LEMUEL J. TWEEDIE (DEFENDANT) . . APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) . . . . . } RESPONDENT.

1915

*May 18, 19.
*Nov. 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Foreshore—Title by possession—Nature of possession —Disclaimer—Evidence of title—Nullum tempus Act.

In proceedings by the Dominion Government for expropriation of land on the Miramichi River the owner, T., claimed compensation for the part of the adjoining foreshore of which he had no documentary title. It was proved that in 1818 the original grantee had leased a part of the land and the privilege of erecting a boom for securing timber on the river in front of it; that his successors in title had, by leasing and devising it, dealt with the foreshore as owners; that for over forty years from about 1840 the boom in front of it was maintained and used by the owners of the land; and that at low tide the logs in the boom would rest on the solum.

Held, reversing the judgment of the Exchequer Court (15 Ex. C.R. 177), Davies and Idington JJ. dissenting, that there was sufficient evidence of adverse possession of the foreshore by the owners of the adjoining land for more than sixty years to give the present holder title thereto.

Per Anglin J.—From a continuous user for more than forty years, which is proved, a prior like user may be inferred. Moreover, from the evidence of assertion of ownership and possession since 1818 a lost grant might, if necessary, be presumed.

Per Davies and Idington JJ.—The placing and use of the boom was only incidental to the lumber business carried on at this place and the consent of the riparian owner thereto cannot be regarded as a claim of adverse possession. The presumption of lost grant was not pleaded and cannot be relied on; moreover, a lost grant could not be presumed in the circumstances.

On application by the Minister of Justice for a disclaimer of damages for the taking of the foreshore the Government of New

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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Brunswick passed an order in council stating that the owner of the adjoining land taken claimed title to said foreshore; that it had been used by the owners for booming purposes and otherwise for more than sixty years; that the Attorney-General was of opinion that whatever rights the province may have had were extinguished and that no claim should be made by it to said foreshore.

Held, per Duff J.—This is an admission touching the title to the foreshore by the only authority competent to make it and is evidence against the Dominion Government in the expropriation proceedings; that it is *primâ facie* evidence of title by possession in T.; and that there is nothing in the record to impair the strength of this *primâ facie* case.

APPEAL from a judgment of the Exchequer Court of Canada(1), awarding compensation for land expropriated for purposes of the Intercolonial Railway.

The Attorney-General for Canada filed an information in the Exchequer Court for assessment of compensation to the defendant Tweedie for the land expropriated. The Crown had tendered $2,150 as its full value.

The defendant claimed compensation for the foreshore of the Miramichi River in front of his land. This was refused by the Exchequer Court and he appealed to have the award increased by the value of his interest in said foreshore, claiming to be the owner or, in the alternative, to have an easement on it for lumbering purposes.

Teed K.C. and *Lawlor K.C.* for the appellant. A subject may acquire title to the foreshore by possession under the Statutes of Limitations. Hall on the Seashore (2 ed.), pages 23 and 154; Moore on the Seashore (3 ed.), pages 690-1 and 830. But the extent and character of the user must depend on the circum-

(1) 15 Ex. C.R. 177.

stances of each particular case. *Lord Advocate* v. *Young*(1), at page 553; *Lopez* v. *Andrew*(2).

The principle as to possession in ordinary cases is stated in *Lord Advocate* v. *Lovat*(3), at page 288; *Kirby* v. *Cowderoy*(4), at page 603.

To acquire title to the foreshore such full and actual possession as is proved in this case is not necessary. See Moore, pages 511, 658, 660; 28 Halsbury, 368-70; *Attorney-General for Ireland* v. *Vandeleur* (5).

Baxter K.C., Attorney-General of New Brunswick, for the respondent, referred to *The King* v. *Cunard* (6); *Wood* v. *Esson*(7); Hall on the Seashore, page 387; *Rose* v. *Belyea*(8); *Attorney-General of British Columbia* v. *Attorney-General for Canada*(9).

THE CHIEF JUSTICE.—The pleadings and evidence are so fully dealt with by my brother judges that it will not be necessary for me to do more than state briefly the conclusion I have reached.

The grant to the appellant of lot 37 did not include the adjacent foreshore, but I think appellant has established a possessory title to it. The evidence shews sufficient continuous use of the boom extending over the foreshore for the purpose of retaining the floating logs. The only other question that arises is as to the nature of this use of the foreshore and its consequences.

(1) 12 App. Cas. 544.
(2) 3 Man. & R. 329*n*.
(3) 5 App. Cas. 273.
(4) [1912] A.C. 599.
(5) [1907] A.C. 369.
(6) 12 Ex. C.R. 414.
(7) 9 Can. S.C.R. 239.
(8) 12 N.B. Rep. 109.
(9) [1914] A.C. 153.

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The Chief Justice.

It seems to me that it is strictly analogous to the common practice of mooring vessels to the bank in such a way that rising and falling with the tide they rest at extreme low tide on the soil of the foreshore. This is the right or privilege known as groundage and in respect of which dues are payable. It is recognized that this right like that of anchorage is one directly affecting the soil and its use raises a presumption of ownership of the soil. See the judgment of Chief Justice Erle in *Le Strange* v. *Rowe*(1).

It seems to me that this floating of logs that ground at every tide upon the soil of the foreshore affords a strong instance of such possession as can be had of lands covered by water at the flow of the tide; it is incompatible with any ordinary use to which the foreshore could be put by another as owner.

The case must be referred back to the Exchequer Court to fix the additional compensation to which the appellant is entitled in view of the fact that he is the owner not only of lot 37, but of its adjacent foreshore.

The appellant is entitled to his costs of this appeal.

DAVIES J. (dissenting).—This is an appeal from a judgment of the Exchequer Court awarding the appellant, as explained in the learned judge's reasons for judgment, the sum of $2,100 "as a just and liberal compensation" for the upland expropriated by the Crown from the appellant,

and for all damages resulting therefrom, including such rights held by the defendant as a riparian owner as distinguishable from those held by the public at large as are mentioned in the case of *Lyon* v. *The Fishmongers Co.*(2), covering all rights whatsoever the defendant may have in respect both of the upland and the water lots.

(1) 4 F. & F. 1048.

(2) 1 App. Cas. 662.

The appellant, however, contended both in the Exchequer Court and in this court that he had acquired a title to the water lot in front of his upland, either under the grant of his upland or by possession and that any rate he had acquired an easement in and over such water lots beyond his riparian right which had been injuriously affected by the Crown's expropriation.

With regard to the claim of ownership of the soil of the foreshore of the water lot it was not vigorously pressed, but at the same time was not abandoned. The argument mainly relied upon was that the plaintiff had acquired an easement in and over the water lot to boom logs therein appurtenant to the upland grant and that the easement had been improperly denied by the judgment below and not considered in the assessment of damages.

So far as this claim to an easement based upon the presumption of a lost grant is concerned, it was not pleaded by the appellant in the Exchequer Court and under the authorities it would seem that this appeal court should not entertain it.

In the view, however, I take of the evidence and the proved facts I do not think the appellant has succeeded in establishing any claim to the water lot in question other than that of a riparian owner and for his damages as such he has been awarded ample compensation.

Now, what are the controlling facts of the case? The appellant claims title under a Crown grant to one Thomas Loban of a lot called No. 37, fronting on the Miramichi River (a tidal river) dated 4th May, 1798.

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The lot in question is one of the number of lots granted to different parties in severalty by the same grant and the whole tract is particularly described by metes and bounds. It begins at the specified point at the "northerly bank of the said river" and after running by defined courses and distances to embrace the 37 lots, returns by a line

> to the northerly bank or shore of the said river, thence along the said northerly bank or shore of the said river following its several courses upstream to the bounds first mentioned.

It seems clear beyond all argument that under this grant the several lots were bounded by the bank of the river and that no part of the foreshore was embraced within the lands granted. The several grantees were riparian owners of their several lots. They had rights of uninterrupted access from their respective lots to the river, and if they gained a prescriptive right to any part of the foreshore it could only be by reducing such part into actual exclusive and notorious possession and maintaining that possession for the statutory number of years.

Now, what acts of possession did the plaintiff or his predecessors in title ever exercise over the foreshore in question ? So far as the soil of the foreshore is concerned, absolutely none. It is true that Loban and perhaps others of the appellant's predecessors leased to some lumbermen or millowners for a number of years a part of this upland lot. Two of these leases were in evidence. The one to Young was dated in 1818 and the other to Muirhead was dated 1873. That to Young, after describing the upland leased, contained the following words:—

> And also the privilege of erecting a boom for the purpose of securing timber, etc., in front of the said lot 37.

The lease to Muirhead after describing the upland leased continued as follows:—

> With the full privilege *of the water* in front of the said piece of land above described and also the privilege of keeping and erecting a boom for the purpose of securing timber and other lumber in front of said lot 37.

No mention is made of any part of the foreshore being leased nor is there any pretence of leasing any part of it. The upland leased is particularly described as running down to the river and bounded by a line *following the courses of the river bank or shore*, and the privilege is given the lessees of keeping and erecting a boom in the waters in front of the land leased.

The facts shew that this booming privilege so called was exercised by fastening a line of logs to a post or pillar driven in the upland and running out to the "boom block" which had been erected by someone in the bed of the river beyond the foreshore or low water mark and again from the block to a wharf some distance further up and running out beyond the foreshore. In this way the logs were protected from being carried away by the tides or storms. There is no evidence whatever of any post or pillar having been placed in the foreshore to retain the boom. As a matter of fact, for many years back, the appellant in his evidence says about twelve, other witnesses say much longer, more than twenty, there has been no boom maintained there at all.

It does seem to me clear that the placing of these booms where they were placed must be considered only in connection with the general conduct of the lumber business on the river at the time. They were necessary to the proper carrying on of that great and exten-

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sive business, but no doubt without the consent or acquiescence of the riparian owner they could not be legally maintained by a third party as against him if they interfered with his right of access to and from the river. His consent or permission, whether appearing in a lease or otherwise, could not be construed as evidence of a claim of adverse possession of the foreshore as against the Crown. It was, it seems to me, such a concession as a riparian owner as such might for a consideration fairly make of his riparian rights. The boom would naturally interfere with his right of access to the river and so far as he could he conceded to the lessee the right to erect and maintain the boom. But I cannot see in such an act a claim to either an adverse possession of the foreshore or of an easement in it beyond the riparian owner's rights therein. And as I have before said, the leases contain no language shewing a claim to the soil of the foreshore, or authorizing the lessee to interfere with it. Nor does it appear that at any time the appellant or his predecessors in title or their lessees ever disturbed or interfered with that soil. All that was done was by means of a line of logs fastened at one end to the owners' ripa and at the other to the boom block in the river beyond low water mark to make a boom to save and keep logs. A case instructive on the point now under discussion as to the extent of a riparian owner's rights is that of *Booth* v. *Ratté*(1), where it was held

> that a riparian owner is at liberty to construct and moor to his bank a floating wharf and boathouse, the same not being an obstruction to the navigation, and is entitled to maintain an action for damages in respect thereof caused by any unauthorized interference with the flow and purity of the stream.

(1) 15 App. Cas. 188.

In delivering the judgment of the Judicial Committee, Sir Richard Couch says, at page 193:—

> So far from being an obstruction to navigation, the maintenance of a floating wharf of that kind, is, in the circumstances stated by the learned Chancellor, a positive convenience to those members of the public who navigate the river with small craft. As a riparian owner, the plaintiff would be at liberty to construct such a wharf and would be entitled to maintain an action for the injuries to it which are complained of.

Applying that language to the booms maintained on the Miramichi River at the place in question, I would say that no question arose as to there having been any obstruction to the navigation of the river. On the contrary, they were essential to the carrying on effectively of the great lumbering and logging business on that river. They did not, in my judgment, affect the title to the soil of the foreshore which always remained in the Crown, nor in the circumstances which surrounded them, would they appear to the Crown to have been maintained by the riparian owners or their lessees *animo habendi, possidendi et appropriandi* which would be necessary to enable their owners or users to gain a title as against the Crown by possession or an easement in the foreshore appurtenant to the upland owned by them beyond their ordinary riparian rights.

For these reasons and without entering upon the question of the New Brunswick "Prescription Act" I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—The appellant claims in three or four alternative ways a title to part of the land over which the Miramichi, a tidal navigable river, flows. The origin of the claim rests in a grant in 1798, made by the respondent to one Thomas Loban

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of lot thirty-seven and other lands. In some way which I cannot understand it is claimed this grant carried with it dominion over part of said land upon which said lot thirty-seven fronted.

As the said lot is defined in the grant by metes and bounds of which that next the river is stated to be

> thence along the southerly bank or shore of the said (Miramichi) river following its several curves down stream,

the grant thereof could not carry with it any part of the land overflowed by said river.

It is further claimed that a lease, which is produced, was made 28th August, 1818, to one Robert Young by the executors of the last will and testament of Thomas Loban, deceased, Jane Loban, his widow, and Alexander Loban, his son, of a part of the said lot thirty-seven described by metes and bounds

> and also the privilege of erecting a boom for the purpose of securing timber, etc., in front of the said lot number thirty-seven down stream until it comes to the distance of fifty feet from the upper part of the boom now occupied by Francis Peabody, Esq.,

and also another part of said lot thirty-seven as described.

The lease was to run for fifteen years from said date and was made renewable for fifteen years or at the option of Jane Loban or her assigns, or in the event of her death, of said Alexander Loban, his heirs, executors, administrators or assigns, to continue it for a further term of fifteen years or to pay "for the buildings and improvements made thereon" at a valuation.

We are not enlightened as to what happened pursuant to this lease. We are told of a boom existing in the locality in question for a number of years and it

might be possible to infer that it existed before the time of the recollection of the oldest witness speaking thereto. Giving credit to all such witnesses tell us, I cannot find therein anything upon which a title to the soil in question could be acquired by virtue of the Statute of Limitations as against the Crown. Indeed, that ground of claim was not pressed as strongly as the next alternative of an alleged easement acquired by prescription.

This sort of claim seems rather indefinite. If we accept the high authority of Lord Cairns speaking in the case of *Rangely* v. *Midland Railway Co.*, in 1868 (1), relative to the definition of an easement, we would be puzzled to find in the evidence herein exactly what he defines an easement to be, or if the land in question is the servient tenement, what land the easement was appurtenant to.

Or if we should attempt to treat the rights claimed (whatever legal definition we may give them) over this part of the Miramichi River by virtue of the creation and use of the boom in question as the subject of acquisition by prescription, as claimed, against the Crown, we find that there was no Act in force in New Brunswick enabling such prescription till 1st of January, 1910.

Admittedly there was no use or enjoyment of this so-called boom for a number of years before that date. And according to my reading of the evidence there had been no use or enjoyment possessed by anybody thereof for over twenty years before that date.

There was apparently no necessity for it, much less actual use of it, after some time not actually fixed,

(1) 3 Ch. App. 306, at p. 310.

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but I think some time twenty years before this proceeding, though occasionally logs or loads of lumber were to be found thereabout.

The timbers forming the boom had, however, disappeared.

In short, I do not think the appellant brings his claim within the meaning of the statute, section 1, chapter 139, Consolidated Statutes of New Brunswick, 1903, which is as follows: —

> No claim for lands or rent shall be made, or action brought by His Majesty, after a continuous adverse possession of sixty years.

The kind of possession that was ever had at any time of the water in question was what every-day experience exhibits in any river used by lumbermen. The possession never could have been conceived as adverse to His Majesty, but in the exercise of a right permitted to those taking such possession in common with others of the public using navigable waters in the like way for the promotion of trade and commerce. Nor was the possession of that continuous character which would lay a foundation for a prescriptive title. The alternative of prescription also must fail.

Then it was suggested that we must presume a lost grant. There are two answers to this. It has not been pleaded, and in the next place, I hardly think the evidence warrants such presumption.

As to the necessity for pleading a lost grant if relied upon see *Smith* v. *Baxter* in 1900(1), at foot of page 146 and top of page 147. That case was tried without pleadings under an order directing the issue and as no point made of the alleged lost grant theory on getting such direction, the claim, started on the

(1) [1900] 2 Ch. 138.

trial, of lost grant instead of prescription it was held by Sterling J. could not be set up; for as such it must be pleaded. And that holding was followed by Parker J. in trying the case of *Hyman* v. *Van Den Bergh* (1), and maintained in appeal(2), and the *Smith* v. *Baxter* case(3) was specifically approved of by Cozens-Hardy M.R. in giving judgment on said appeal.

This seems to dispose of the claim to rest on presumption of lost grant, for it is not pleaded.

There is not sufficient in the length of time which elapsed and in that which transpired before the Act, 8 Will. IV., ch. 1, came into effect, to give any efficacy to the presumption before that.

That statute by its terms seems to forbid any presumption of a grant thereafter such as we are asked to presume. The grants thereafter must be of the open kind susceptible of proof from the records that must exist.

The maxim *omnia præsumunter,* etc., relied upon cannot help. There is no basis shewn upon which it could operate. To so apply it would be irrational. In short it would to do so be to presume the advisors of the Crown had acted against rather than in accordance with law.

As to the claim that a sufficient sum was not allowed for expropriation of that for which appellant was entitled to be compensated, I think the weight of evidence against him is such as to forbid our interference.

The appeal should be dismissed with costs.

(1) [1907] 2 Ch. 516. (2) [1908] 1 Ch. 167.
(3) [1900] 2 Ch. 138.

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DUFF J.—The lands that are the subject matter of this controversy were taken for the purposes of the Intercolonial Railway under the provisions of chapter 143, R.S.C., on the 21st September, 1910.

On the 16th of July of the same year the following minute had been passed by the Lieutenant-Governor in Council of New Brunswick:—

> Memorandum and report of the Honourable Attorney-General for the information of the Committee of the Executive Council. The Attorney-General reports, that it is proposed to make a diversion of the line of the Intercolonial Railway from Nelson to Loggieville in the County of Northumberland, in the Province of New Brunswick, and the Minister of Justice of Canada has through his agent, Warren C. Winslow, Esquire, K.C., of Chatham, N.B., applied for a disclaimer of damages on account of taking for use of the said Intercolonial Railway, certain lands covered with water, situate below highwater mark on the Miramichi River, at a point called Walsh's Cove, the particular lots being described as follows:—
>
> Lot number eighty-six, beginning at station 290-77 on the centre line of the right of way of the new diversion at its intersection with the eastern side line of the Russell Wharf, so called; thence north-westerly by the said line seventy-five (75) feet, more or less, to a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence easterly parallel to the centre line and distant therefrom north-westerly seventy-five (75) feet at right angles four hundred and thirty (430) feet, more or less, to the prolongation of the western boundary of the property of Walsh Brothers at a point distant seventy-five (75) feet, north-westerly at right angles from the centre line, thence by the said western boundary and prolongation south-easterly, crossing the centre line four hundred and seventy (470) feet, more or less, to a point on the southerly shore of the river Miramichi, so called, at highwater mark; thence north-westerly by the shore at highwater mark, four hundred and ten (410) feet, more or less, to the eastern side line of the Russell Wharf aforesaid; thence by the said eastern side line fifty (50) feet, more or less, to the place of beginning, containing 154,330 square feet, more or less.
>
> Lot number eighty-four, beginning at the intersection of the centre line of the right of way of the new diversion with the western boundary of the property of the said Dominion Government; thence by the said boundary north-westerly seventy-five (75) feet, more or less, to a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence easterly parallel to the centre

line one hundred and fifty (150) feet, more or less, to the eastern boundary of said property at a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence south-easterly by the said boundary crossing the centre line, and the shore of the river Miramichi, so called, at the original highwater mark, three hundred and ninety (390) feet, more or less, to the eastern boundary of the property of Walsh Brothers; thence north-westerly by the said eastern boundary four hundred and ten (410) feet, more or less, to the place of beginning, containing 48,350 square feet, more or less, and containing in both lots 202,680 square feet, more or less.

The Attorney-General having carefully inquired into the matter has ascertained that the owners of the lands above mentioned along the shore, claim that they are entitled to the land covered by water in front of their said lands to the channel or to a line drawn from the north-easterly corner of the Russell Wharf, to the north-westerly corner of the Loggie Wharf, with the exception of the property claimed by the Walsh Brothers, and that the said land covered by water has been used for over sixty years by the owners of the said lands for booming purposes and otherwise, and that blocks have been built in front along the channel for said booming purposes for over sixty years. He is, therefore, of opinion that whatever rights the province may have formerly had in the said lands covered by water, that said rights have become extinguished, and that it would be inadvisable to set up any claim to the same. He, therefore, recommends that upon His Honour the Lieutenant-Governor approving of this minute, that the Minister of Justice be informed that the said Province of New Brunswick lays no claim to the said lands covered by water and situate below highwater mark, and that the Department of Railways must deal with the parties claiming said lands and lands covered by water.

And the Committee of the Executive Council concurring in the said recommendation.

It is accordingly so ordered.

Certified: Passed July 16th, 1910.

(Sgd.) JOE. HOWE DICKSON.
Clerk of the Executive Council of N.B.

This instrument constitutes an admission touching the title to the lands in question made by the only executive authority competent at the time to make admissions on that subject on behalf of the Crown; and, therefore, as an admission on behalf of the Crown it is admissible in my opinion in evidence against the plaintiff in this proceeding.

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This admission, of course, does not operate as a conveyance; but it is *primâ facie* evidence of title by possession. And it is sufficient for the purposes of this appeal to say, (applying the well settled principle that enjoyment of "all the beneficial uses of the foreshore" for sixty years,

which would naturally have been enjoyed by the direct grantee of the Crown

Lord Advocate v. *Young* (1), at page 553, is sufficient to establish a case of title by possession) that the evidence as a whole (while it cogently supports) contains little or nothing to detract seriously from the strength of this *primâ facie* case.

There should be a reference back to ascertain the amount of compensation to which the appellant is entitled in respect of the parts of the foreshore and solum taken. I should not disturb the finding in respect of the value of the upland taken or in respect of compensation for injurious affection of the upland.

ANGLIN J.—For the construction of a line of railway, known as the Chatham Diversion of the Intercolonial, the Crown has taken a portion of lot 37, admittedly the property of the defendant. In respect of this piece of upland, including riparian rights, he has been awarded in the Exchequer Court as compensation the sum tendered by the Crown, $2,150. The Crown has also utilized for its railway a portion of the foreshore in front of lot 37 to which the defendant has hitherto in this litigation unsuccessfully asserted title. On the present appeal he seeks to have his title

(1) 12 App. Cas. 544.

to the foreshore established, or, in the alternative, his right to an easement over it for the booming of logs, and to receive compensation in respect thereof, and he also claims increased compensation for the upland taken and injuriously affected.

In regard to the latter claim I have not been satisfied that the amount allowed by the learned trial judge is inadequate.

I also agree with the learned assistant judge of the Exchequer Court that the grant to the defendant's predecessor in title of lot 37, bounded by the waters of a tidal river, did not carry to the grantee title to the foreshore. It should scarcely be necessary to say that the order in council passed by the Provincial Government disclaiming any interest in the foreshore in question does not vest title to it in the appellant. But if he was in possession when the expropriation proceedings were instituted, his inchoate holding title, though short of the statutory sixty years duration, would avail as a defence against everybody but the true owner, and inasmuch as, if the defendant is not the owner, the title would be in the Crown in right of the Province of New Brunswick and not in right of the Dominion, the disclaimer of the former may be of importance. Moreover, if the defendant had possession when the expropriation proceedings were commenced and the Crown had been out of *de facto* possession for twenty years, the statute 21 Jac. I., ch. 14, may be an obstacle in the plaintiff's path. *Doe d. Watt* v. *Morris*(1); *Emmerson* v. *Maddison*(2). But in the view I take of the defendant's claim of title by

(1) 2 Bing. N.C. 189. (2) [1906] A.C. 569.

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possession it is not necessary to dwell upon these aspects of the case.

In so far as the defendant's claim to a prescriptive easement rests upon the "Prescription Act" (C.S., N.B., 1903, ch. 156), he encounters the difficulty that the alleged right of booming logs had not been exercised for several years before this action was brought (section 3). His claim to an easement apart from the operation of the statute need be considered only if his claim of title by possession to the solum cannot be supported. After hearing the evidence in support of this latter claim the learned trial judge deemed it insufficient. The question is one of fact, and the judgment in favour of the Crown should be interfered with only if upon a careful consideration of the evidence it is clear that the conclusion reached is erroneous.

In order to establish title by possession to a portion of the foreshore it is not necessary to prove the same exclusive possession of it which would be requisite in a case of uplands. A grantee of foreshore holds it subject to the *jus publicum* of navigation and fishing and a similarly restricted title to it by possession may be established by proof of such beneficial enjoyment as a grantee holding subject to this *jus publicum* might have exercised. *Lord Advocate* v. *Young*(1); Moore on Foreshore (3 ed.), pp. 658, 660, 779, note (*u*), and 830, note (*s*); 28 Halsbury, pp. 368-9. In *Johnston* v. *O'Neill*(2), at page 583, Lord Macnaghten, quoting from the speech of Lord O'Hagen in *Lord Advocate* v. *Lord Lovat*(3), said:—

(1) 12 App. Cas. 544, at p. 553. (2) [1911] A.C. 552.
(3) 5 App. Cas. 273, at p. 288.

As to possession it has been said in this House that "it must be considered in every case with reference to the peculiar circumstances * * * the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might be expected to follow with due regard to his own interests—all these things, greatly varying as they must under various conditions, ought to be taken into account in determining the sufficiency of a possession."

This same passage was quoted with approval in *Kirby* v. *Cowderoy*(1). This restriction upon the nature of the possession requisite must be borne in mind in considering the sufficiency of the case made out. What is that case?

The upland lot No. 37 was granted to Thos. Loban in 1798. We have no evidence of any dealing with the foreshore by him. He died in 1817. By a lease dated August 29th, 1818, his executors and his devisee demised to Robert Young for fifteen years from the 1st of July, 1817, *inter alia,*

the privilege of erecting a boom for the purpose of securing timber, etc., in front of the said lot No. 37, from the upper line of the said lot 37 down stream until it comes to the distance of 50 feet from the upper part of the boom now occupied by Francis Peabody, Esq.

There is no evidence of actual occupation under this lease and it may be contended that the lease itself is as consistent with a claim by the Lobans to an easement of the right to boom logs as it is with an assertion of a title to the solum of the foreshore. But see *Van Diemen's Land Co.* v. *Table Cape Marine Board*(2), and *Le Strange* v. *Rowe*(3). The next piece of documentary evidence is not subject to this observation. It is the will of Jane Loban, widow and devisee of Thos. Loban, made in 1852, whereby she

(1) [1912] A.C. 599, at p. 603. (2) [1906] A.C. 92 99.
(3) 4 F. & F. 1048.

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devised to her son, John Loban, the foreshore in front of lot 37 "to the outside of the boom in front." Meantime the evidence of the actual presence and use of the boom itself commences.

His Honour Judge Wilkinson, aged 89 years, and a resident of Chatham for 75 years, formerly County Court Judge of the County of Northumberland, deposed to the existence and use of the boom for storing logs from 1850 for a number of years down to a period some "20, 30 or 40 years ago."

Jas. Curran, aged 78, who resided in Chatham all his life, cannot remember when the boom was not in front of the Loban lot. His memory goes back to 1846. The boom was first used to his knowledge by Joseph Cunard, then by Johnston and MacKay, and later by Ritchie and by Muirhead. He remembers constant user of the boom down to about 27 or 28 years ago and a subsequent user some eight or nine years ago.

Jas. Mowatt, aged 81, knew the Loban property for sixty years. He had a shop on part of it for 25 years prior to 1880. The boom was maintained during that period.

Jos. Synott knows of the existence of the boom since 1850. He and Mowatt, however, state that they think the user of it for storage purposes ceased about 1884 or 1885.

Alexander Fraser, aged 81, came to Chatham in 1846. He remembers the block to which the boom was attached from about that time, and that the Rainnies used the boom from about 1847 to 1850.

In 1862 John Loban devised to his widow, Jane Grey Loban, the foreshore "to the outside of the boom in front."

Allan Ritchie deposed that the firm of D. & J. Ritchie made payments of rent for the use of the boom in question first to John Loban and afterwards to Jane Grey Loban from 1855 to 1873, when it was leased to Muirhead.

Jas. Robinson deposed to the use of the boom from 1861 down to about ten years ago.

The defendant Tweedie, 65 years of age, gives evidence of the constant use of the boom from his earliest recollection down to 1886 by lessees or licensees of the Lobans and to subsequent intermittent use of it down to about ten or twelve years ago. He acted as solicitor for Jane Grey Loban and drew a lease of the boom from her to Muirhead in 1873. He also proves payment of rent for the boom by Muirhead to Jane G. Loban and the user of it by Muirhead down to 1886 and subsequently by Richards.

John Johnson, a witness called by the Crown, says that sixty years ago the boom was an old established boom and that it was used for many years until some time, he cannot say how long, after the burning of the mill in 1873.

There is also evidence from Alexander Fraser that he had heard that the boom existed long previous to 1845, but this I treat as inadmissible.

In 1892 Muirhead's interest as lessee of the boom was sold by the sheriff and bought by the defendant. In 1895 Jane G. Loban demised to the appellant *inter alia* the boom privilege for a term of thirty years. This he assigned to Helen Russell. In 1906 Jane G. Loban conveyed to the defendant her reversion in the property, including the block and boom, and assigned to him her rights under the existing

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leases. In 1909 Helen Russell surrendered her rights to the defendant. There is no contradiction of the oral evidence of occupation and there is no suggestion that all the documents mentioned were not executed and delivered for substantial consideration and in good faith, no question of title having then arisen. They leave no room to doubt the character of the right to the foreshore which the Lobans asserted and make clear the intention with which the acts of occupation were performed. *Duke of Beaufort* v. *Aird*(1). While the storage of logs at high tide may not have involved any actual possession of the solum of the foreshore, at and for some time before and after low tide the logs undoubtedly lay upon the solum itself. *Le Strange* v. *Rowe*(2), at pages 1052-3. Moreover, the block to which the booms were attached, though perhaps outside the foreshore, was a permanent structure and the booms were themselves secured by pickets. They would not otherwise have held in place. These were, in my opinion, acts indicative of an assertion of ownership such that those interested in disputing the title asserted by the Lobans would so understand them. Coulson & Forbes, Law of Waters (3 ed.), 29-39.

Having regard to all these circumstances I think the user of the foreshore shewn to have been made by the predecessors in title of the defendant and their lessees or licensees was of the character necessary to support a claim of possessory title. Continuous user of this kind from 1840 to 1885 or 1886 is clearly shewn by the evidence and it indicates that the Loban boom

(1) 20 Times L.R. 602. (2) 4 F. & F. 1048.

was well known and established for years prior to 1840 or 1845, beyond which the memory of living witnesses does not go. There is no reason to suppose that the booming privilege demised in 1818 to Robt. Young was not exercised or that the assertion of ownership of the foreshore by the Lobans and occupation of it under them do not date at least from that time. *Rogers* v. *Allen*(1); *Attorney-General* v. *Emerson*(2). The reference in the lease of 1818 to the fact that an adjacent part of the foreshore was then occupied by a boom held by Francis Peabody, Esq., is significant in this connection. If the later user of the Loban boom has been intermittent it would appear to have been only because owing to the burning of mills and other causes permanent tenants for it were not available. There is no evidence of anything to suggest abandonment of the foreshore or of the right to use it for booming purposes.

From a continuous user of upwards of forty years (such as has been actually proved in this case) an earlier like user may readily be inferred. *Chad* v. *Tilsed*(3). This, coupled with the lease of 1818 and subsequent documents indicative of the character of the right asserted (*Re Alston's Estate*(4)), in my opinion suffice to support the defendant's claim to a possessory title under the New Brunswick statute, 6 Wm. IV., ch. 74 (now C.S.N.B., ch. 139, sec. 1).

If it were necessary for him to invoke the doctrine of lost grant, even a shorter user than has been proved might warrant the presumption of such a grant; 28 Halsbury, 371 (*g*); Moore's Foreshore (3 ed.), p. 598;

(1) I Camp. 309.
(2) [1891] A.C. 649, at p. 658.
(3) 2 Brod. & B. 403, at p. 408.
(4) 28 L.T. (O.S.) 337.

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Duke of Beaufort v *Mayor of Swansea*(1); *Re Alston's Estate*(2). Although the statute of 8 Wm. IV., ch. 1, probably precludes a presumption of a grant made subsequently to 1837, it presents no difficulty in presuming a grant prior to that date. The evidence proves actual possession from 1840 at least to 1886, if not 1902, and warrants an inference of assertion of ownership and possession consistent therewith since 1818 and there appears to be no reason why a lost grant of a date earlier than 1837 should not be presumed. Taylor on Evidence (10 ed.), 138; *Turner* v. *Walsh*(3).

Although in most instances the courts have, no doubt, dealt with ambiguous and equivocal grants of upland, and the question presented has been whether the proof of user of the adjacent foreshore was such as warranted its inclusion in the grant of the upland, such cases as *Lord Advocate* v. *Young*(4), and *Mulholland* v. *Killen*(5), would seem to be authorities for the view that, although the description of the riparian lot cannot be said to include any part of the adjacent foreshore, a grant of the latter may be presumed from long user. That title to foreshore may be acquired against the Crown by occupation for the statutory sixty years in cases where the grant of the upland clearly does not include it, is, I think, not open to doubt. 6 Encyc. Laws of England, 199.

The evidence adduced by the defendant in support of his possession is as satisfactory as could reasonably be expected, having regard to all the circumstances,

(1) 3 Ex. 413.
(2) 28 L.T. (O.S.) 337.
(3) 6 App. Cas. 636.
(4) 12 App. Cas. 544.
(5) Ir. R. 9 Eq. 471, at p. 481.

and it should, in my opinion, be held that he has established title to the foreshore in question.

It is quite clear that the compensation which has been allowed him is confined to the damage sustained by deprivation of and injury to his upland property and riparian rights incident thereto. Nothing has been allowed for his interest in the foreshore, it having been held that he had none. As already indicated that interest is subject to the *jus publicum* of navigation and fishing, and it is quite possible that any user of the foreshore such as the defendant alleges he contemplated was out of the question. Any possibility of obtaining a license to so use it he is entitled to have taken into account. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1); but its remoteness must also be considered. *Cunard* v. *The King*(2). The value of the foreshore in question in former years for booming purposes may perhaps be estimated from the rental paid for the privilege, but the revenue which would have been derivable from this or any other available source, now or in the future, had the Chatham Diversion not been undertaken, may be greater or smaller than formerly. It must also be borne in mind that in the $2,150 already allowed as compensation there is included a substantial sum for riparian rights, and it may be that the situs of the pier or block to which the boom was attached and of part of the boom itself is not included in the property to which the defendant's title has been established. *Fithardinge* v. *Purcell*(3).

On the whole, while the appellant is entitled to

(1) [1914] A.C. 569. (2) 43 Can. S.C.R. 88.
(3) [1908] 2 Ch. 139, at p. 166.

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some additional compensation in respect to his interest in the foreshore, I think we are not in a position to fix the amount which should be allowed him, and that the case must be referred back for that purpose to the Exchequer Court.

The appellant is entitled to his costs of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: *M. & J. Teed.*

Solicitor for the respondent: *Allan A. Davidson.*