not establish a right.
>
> Owners of wilderness or wooded lands lying alongside or in rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoliation.

Henry J. said, (page 592):

> Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should *continue that disseisin so as to amount to an ouster*, and that *ouster maintained for the statutory period.* That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of land of which the party claims possession.

Now, in my judgment, the possession necessary under a colourable title to *oust* the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within

> the boundaries of the deed *but only when and while there is that part occupation*. And before it can be extended it must exist and is only extended by construction while it exists. It may be that a person with colourable title engaged in lumbering on land would be held *while so engaged and in actual occupation of part* to be in the constructive possession of all not actually adversely occupied even if that embraced some thousands of acres within the bounds of his deed. But it is clear to my mind that if and when such person withdraws from the possession of the part by ceasing to carry on the acts which gave him possession there he necessarily ceases to have constructive possession of the rest. His possession in other words must be an actual continuous possession, at least of part."

He also stated at p. 639:

> "Evidence that a party claims land by possession either with or without colour of title is not sufficient when it merely establishes that the claimant used the lands in the same way and for the same purposes as an ordinary owner would. A true owner of lands is not bound to use them in any way. He may prefer to leave them vacant. While they are vacant he still retains the legal possession, and he only ceases to be in legal possession when and during the time that he is ousted from it by a trespasser or squatter, who has acquired and maintained what the law holds to be an actual possession. If the squatter claims to have ousted him by constructive possession he must prove a continuous, open, notorious, exclusive possession of *at least part of the lands* the whole of which he lays claim to under his colourable deed."

The following passages are from the text **Anger and Honsberger Law of Real Property** 2nd ed. at page 1515:

> "The possession that is necessary to extinguish the title of the true owner must be 'actual, constant, open, visible and notorious occupation' or 'open, visible and continuous possession, known or which might have been known' to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is 'equivocal, occasional or for a special or temporary purpose'."

And at page 1518:

> "The possession necessary under a colourable title to bar the title of the true owner must be just as actual, open, exclusive, continuous and notorious as when claimed without colour of title, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is such partial occupation."

See also **Harris v. Mudie** (1882), 7 0.A.R. 414.

The trial judge made several references to the failure of the appellant to exercise acts of possession over the land or to exclude trespassers. It appears from his decision that he concluded acts of trespass falling short of actual possession of some portion of the lands were sufficient to dispossess the true owner where there was a claim of color of title.

The trial judge stated:

> "Using it as a campground, consistently paying the municipal tax levy on the island and their regular seasonal visits in the context of having 'colour of title' amounts in total to something more than disjointed acts of trespass."

He also stated:

> "While I find that the superior paper title rests with the plaintiff, I am satisfied that with the assistance of colour of title, Milford's Garage has established that they and their predecessors have exercised such continuous, open, notorious and exclusive possession as to exclude the owner from his normal rights."

With respect the learned trial judge applied the wrong standards both with regard to the acts of possession and to the claim of constructive possession. There was evidence that the appellant was not aware of any intrusions on the land until he saw the cottages in 1976. There was no reference in the deed from Albert Ramey to Harold and Barbara Ramey to the island. With respect that deed was not sufficient to support a claim of colour of title to the island.

The appellant lists a number of factual errors in the decision. They relate mainly to the acts of possession by the respondents. They are relevant in assessing the trial judge's

conclusion that the defendants had established title by possession.

The appellant's brief summarizes the acts of possession as follows:

> "14 The acts of possession performed by the respondents Milford's Garage Limited consist of the following: Cutting eighty to ninety cords of wood around 1960 (Evidence of Eldridge Ramey Case on Appeal page 245 line 25 - page 246 line 10; page 248 lines 6-26. Evidence of Lester Turner page 260 line 16 - page 261 line 7), hunting (Evidence of Lester Turner Case on Appeal page 261 line 8 - page 262 line 32) and paying real property taxes in 1991 and perhaps some earlier years (Evidence of Lester Turner Case on Appeal page 256 lines 16-28).
>
> 16. The acts of possession on which the respondents Harold Ramey and Barbara Ramey are relying are as follows: Logged the island once in the late forties or early fifties (Evidence of Harold Ramey Case on Appeal page 204 lines 19-26; page 205 lines 30-34, children camped on the island a couple of times around 1975 (Evidence of Harold Ramey Case on Appeal page 204 line 27 - page 205 line 5; page 205 lines 17-29. Evidence of Barbara Ramey Case on Appeal page 268 line 30 - page 269 line 4), picked cranberries (Evidence of Harold Ramey page 205 lines 7-8. Evidence of Barbara Ramey Case on Appeal page 269 lines 5-14), visited the island three times every summer (Evidence of Harold Ramey Case on Appeal page 198 lines 10-13 paid taxes (Evidence of Harold Ramey Case on Appeal page 201, lines 4-12. Evidence of Barbara Ramey Case on Appeal page 269 lines 21-26."

I think that is a fair assessment of the evidence. I agree with the appellant's submission that these acts were not sufficient to extinguish the appellant's title under the **Statute of Limitations**. These acts were not exclusive, continuous and notorious as required under the **Act**.

Turning to the cross-appeal the respondents' claim that the trial judge erred in holding that the appellant had the superior title to the land by virtue of the conveyances to him. They maintain that Albert Ramey in conveying the land to his son Elmer in 1933 only intended to convey the area on the northern side of the lake. Nothing in that deed supports

that contention. The deed used the same description as contained in the previous conveyances and referred to the land as comprising one hundred acres.

Harold and Elmer Ramey testified that Elmer only occupied the property on the northern side of the lake and that Albert retained possession of the south eastern side of the lake which he conveyed to Harold in the maintenance deed. The description in that conveyance is by no means clear. The trial judge did not find Elmer Ramey a satisfactory witness because of his age. It is clear from the transcript that he was confused and that his memory was poor. He had no difficulty in pointing out the boundaries to Mr. Hebb in 1989.

The respondents point to the reference in the deed from Ronald and May Wile to the appellant in 1959 where the word "western" is included in the description. They contend that this restricted the conveyance to the northwestern side of the lake. The reference is not consistent with the remainder of the description. Mr. Hebb was unable to explain the reference and simply considered it an error. The trial judge did not accept the respondents' claim and refused rectification of the deed. I can find no error on the part of the trial judge in reaching that conclusion.

There was argument as to the admission of a statutory declaration by Linkard Hunt. The trial judge concluded that it had little weight. I do not think it is necessary to consider that evidence further.

I would allow the appeal, dismiss the cross-appeal and set aside the order and certificate of titles issued in the trial court. The appellant is entitled to a certificate of title in fee simple to the lands set out and described in Schedules "A" and "B" of the order appealed from together with costs of the action and the appeal against the respondents. The trial judge directed the costs to be taxed in one bill under the third scale on the value equivalent to the municipal assessment on the property. The trial costs will be assessed on that basis. I would allow costs on the appeal in the amount of $1500.00 plus disbursements.

Concurred in:

Matthews, J.A.

Pugsley, J.A.

J.A.

C.A. No. 106187

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DELMER E. CONRAD

Appellant

- and -

REASONS FOR JUDGMENT BY:
THE HONOURABLE THE ATTORNEY GENERAL OF THE PROVINCE OF NOVA SCOTIA, MILFORD'S GARAGE LIMITED, HAROLD RAMEY and BARBARA RAMEY

JONES, J.A.

Respondent