

McDonell v Giblin - (1904) 23 NZLR 660

Supreme Court, Wanganui
3, 4 March; 30 March 1904
Cooper J

*Statute of Limitations -- Adverse Possession -- Sufficiency of Possession -- Openness -- Exclusiveness -- Continuity -
- Land Transfer Acts -- Application for Certificate of Title.*

In order to constitute a title by adverse possession, the possession relied on must be for the full period of twenty years, actual, open and manifest, exclusive, and continuous. It must be sufficiently open and manifest to enable an owner reasonably careful of his own interests, if living in the locality, reasonably to discover that some one has taken possession of his land. It must be sufficiently exclusive to entitle the person claiming to be in possession to maintain an action of trespass against a stranger to the title entering upon the land or allowing his cattle to stray upon it. And, although there need not be actual physical possession for every hour or day of the statutory period, the possession must have reasonable continuity.

Intermittent grazing and tethering of a cow upon a corner town section, occasional grubbing of gorse and thistles from the section, and occasional repairing of fences dividing it from adjoining sections (gaps being, however, left in the fences dividing it from the streets, so that it was sometimes walked across as a short cut, and there was nothing to prevent stray cattle and horses from going upon it), held not to constitute sufficient adverse possession.

THIS was an action in which the plaintiff, Mary McDonell, claimed an injunction to restrain the defendants, Mary Ann Giblin and the District Land Registrar for the District of

Footnote

(1) 6 App Cas 636.

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Wellington, from proceeding with an application for a certificate of title under the Land Transfer Act, in the name of the defendant Giblin, in respect of certain land in the Borough of Wanganui. The action was tried at Wanganui before Cooper J, without a jury, on the 3rd of March, 1904, and argued the next day upon findings of fact come to by the Judge. The facts of the case will be found fully set out in the judgment.

W J Treadwell for the plaintiff.

W H Barnicoat for the defendant Giblin.

Cur adv vult

COOPER J

The plaintiff's claim is to restrain the defendants from proceeding with an application for a certificate of title under the Land Transfer Act for certain town land at Wanganui, on the ground that the plaintiff has for more than twenty years been in continuous adverse possession of such land.

The facts as found by me at the trial are that the plaintiff fenced this land in at least sixteen and possibly seventeen years ago, and that she has been in exclusive adverse possession for that period; that for at least five years prior to fencing the land she placed her cow upon the land for grazing, sometimes tethering the animal, and sometimes minding it either by herself or her daughters; that during that period of five years the use of the land for such purposes was intermittent, there being occasions when the land was not used at all by the plaintiff for grazing or any other purpose; that during the same period of five years she repaired from time to time the boundary fences on McGregor's and Collins's boundaries,

and from time to time grubbed the thistles and gorse from the land; that the Coupland Street boundary was unfenced in great part, though there appear to have been the remains of a hedge or fence for a short distance from the corner of Keith Street; that along the Keith Street boundary there was a ditch and bank and a gorse hedge, which was broken in gaps throughout its length; that there is some slight evidence that, prior to the fencing of the land by the plaintiff, boys occasionally played on the section, and that passers-by may have occasionally crossed the section as a short cut; that the plaintiff fenced the land by the advice of the then Town Clerk, and she has from that time paid the rates assessed upon it; that neither the defendant Giblin nor her father, through whom she claims, have ever been in actual

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physical possession of the land; that there was nothing to prevent straying cows and horses from going upon the land before it was fenced. At the time the plaintiff came to Wanganui she was a married woman. Her husband was frequently absent from home at work in various parts of the district, but lived off and on at the house in Liverpool Street, and later on in the house at Coupland Street, occupied by the plaintiff and her family. He died last year without a will, and administration of any estate he may have had has not yet been granted to any person.

Upon these findings, which have been accepted by counsel for the parties, the question whether the plaintiff has acquired, by adverse possession, a title to the land was argued before me on the 4th instant, and I reserved judgment.

In order to constitute a title by adverse possession, the possession relied on must be for the full period of twenty years, actual, open and manifest, exclusive, and continuous; and the onus of proof in such an action as this rests upon the plaintiff. She has not, in my opinion, proved such a possession for more than sixteen or seventeen years. Her possession prior to the time when, by the advice of the Town Clerk, she fenced the land was not so Open or manifest as to necessarily give to the rightful owner the knowledge or the means of knowledge that possession adverse to his title had been taken. The land was to a great extent unfenced, and the plaintiff's own evidence is that there was nothing to prevent stray cattle wandering on to the section, prior to her fencing it, and when neither she nor any member of her family was upon it. In order to dispossess the rightful owner the possession which is claimed to be adverse to his rights must be sufficiently obvious to give to such owner the means of knowledge that some person has entered into possession adversely to his title and with the intention of making a title against him; it must be sufficiently open and manifest that a man reasonably careful of his own interests would, if living in the locality and passing the allotment from time to time, by his observation have reasonably discovered that some person had taken possession of the land. No doubt, in applying this rule, regard must be had to the character and position of the land. In this case the land was a corner section, open in many parts of both street frontages to the road. According to the evidence nothing was done to the land for the first five years by the plaintiff but the occasional grubbing of some gorse and thistles

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growing on the land, and the occasional repairing of the dividing-fences. I do not think these acts were of such a nature as would reasonably have brought to the notice of the owner the fact that some person had entered into exclusive possession of the land. Nor would the fact that from time to time a cow was either tethered upon the land or grazing under the care of the plaintiff or one of her children reasonably tend to give such a notice. Such acts, although amounting to a trespass upon the land, do not of themselves necessarily constitute possession. There is, also, evidence in this case that persons living close to the land during the five years prior to the fencing of the land by the plaintiff, and accustomed to walk past and across the land in question, were not aware that the plaintiff used the land or allowed her cow to graze upon the land from time to time. (See particularly the evidence of Mr Ross.) I think, therefore, that the plaintiff has failed to show that the possession she claims to have commenced some twenty-two or twenty-three years ago was for the first five years sufficiently open to impute to the then rightful owner that she had taken possession of his land. Nor, in my opinion, was such possession exclusive. It is impossible to hold that the plaintiff prior to her fencing the land had such a possession of it as would have entitled her to maintain an action for trespass against a stranger to the title who entered upon the land or allowed his cattle to stray upon it. Possession in order to be "adverse" must be such as will be sufficient to entitle the person in occupation during the twenty years to maintain his right against any person but the rightful owner. Nor, in my opinion, was the plaintiff's possession continuous. It is not necessary that the person claiming a possessory title should be in actual physical possession for every hour or day of the statutory period, but the possession must have reasonable continuity. The plaintiff's evidence is that she herded and grazed her cow on the land in question; that later on she purchased another cow, and also at times herded and grazed this one 'also on the land; that there was, as was necessarily the case, but little grass upon the section, and that in order that the cows might be properly grazed she used sometimes to graze them on the Town Belt, sometimes in a paddock belonging to a Mr Nathan, and sometimes on this section; and that many a time when she put the cow or cows on the section at night; she would find them in the pound the next morning. She also says

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that "when the cows were out of milk I used to send them away. For a good while I used not to have anything on the land when the cows were away, and this continued until I fenced the land in, seventeen or eighteen years ago. I used to send the cows away when they were dry to Brunswick." Mr Ross, to whose evidence I have before referred, states that while he lived in the locality, and up to the time the land was fenced, the section was open, and that there was a track across it, and that he used to walk across it as a short cut, and that he cannot recollect on any occasion seeing either the plaintiff or her cows upon the land. It is in my opinion clear that up to the time she fenced the section she only used it intermittently for convenience for the occasional grazing of her cattle, and that she had not until she fenced the land manifested any intention of holding exclusive and continuous possession of this section. In my opinion, in order to constitute adverse possession, much more must be proved than the plaintiff has proved in the present case.

As, therefore, she has only established an adverse possession for a period of at the utmost seventeen years, she is not rightfully entitled to the land as against the plaintiff, in whom the legal title is.

The view I take of the case renders it unnecessary for me to express any opinion upon the question whether the possession relied upon by the plaintiff was such as if it had been established would have entitled her to maintain the action without obtaining administration of her husband's estate.

I give judgment for the defendants, with costs on the lower scale, and an allowance of £10 10s. for the second day. Judgment for the defendants.

Solicitors for the plaintiff: Treadwell & McBeth (Wanganui).

Solicitor for the defendants: W H Barnicoat(Wanganui).