S.C.A. No. 02697

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Chipman and Hart, JJ.A.

Cite as: Gillis v. Budge, 1993 NSCA 67

BETWEEN:

DENNIS GILLIS	)	J. Michael MacDonald
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
WILLIAM BUDGE	)	A. Jean McKenna
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	March 29, 1993
	)	
	)	
	)	Judgment Delivered:
	)	April 13, 1993

THE COURT: The appeal is allowed and the cross-appeal is dismissed without costs as per reasons for judgment of Chipman, J.A.; Clarke, C.J.N.S. and Hart, J.A., concurring.

CHIPMAN, J.A.:

At issue in this appeal are the competing claims of the parties to a portion of lands on the western side of the Cabot Trail at Ingonish Centre, Victoria County, Nova Scotia. The land involved is a narrow trapezoidal shaped strip with approximately 66' of frontage on the Cabot Trail. Its depth is 576' on the north side and 476' on the south. At its western tip it is 13' wide. It is shown

on a portion of a plan dated November 16, 1990 by James F. Aucoin, N.S.L.S., attached hereto as Schedule "A" (the Plan).

The lands at issue in this appeal were the subject matter of two earlier decisions in the Supreme Court, in 1980 and 1989, respectively.

The respondent, William Budge, who was the defendant at the trial derived title to his land from a large parcel known as the McGean tract. Until March 4, 1989, his claim to the disputed area was based solely on this title. His property is located on the west side of the Cabot Trail, immediately to the north of the disputed area.

The appellant, Dennis Gillis who was the plaintiff at the trial, owned lands to the southwest of the lands at issue and west of Lot 2A on the Plan. He derived his title and all claims to the disputed land from a Crown grant to Colin Cain (Kane) in the year 1871.

The Cain Grant consisted of 120 acres. John Cain, (Colin Cain's heir in title) and his wife conveyed 100 acres thereof to Thomas Alonzo Brewer on January 3, 1931. The description of the lands conveyed is:

> "Lot as in Gr. Bk. B/186, stated to be at West Ingonish, as in Gr. Bk. B/186 and as in R.R. 373, "said Grant to Colin Cain and said Deed to John Cain containing 120 acres; said lot herein conveyed . . . to contain 100 acres the remaining 20 acres having been conveyed to William Doyle, Thomas McLellan and James Cain (or, Kane) respectively, namely 1 acre to William Doyle, 14 acres to Thomas McLellan and 5 acres to James Cain said last mentioned land having been conveyed to James Cain by John Cain and Susan Cain his wife by Deed dated March 6, 1924, and comprising the northwest corner of said land granted to John Cain and measuring 800 feet by 180 feet."

The appellant acquired his property by deeds in 1979 and 1980 from Harry Cain and David Cain respectively who in turn obtained the lands from James Cain on December 1, 1961.

In 1982, a dispute between Sarah Brewer, widow and successor in title of Thomas Alonzo Brewer and the appellant Gillis was resolved by a decision of Grant, J. in the Supreme Court **sub nom Brewer** v. **Gillis** (1982), 53 N.S.R. (2d) 656. In that case, Brewer challenged the appellant's title to his lands to the southwest of the land in issue on the basis **inter alia** that such lands were included in the parcel conveyed by John Cain to Thomas Alonzo Brewer in 1931. It was claimed that this parcel, in fact, consisted of more than one hundred acres because it included, among other things the 14 acres referred to in the description as having been conveyed to Thomas McLellan. Mr. Justice Grant found that there had never in fact been a conveyance delivered to McLellan by Cain because the former had not completed payment. With respect to the submission by Sarah Brewer that the deed from John Cain conveyed at least 114 acres and with respect to her position generally, Grant, J. said at p. 668:

> "The plaintiff claims through Exhibit 7, being the deed from John

Kane *et ux.* to Thomas Alonzo Brewer. This deed clearly, in my interpretation, conveys 100 acres only and not 120 acres.

The plaintiff and her son have proceeded on the basis that Exhibit 7 gave their predecessor in title at least 114 acres.

I cannot accept that position. Whatever became of the 14 acres said to have been deeded to Thomas McLennan is, I find, not their affair. Exhibit 7 conveys 100 acres only. Whether the 14 -acre McLellan lot was deeded properly or not does not increase the size of the lot conveyed in Exhibit 7.

I reject the submission that the 14 -acre McLennan lot reverted to Brewer. If the deed never materialized, it then reverted to John Kane and came to the defendants through his chain of title.

As I interpret Exhibit 7 it conveys 100 acres only to the grantee. I find that Exhibit 7 conveys the 100 acres only."

At p. 669 he said:

"There is, I find, at least 14 acres which were never deeded to the plaintiff lying to the north of her lands.

The explanation advanced by the witness, Joseph Doyle, is plausible. There was a conveyance to McLennan but never delivered to McLennan because he never completed payment for it. McLennan abandoned the lands and there was a subsequent conveyance from John Kane to James Kane (para. 7, Exhibit 14). John Kane was conveyed the 120 acres from Colin Kane (para. 3, Exhibit 14).

There is no evidence other than Exhibit 1 and that of Thomas Brewer, Jr. which I can accept, of the location of the north line of the plaintiff's property. The lots described as numbers 4 and 7 in the abstract of title, Exhibit 14, lie to the north of the Brewer lands. They were both part of the original Cain Grant, but along with the Doyle lot were excluded from the deed to Brewer."

And at p. 677 he said:

"James Kane did get title to 15 acres out of the Colin Kane (Cain) grant. I find that the 15 - acre lot includes the 14 - acre lot of McLennan excepted from the deed from John Kane to Brewer (para. 5, Exhibit 14).

Although the description of the 15 acres contained in James Kane's deed is difficult to plot or follow, I find that it did convey lands lying generally to the west of the Doyle lands and to the north of the Thomas Alonzo Brewer lands. No doubt because of the difficulty with that description, a new description was used when he conveyed the lands in para. 14 of Exhibit 14.

> I find on a balance of probabilities the 15 - acre lot conveyed to James Kane in the deed described in para. 7 of the abstract of title (Exhibit 14) is the same lot conveyed by James C. Kane et ux. to Harry G. Kane and David Baxter Kane in the deed described in para. 14 of Exhibit 14."
>
> (emphasis added)

Grant, J. dismissed the action of Sarah Brewer and held that, as against her, Dennis Gillis was entitled to 15 acres, based on his title derived from the Cains (including the lands originally intended to be conveyed to McLellan).

In the meantime the appellant, realizing that his lands were landlocked, attempted to gain a right of way to the Cabot Trail by conveyances from Simon MacNeil and his wife, Marie and from George McGean and John McGean, in 1980. In 1985, the appellant and his wife obtained a Quit Claim Deed from David Cain and Harry Cain. The deed recited that the grantors were two of the children of James and Lisa Cain. They conveyed their interest in lands acquired by James and/or Lisa Cain to a strip of land on the west side of the Cabot Trail between the line later fixed by Nathanson, J. on the north and the MacNeil lands on the south, having a north-south distance expressed to be 20' more or less between these two boundaries.

A proceeding brought by the appellant Gillis as plaintiff and the respondent Budge as defendant was tried at Baddeck before Nathanson, J. of the Supreme Court in October of 1987 and June of 1988. In that proceeding, the parties took the position that the appellant derived his title from the Cain Grant and the respondent derived his title from the McGean tract. Neither party claimed a Certificate of Title and it was agreed that the sole issue to be resolved by Nathanson, J. was the location of the defendant's southern boundary, that is to say the southern boundary of the McGean tract which was also the northern boundary line of the Cain Grant. Several surveys with conflicting conclusions had been prepared. In his decision dated July 21, 1988 Nathanson, J. reviewed the evidence and came to a conclusion as to the location of the northern boundary of the Cain Grant and the southern boundary of the respondent's lands. This was incorporated in the Order for Judgment in the following terms:

> "It is hereby ordered that the Northern Boundary of the Cain Grant (being the Southern Boundary of the line of the lands of the defendant by agreement) is declared to be the extension of that straight line between Crown Survey Monuments V-1952 and V-1953, extending easterly to the western side of the Cabot Trail in a direction north 76 degrees 33' and 36 " East as highlighted in red in the attached plan of Leonard Harvey, N.S.L.S. dated June 10, 1987."

This line is the northern boundary of the trapezoidal shaped parcel in dispute and can be clearly identified by reference to the Plan hereto. Nathanson, J.'s order was issued on February 22, 1989 and would, it would have seemed, put the matter to rest.

Such was not to be the case. On March 4, 1989 the respondent, William Budge, secured a Quit Claim Deed from Sarah Brewer, plaintiff in **Brewer** v. **Gillis**, **supra**, which conveyed to him a parcel of land on the west side of the Cabot Trail commencing at a point on the northeastern corner of the MacNeil lands shown as Lot 1 on the Plan hereto. The description proceeded thence in a northerly direction along the Cabot Trail to the northern boundary of the lands granted to Colin Cain, such boundary having been established by the decision of Nathanson, J. It proceeded thence in a northwesterly direction along such northern boundary of the Cain Grant as so established for 530', thence southerly to MacNeil lands and easterly along the northern boundary of the MacNeil's land a distance of 530' more or less to the western boundary of the Cabot Trail and the point of beginning. The description referred to this as a portion of the lands conveyed by John Cain to Thomas Alonzo Brewer by the deed dated January 3, 1931, being that portion of lands lying between the northwestern boundary of the Cabot Trail and the southeastern boundary of the lands of Dennis Gillis as awarded to him by the decision of Mr. Justice Grant.

Armed with this conveyance, the respondent herein placed obstructions on, and exercised other acts of ownership with respect to, the lands now in dispute. The result of this was the commencement of this proceeding in the Supreme Court by the appellant on September 12, 1990.

The matter proceeded to trial, and by decision dated January 10, 1992 the court reviewed the history of the title and the decisions of Grant, J. in **Brewer** v. **Gillis** and Nathanson, J. in **Gillis** v. **Budge**. The court concluded that as to a 20' strip being the southern portion of the

trapezoidal area in question and bordering the MacNeil and Doyle lands (Lot 1 and 2A on the Plan), the appellant had obtained an interest from two of the heirs of James Cain, David and Harry Cain. This was on the footing that when James Cain had conveyed the MacNeil property shown on the Plan to one Samuel Brewer, MacNeil's predecessor, he conveyed only 140' of a total of 160' of road frontage owned by him. He had neglected to convey the 20' strip north of the MacNeil lands. When James Cain died he left all of his property to his wife, Elizabeth, and when she died, her property was left equally to her nine children, of whom David and Harry had conveyed their interests to the appellant Dennis Gillis in 1985. Thus, the respondent had a 2/9 interest in the most southerly 20' of the trapezoidal parcel at issue.

As to the balance of this parcel, being the triangular piece to the north with approximately 46.17' frontage on the Cabot Trail, the trial judge concluded that this was conveyed by Sarah Brewer to the respondent Budge in the Quit Claim Deed of March 4, 1989 to which I have referred. The court's reasoning is summarized in the following two paragraphs:

> "Although the arguments by both counsel on other issues regarding res judicata and nemo debet bis vexari are very cogent, I am not persuaded that one is superior to the other. If I were to accept all of their arguments, there would be no issues outstanding and the parties would be left with the practical problems unresolved. Therefore justice and common sense demands a resolution of the outstanding conflict which, it is hoped, will prevent further legal action regarding these lands.
>
> I am satisfied that the deed to Thomas Brewer from John Kane in 1931 conveyed all of the Crown Grant with the exception of the Doyle lot, the James Cain five acres, which is the land now owned by Archibald, and the land conveyed by John Kane to James Kane in 1938 containing 15 acres more or less and which included 160 feet of road frontage. That road frontage, I am satisfied, began southwest of the rock on the MacNeil southern boundary line as shown on the Aucoin plan. Therefore, Thomas Brewer received a residual deed. The description in that deed is of the whole 120 acre Crown Grant and then excepts out the other three lots. The placement of those other lots has been generally determined by Grant, J. The parcel excepted out of the Brewer Deed, described as the McLellan lands, reverted to John Kane as found by Grant, J. and was deeded by him to James Kane in 1938."

The result was that as to the southern 20' portion of the trapezoid, the appellant had

a 2/9th's interest. As to the balance, it was included in the conveyance of March 4, 1989 from Sarah Brewer to the respondent. The trial judge was not prepared to give either party a Certificate of Title with respect to these portions. As to damages, the trial judge found generally that the quantum of trespasses of each party against the other were of equal value and should be set off. Each party was ordered to bear his own costs.

The appellant appeals, contending that the trial judge erred in recognizing that the respondent had any title to the land south of the line fixed by Nathanson, J. The respondent cross-appeals contending that the appellant should have asserted his title in **Gillis v. Budge (No. 1)** before Nathanson, J. Not having done so, he is too late now by reason of the principle **nemo debet bis vexari**. The respondent seeks solicitor/client costs.

The key to the trial judge's decision herein is the conclusion that by the deed of January 3, 1931 from John Cain to Thomas Alonzo Brewer, the latter "received a residual deed". By reference to the location of the other lots as generally determined by Grant, J. the court concluded that the portion containing 15 acres included 160' of road frontage running north from the rock which can be seen marked on the Plan. Because the trial judge considered that Brewer received a "residual deed" it followed that the land to the north of this property and to the south of the line fixed by Nathanson, J., that is the triangular portion with a road frontage of 46.17', was owned by Sarah Brewer and effectively conveyed by her Quit Claim Deed of March 4, 1989 to the respondent.

With respect, I cannot agree that Thomas Alonzo Brewer "received a residual deed", or, in other words, acquired from John Cain by the deed of January 3, 1931 all of the 120 acre parcel with the exception of the 20 acres specifically referred to as that being conveyed to William Doyle, Thomas McLellan and James Cain (being respectively, 1, 14 and 5 acres). Such a conclusion is contrary to that reached by Grant, J. in **Brewer** v. **Gillis**, **supra**. Although the specific parcel considered by Grant, J. was not the lands at issue, one of the matters necessary to his decision between the parties was the common root of title of the land at issue there and the land at issue at these proceedings. That decision is **res judicata** as between the appellant Gillis who was a party to

it and the respondent Budge, the successor in title to Sarah Brewer.

The passages from Grant, J.'s decision which I have set out make clear that if there was any residue, it rested with the lands excluded in the conveyance of January 3, 1931 from John Cain to Thomas Alonzo Brewer and referred to as comprising a total of 20 acres. Grant, J. has unequivocally found that the Brewer lands consisted of no more than 100 acres and that such land was to the south of the 15 acres contained in James Cain's deed. A reading of Grant, J.'s decision and particularly the portions quoted above leads me to the conclusion that that portion of the lands to the south of the line fixed by Nathanson, J. and to the north of Lots 1 and 2A on the Plan (MacNeil and Doyle, respectively) was not a portion of the 100 acres deeded to Brewer in 1931. The respondent, as owner of part of the McGean tract, was without title to this portion. His position was not improved by the deed from Sarah Brewer of March 4, 1989 from that in which he found himself following the decision of Nathanson, J. fixing the line.

As the trial judge pointed out, there was no determination by Grant, J. as to whether any of the predecessors in title to the present parties received the residual lands of the Cain Grant. As well, Grant, J. made no determination regarding the title to the lands between the northern boundary of the MacNeil lot and the northern boundary of the Cain Grant. The extent of that area as the trial judge pointed out was not known until Nathanson, J. determined the exact placement of the grant line. As well, Nathanson, J., not having been asked to do so, made no findings regarding title to the land immediately south of the line fixed by him.

I share the trial judge's view that acceptance of the argument of the appellant does leave some practical problems unresolved. Nevertheless, some progress can be made.

I have already concluded that the respondent has no title to the lands at issue by reason of the Sarah Brewer deed. Moreover, whatever defects there may be in the appellant's title to such lands, the respondent is, in my view, precluded from denying his title.

In **Gillis v. Budge (No. 1)**, title was not the issue before Nathanson, J. He said at the outset of his decision:

" This is a classic trespass action. Gillis and Budge own lots of land which both believe are adjacent so that the northern boundary of the Gillis lot would be the southern boundary of the Budge lot. Gillis claims that Budge has been trespassing upon his lot, and Budge counterclaims that Gillis has been trespassing upon his lot. Counsel for both parties agree that the sole issue to be decided is the location of the common boundary.

An agreed statement of facts on file sets out the following information:

"1. The Plaintiff and Defendant are owners of land located at Ingonish Center, in the County of Victoria, in the Province of Nova Scotia.

2. Their respective pieces of land are located on the western side of the Cabot Trail, running from Ingonish Beach to Neil's Harbour.

3. The Plaintiff derives title to his land from a Crown Grant to one Colin Cain (Kane) in the year 1871.

4. The Defendant derives his title from a tract of land occupied over the years by the MacGean family. The MacGean lands are bounded on the south by the northern boundary line of the Cain Grant.

. . .

6. Neither party claims a Certificate of Title. The sole issue to be resolved by this Honourable Court is the location of the Defendant's southern boundary, which is also the northern boundary line of the Cain Grant.

7. Several surveys, with conflicting conclusions, have been effected in an effort to determine the proper boundary line.

The northern boundary of the Gillis lot is purported to be the northern boundary of the Cain grant. The southern boundary of the Budge lot is purported to be the southern boundary of the MacGean tract. The northern boundary of the Cain grant is purported to be the southern boundary of the MacGean tract. It is the last mentioned purported common boundary that the parties want the Court to locate."

(emphasis added)

Thus, apart from his subsequent claim based on the Sarah Brewer deed which I have rejected, this is a sufficient admission by the respondent of an interest of the appellant in lands to the south of the line ultimately found by Nathanson, J. Moreover, on viewing the quit claim deed from

David and Harry Cain, although the north and south distances are said to be twenty feet they also are referred to as twenty feet "more or less" and the description purports to pick up all the land between the property of the respondent and the MacNeil lands. Although it is not necessary or desirable to consider the exact extent of this interest, it is clear that the appellant has some claim to these lands whereas the respondent has none at all. As between him and the appellant, the latter is the owner of them and entitled to maintain a claim for damages for the acts of trespass proved at the trial. No special damages were proved. It is difficult to quantify general damages but this court is in as good a position as the trial judge to do so. After reviewing the evidence relating to the respondent's actions, I would not categorize the damages as substantial and I would allow general damages of $200.00 to the appellant.

As to the cross-appeal, the doctrine of **nemo debet bis vexari** has no application. That doctrine precludes a party from raising, in subsequent litigation, an issue which he had the opportunity to raise an earlier litigation with the same party. The respondent's contention that the appellant did not raise the issue of his title in **Gillis v. Budge (No. 1)** is disposed of by reason of the fact that, as Nathanson J. made clear, the only issue before him was the fixing of the line. The scope of that litigation was not wide enough to give the appellant the opportunity to prove his title. The admissions by the parties and the statement by Nathanson J. as to the issue makes this clear.

I would therefore allow the appeal by setting aside the decision and order of the trial judge and substitute therefor an order that the respondent has no interest in the trapezoidal shaped piece of land illustrated on the Plan and lying to the south of the line fixed by Nathanson, J. in **Gillis** v. **Budge** (1986), S.BD. No. 00118. I would also award the appellant general damages of $200.00. As to costs, I would award costs to the appellant at trial by fixing "the amount involved" pursuant to the tariff of costs and fees at $25,000. I would apply scale 3, the basic scale, to arrive at costs in the amount of $3,000, to which will be added disbursements of the trial to be taxed. I would also award the appellant the costs of this appeal to be fixed at 40% of the trial costs or $1,200, together with disbursements to be taxed. I would dismiss the cross-appeal without costs.

J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.