POSSESSORY TITLE TO WILDERNESS LAND

David M. Harley*

The acquisition of title to wilderness land through adverse possession is of special interest to New Brunswick lawyers. In the first place this branch of the law had its beginnings in the very early jurisprudence of the Province. A leading case, *Doe d. Des Barres v. White*,[1] was decided in 1842. Secondly, a number of the leading cases have been decisions of the New Brunswick courts or have originated here.[2] Thirdly, the development of this branch of the law was strongly influenced by decisions of United States courts. The American courts first drew the distinction between cultivated and wilderness land. They also developed the theory of colour of title. In the absence of relevant English authorities our courts turned quite naturally to the American cases.[3] Fourthly, the recognition by the Courts that an actual possession of wilderness land can be shown and will suffice to establish title to the land itself provides an excellent jurisprudential illustration of the very broad meaning given to the word "possession" in different branches of the law. In the eyes of the law a man may be deemed to be in actual possession of a tract of wild land when the degree of actual occupation and physical control is very slight.[4] Finally, the subject, despite its long history and the numerous decided cases, has definite practical importance even today. Much of the land in New Brunswick has remained uncleared and uncultivated so that practitioners must frequently consider the subject in real estate transactions.

Although there have been many cases on the matter including several decisions of the Supreme Court of Canada, it still cannot be said that the law is settled. The rules adopted by the courts have never been clearly and precisely formulated and several important questions have scarcely been discussed. The purpose of this article is to re-examine this branch of the law and to state the law as it now stands.

Very early in the 19th century American courts drew a distinction between cultivated and wilderness land when considering questions of possessory title and it was soon adopted by our

---

*David M. Harley, M.A. (Toronto), B.A., B.C.L. (Oxon), is associated with Carter & Taylor, Inches & Hazen, Saint John, N.B.

1. (1842) 3 N.B.R. 595.
2. *Doe d. Des Barres v. White* (1842) 3 N.B.R. 595; *Wood v. LeBlanc* (1904) 34 S.C.R. 627; *Farren v. Pejepscot Paper Company et al* (1933) 5 M.P.R. 261.
3. See remarks of Parker, J. in *Doe d. Des Barres v. White* (1842) 3 N.B.R. 595, at p. 623 and the large number of American cases cited in the judgments.
4. Cf. *Kirby and Cowderoy* [1912] A.C. 599.

courts.[5] Since so much of the land in North America was unsettled wild land, the distinction was a necessary and valuable one. It is not found in the earlier English law for the very good reason that most of the land in England was settled and enclosed. This does not mean that there is no authority in English law for drawing distinctions of this sort. English judges have recognized that the evidence necessary to prove possession must vary in relation to the nature of the thing that is to be possessed. A notable example of this judicial attitude is found in the House of Lords case of *The Lord Advocate v. Lord Lovat.*[6] This case involved a dispute over the title to certain fishing rights on a river in Scotland. The defendant claimed title by virtue of continuous long user and enjoyment. Although title to land was not directly in issue, the observations of the House were of the most general nature and made in the broadest terms. Lord O'Hagan said:

> As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests — all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.[7]

Observations of a similar nature may be found in two Privy Council cases, *Des Barres and another v. Shey*[8] and *Kirby v. Cowderoy*[9]. These cases involved disputes over wild lands in Nova Scotia and British Columbia.

While Canadian courts have recognized titles to wilderness land based on adverse possession, their approach to the subject has on the whole been a cautious one. It is perhaps a significant fact that in most of the leading cases the claim to a possessory title failed.[10] The reason for this timidity is the desire of the courts to protect security of title which they consider the main interest of the community in disputes involving the title to land. An owner should only be deprived of his land in a clear and obvious case and the fact that he chooses to leave his land unused and unoccupied should not prejudice his rights. The courts will only divest him of his title if another person has established and can prove an actual possession of the land adverse to the owner.

---

5. E.g. *Doe d. Des Barres v. White* (1842) 3 N.B.R. 595.
6. (1879) L.R 5 App Cas. 273.
7. *Ibid*, at p. 288.
8. (1873) 29 L.T. 592.
9. [1912] A.C. 599.
10. E.g. *Doe d. Des Barres v. White* (1842) 3 N.B.R. 595; *Sherren v. Pearson* (1887) 14 S.C.R. 581; *Wood v. LeBlanc* (1904) 34 S.C.R. 627; *Farren v. Pejepscot Paper Company et al* (1933) 5 M.P.R. 261.

Security of title is also the main consideration underlying the Limitation Acts.[11] These Acts were designed to cut down, in the community interest, disputes involving title to land. This is achieved by limiting the time within which disputes of this sort can be commenced and by recognizing the validity of titles based simply upon actual possession of the land for the necessary statutory period.

The courts also protect security of title by placing the burden of proving an actual possession of land on the person claiming possessory title. The burden is a heavy one and against it is the presumption that the true owner remains in possession of his land even if he has ceased to occupy it unless in the meantime someone else has entered and dispossessed him.[12]

Although the main concern of our courts has been to protect security of title, they have been prepared to make certain concessions in favour of the person claiming possessory title. Thus they recognized that title to wilderness land could be acquired through adverse posssesion and that an actual possession of wilderness land could be shown by evidence short of clearing and enclosure of the land. They also made concessions in favour of the person possessing wilderness land under a colourable or defective title. These concessions were a direct result of the external circumstances existing in North America. Much of the land was uncleared wild land which was settled and cleared only gradually. Often it was left uncleared as it was unsuitable for cultivation and could best be used in its natural state as a source of wood supply. It was not a general practice to fence and enclose the whole of one's land. With this external situation in mind should the true owner always be free to rebut a claim to possessory title merely by showing that throughout the statutory period his land had remained uncleared and unenclosed? Or, to put it differently, should security of title be protected at all costs even in circumstances where the possessor could show a possession as complete as the nature of the land permitted or that he had used and occupied the land in the same manner and to the same extent as the true owner could have done had he chosen to make full use of his land? Our courts took the sensible view that the degree of actual possession necessary must be related to the character of the land in dispute and they made concessions in favour of the possessory claimant. It remains uncertain how far these concessions go and indeed it is a difficult question how far they

11. In New Brunswick the relevant statute is the Limitation of Actions Act, R.S.N.B. 1952, c. 133, which by section 29 provides: "No person shall take proceedings to recover any land but within twenty years next after the time at which the right to do so first accrued . . ."

12. On this point see the remarks of MacQuarrie, J. in *Ezbeidy v. Phalen* [1958] 11 D.L.R. (2d) 669.

should go as security of title would be jeopardized if too great a relaxation in favour of the possessor were permitted.

The cases on possessory title to wilderness land can be divided into two main groups:

(1) those in which a squatter claims possessory title; and

(2) those in which someone having "colour of title" claims possessory title.

Squatter Claiming Possessory Title

Where a squatter claims possessory title the rule is that he must prove an actual possession of the land for a continuous period of more than twenty years — a possession open, notorious and exclusive — and, as in the case of cultivated land, the acquisition of title is confined to that part of the wilderness land actually possessed. A squatter can claim nothing in relation to his possession by construction as the law will not favour a wrongdoer. The question immediately arises: what must a squatter prove in order to establish an actual possession of wilderness land? This question was first considered by the New Brunswick courts in *Doe d. Des Barres v. White.*[13]

The facts in this case were as follows. More than 30 years before the commencement of the action, the defendant settled on land owned by the lessor of the plaintiff. He cleared part of the land fronting on the Memramcook River, built a house on this cleared portion and lived there continuously. It was conceded that the defendant had acquired title to the cleared land, and title to it was not disputed in the action. The dispute concerned a large tract of wilderness land extending back from the edge of the cleared land to a ridge approximately three miles from the river and running parallel to it. The boundary lines of this wild land had not been surveyed until 1831. It was argued for the defendant, however, that the ridge running along the rear of the *locus in quo* constituted a sufficient boundary, and, as he had intended to occupy up to this ridge a lot having the same width as his cleared land on the river, that the absence of side lines was unimportant.

As evidence of his actual occupation of the wild land, the defendant proved that for a period of more than twenty years he had entered from time to time to cut and remove firewood, logs and poles and to make rough wood roads. The wood cutting was not systematic as the defendant merely cut enough wood to supply his needs as they arose.

---

13. (1842) 3 N.B.R. 595.

Parker, J. said that this was the first time that the Supreme Court had had to consider what constituted an actual possession of wilderness land. In the absence of English authorities he examined the American cases at length and concluded that the evidence was insufficient to establish an actual possession of the land and therefore the defendant's claim failed. He said at page 636:

> . . . I must confess after weighing and examining the evidence with the greatest care, I think the proof falls very far short of making out the necessary requisites of an adverse possession of twenty years.[14]

The ridge running along the rear of the *locus in quo,* was too vague a feature to constitute a boundary line. There was nothing to show exactly what part of the *locus in quo* was affected by the periodic woodcutting, and, since boundaries were not laid out before 1831, the possession was not open and notorious enough to give notice to the owner that the defendant claimed the land.

Parker, J., did say that if the evidence had been stronger the defendant might have succeeded, and he did not close the door to possessory claims based upon evidence of this sort. He said:

> If however the repeated acts of cutting and taking away trees openly, notoriously, and exclusively committed by one person, with the knowledge of the owner, or under such circumstances as that he cannot be presumed to be ignorant of them, and without interruption on his part, will ripen into actual possession of the soil, one of two things would seem further required, namely, that the land over which the claim extends shall be defined, either by marks and bounds upon the land itself, or by some deed or instrument under colour of which the party has entered; and that to make out a possession of twenty years duration, there must have been sufficient acts of this sort committed before the commencement of that period, and not merely while it was running on. It is also material to show distinctly that all the acts of cutting relied on have been done by the party himself or by others under his direction, or that there be at least the same degree of certainty on this point as would be required to make him answerable in an action of trespass.[15]

The *Des Barres* case was followed by the Supreme Court of Canada in *Sherren v. Pearson*,[16] on appeal from the Supreme Court of Prince Edward Island. The facts in *Sherren v. Pearson* were similar to those in the *Des Barres* case. The dispute concerned the title to wild woodland situated between properties owned by the defendant and the plaintiff. The jury decided that the plaintiff had legal title to the disputed land and the defendant then sought to establish title by adverse possession. The def-

14. *Ibid*, at p. 636.
15. *Ibid*, at p. 632-633.
16. (1887) 14 S.C.R. 581.

endant had not fenced the land nor cut boundaries, but it was clearly identifiable as it was bounded on its northern and southern sides by two roads which converged at or near the other two boundaries. The evidence of actual possession was that the defendant and others through whom he claimed possession cut wood and poles on the land for a period exceeding twenty years. The Court, after reviewing with approval the *Des Barres* case, rejected the defendant's claim. Ritchie, C. J., said:

> The mere acts of going on wilderness land from time to time in the absence of the owner, and cutting logs or poles, are not such acts, in themselves, as would deprive the owner of his possession. Such acts are merely trespasses on the land against the true owner, whoever he may be, which any other intruder might commit. There was no occupation of the lot by the defendant; there was nothing sufficiently notorious and open to give the true owner notice of the hostile possession begun. An entry and cutting a load of poles or a lot of wood, being itself a mere act of trespass, cannot be extended beyond the limit of the act done, and a naked possession cannot be extended by construction beyond the limits of the actual occupation, that is to say, a wrongdoer can claim nothing in relation to his possession by construction.[17]

Thus in the two leading cases of squatters claiming possessory title to wilderness land the claim failed. What conclusions can be drawn from these cases?

The first conclusion is that mere evidence of woodcutting on the land will not of itself suffice to establish an actual possession of the land itself. This is a sensible conclusion. Woodcutting could easily be carried out on another's land for the statutory period without the owner having notice of it. And even if the owner has notice, is he to assume that someone else is claiming his land or merely that someone has been stealing his trees? Moreover, woodcutting by its very nature cannot be continuous and cannot be carried out over the whole of the wild land at the same time. In the *Des Barres* case Parker, J., did suggest that repeated cutting, if begun well before the twenty year period and if accompanied by the cutting and maintaining of boundary lines, would be sufficient to establish actual possession of the land itself, but in no case has this suggestion been followed.

The second conclusion is that a squatter can show actual possession of wild land by evidence short of actual clearing and enclosure of the land itself. This proposition is not affirmatively stated in either case but it is surely a legitimate inference from them. As to clearing of the land, it was not suggested in either case that this was necessary. Much wild land is unsuitable for clearing and cultivation, so it would be unreasonable to require it to be cleared, especially since it can no longer be enjoyed if it is.

17. *Ibid*, at p. 586.

There is no decisive authority on the point of enclosure. A squatter must establish boundaries of some sort but the cases do not say he must enclose by fencing. Parker, J., clearly did not think it was necessary. In explaining the *Des Barres* case in the later case of *Humphreys v. Helmes,* he said:

> That case did not decide, that there could be no adverse possession of land not enclosed by fences, nor brought into actual cultivation; but that, if the defendant relied simply on acts of possession, or the cutting down and taking away trees off of land, on which he entered without deed or defined bounds, it was not the first act of cutting, that made the commencement of the possession, but there must be such a continuance and extension of the acts, as would clearly indicate the intention to occupy, and not merely to trespass, before the Statute would begin to run: and these must be judged of by a jury.[18]

There are two Ontario cases[19] which say that enclosure is not required, although in these cases the possessor had colour of title. The weight of American authority is against the need for enclosure.[20] Apart from the authorities, it would be unreasonable to require enclosure when a squatter claims possessory title of wild lands as it is not a general practice to enclose lands of this nature.

The question left unanswered by the *Des Barres* case and by *Sherren v. Pearson* is what further evidence in addition to the woodcutting would have sufficed. Suppose for example the defendant in the *Des Barres* case cut and maintained boundary lines around the *locus in quo* for the statutory period, keeping out trespassers and cutting wood within the defined area for more than twenty years. Would this evidence coupled with the defendant's actual clearing and occupation of the land fronting on the river have been sufficient to give him actual possession of the wilderness land? The extent of the wilderness land would be clearly identifiable and there would be ample notice of the possession to the outside world. The maintenance of the boundary lines would provide the element of continuity lacking in the periodic woodcutting. There is no injustice to the owner who has sufficient notice of the possessor's claim. Security of title would not be endangered as the limits of the possession are fixed. As the cases now stand our courts are free to say that in these circumstances an actual possession of the land is shown. If they are not prepared to take this view, then it is nonsense to talk about squatters obtaining possessory title to wilderness land as they would seldom be able to show an actual possession greater than this.

18. (1861) 10 N.B.R. 59, at p. 71.

19. *Heyland v. Scott* (1869) 19 U.C.C.P. 165; *Davis v. Henderson* (1869) 29 U.C.Q.B. 344.

20. C.J.S., vol. 2, p. 539.

Persons Having Colour of Title Claiming Possessory Title

The second group of cases are those in which the claimant has "colour of title" to the wild land. The phrase "colour of title" means that the possessor, unlike a squatter, entered the land by virtue of some documentary title to it, which, unknown to the possessor, is defective and invalid. A person may have sold him land to which he had no title. An incapacitated person may have given a deed. The importance of colour of title is that the possessor has some document containing a description of the land intended to be conveyed and to be occupied by the possessor and, since the possessor is not a trespasser, constructive effect can be given to his acts of possession. The rule is that if a person having colour of title can show actual possession of part of the wild land for the statutory period—a possession open, notorious, continuous and exclusive—his possession, in the absence of possession by someone else, is constructively deemed to apply to the whole of the land described in his defective document of title.

This doctrine first emerged in the United States and was later adopted by the Canadian courts. The following statement from the Corpus Juris explains the underlying basis of the doctrine:

> The idea of constructive possession by virtue of colour of title is native to the United States, being devoid of any basis in the prior English Law, and being originally based upon pioneer customs and necessities, whereby land was originally cleared and enclosed only gradually and a little at a time, so that the fact of possession was referable to the paper title, for discovery of the extent of the claim, instead of, and as a substitute for, the clearings and enclosures of more settled communities. The passing of pioneer days has not, however, resulted in a discarding of the rule as one no longer adapted to present needs but in the assignment for it of the broader reason that one entering and holding under colour of title thereby asserts an intention to possess and claim all of the land within the boundaries of his document of title, his entry under such instrument being explanatory of his acts and resolving any doubt as to their purpose and tenor.[21]

Since defects are often encountered in the title to wild lands the importance of colour of title is immediately apparent: as long as the possessor has colour of title he can prove possessory title to the whole of his land merely by establishing his actual possession of part.

The Canadian courts have accepted the doctrine[22] although there are no leading decisions where it has been applied. It was

21. *Ibid*, p. 771.
22. *Vide*: *Lessee of Cunard v. Irvine* (1853) 2 N.S.R. 31; *Doe d. Baxter v. Baxter* (1858) 9 N.B.R. 131; *Heyland v. Scott* (1869) 19 U.C.C.P. 165; *Humphreys v. Helmes* (1861) 10 N.B.R. 59; *Davis v. Henderson* (1869) 29 U.C.Q.B. 344; *Mulholland v. Conklin* (1872) 22 U.C.C.P. 372; *Stewart v. Goss* (1933) 6 M.P.R. 72; and the two Privy Council cases, *Des Barres and another v. Shey* (1873) 29 L.T. 392 and *Kirby v. Cowderoy* [1912] A.C. 599.

recognized, discussed, but not applied by the Supreme Court of Canada in *Wood v. LeBlanc* in 1904.[23] The doctrine does involve theoretical difficulties as apparently there are two competing constructive possessions: that of the owner who remains in possession of his land until actually dispossessed, and that of the possessor who has taken actual possession of part of the land. The early applications of the doctrine have also been judicially criticized.[24] In the two leading New Brunswick cases on the doctrine,[25] the attempt to rely upon it failed, not because the courts refused to recognize it, but because in each case the defendant failed to prove the actual possession of part of the land for the statutory period which is an essential prerequisite of its application.

A recent case where the doctrine was applied is the case of *Stewart v. Goss.*[(26)] Here the defendant claimed possessory title to 110 acres of woodland in Charlotte County which his father had purchased in good faith from a non-owner in 1872. A deed was given but not registered, owing to some irregularity in its execution. The deed was subsequently lost although the plaintiff did know of its existence. In 1872 the defendant's predecessors entered the property and began clearing it until 30 to 40 acres were cleared and fenced. Between 1872 and 1900 this cleared portion was cultivated by the defendant's predecessors. After 1900 the cleared land lay idle and from time to time the defendant cut pulpwood on the property. The New Brunswick Court of Appeal applied the theory of colour of title and held that in the 1890's a possessory title had been acquired to the whole of the *locus in quo* thereby extinguishing the plaintiff's right to institute the present action.

The leading New Brunswick case on colour of title is *Wood v. LeBlanc.*[27] The plaintiff who commenced an action of replevin for wrongfully removing logs from wild woodland could not show a valid documentary title to the land because his predecessors had purchased it from a squatter. The plaintiff then relied on possessory title. The evidence on which he relied was that he and his predecessors lumbered on the land, had surveys made and woodroads cut. The Supreme Court of Canada, in affirming the judgment of the New Brunswick Court of Appeal, unanimously rejected the plaintiff's claim. Davies, J., said:

---

23. (1904) 34 S.C.R. 627.

24. See the judgment of Carter, C. J. in *Humphreys v. Helmes* (1861) 10 N.B.R. 59, and that of Armour, J. in *Shepherdson v. McCullough* (1882) 46 U.C.Q.B. 573 (both dissenting).

25. *Wood v. LeBlanc* (1904) 34 S.C.R. 627; *Farren v. Pejepscot Paper Company et al* (1933) 5 M.P.R. 261.

26. (1933) 6 M.P.R. 72.

27. (1904) 34 S.C.R. 627.

> 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 posssesion 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.[28]

The court followed the *Des Barres* case[29] and *Sherren v. Pearson*,[30] in deciding that lumbering operations which are not continuous do not constitute actual possession of land.

The same conclusion was reached by the New Brunswick Court of Appeal in *Farren v. Pejepscot Paper Company et al* [31] where the facts were similar to those in *Wood v. LeBlanc*. The defendant company proved that lumbering operations had been carried out on the *locus in quo* five times during a period of 30 years. Throughout the same period the defendant had employed a caretaker to inspect its properties including the *locus in quo*, to watch the boundary lines and to keep out trespassers. Again this evidence was not enough. Barry, C. J., said:

> The mere acts of going on wilderness lands from time to time, in this case five times in thirty-three years, in the absence of the owner and cutting logs, are not such acts in themselves as would deprive the owner of his possession. Such acts are merely trespasses on the land against the true owner, whoever he may be, which any other intruder might commit.[32]

The Court was not impressed by the caretaker's evidence as he did not say that he actually knew the exact boundaries of the *locus in quo* and he only inspected the properties in the wintertime.

A comparison of *Wood v. LeBlanc* and the *Pejepscot* case with the cases where colour of title has been applied shows that

---

28. *Ibid*, at p. 635.
29. (1842) 3 N.B.R. 595.
30. (1887) 14 S.C.R. 581.
31. (1933) 5 M.P.R. 261.
32. *Ibid*, at p. 287.

what the courts require before they will apply colour of title is an actual clearing of part of the *locus in quo* and occupation of this cleared land by cultivating it or living on it for the whole statutory period[33]. If these things are shown then the courts are much more willing to favour the possessory claimant. It is true that there are suggestions in the cases that lumbering while it is actually going on represents actual possession of the land, but there are no Canadian cases where lumbering alone has been sufficient and it is hard to see how it ever could be since by its very nature it is not continuous.

After the cautious attitude displayed in *Wood v. LeBlanc* and the *Pejepscot* case, the decision of the Privy Council in *Kirby v. Cowderoy*[34] comes somewhat as a shock. More than twenty years before the action the plaintiff conveyed certain wild lands in British Columbia to the defendant. The conveyance was absolute in form but it was treated by the parties and accepted by the court as a mortgage. The plaintiff sought recovery of the land and was met by the defence that as the defendant had been in possession of the land as mortgagee for more than twenty years the right to recovery was extinguished. The only evidence of possession by the defendant was (1) by British Columbia law conveyances of land transferred to the grantee *inter alia* "possession" of the land itself; and (2) the defendant paid the taxes on the land for the statutory period. The Privy Council, reversing the British Columbia Court of Appeal, found for the defendant. Lord Shaw of Dunfermline said:

> It appears to be established, in short, that (1) for over twenty years before the institution of this suit the appellant had, so far as this wild land was concerned, performed the only act of possession of which it appeared to be capable, namely, he had paid all the taxation upon it; whereas (2) the respondent was aware that this was being done by the appellant and he (the respondent), so far from anything even remotely akin to adverse possession, had washed his hands of all connection with the property.[35]

Although this case is a decision of the Privy Council, it is certainly open to grave doubt. None of the Canadian cases on possessory title to wilderness land was cited in the judgment or in the argument. Only one judgment was given and it is very brief. The fact that the respondent knew the taxes were being

33. *Vide*: *Lessee of Cunard v. Irvine* (1853) 2 N.S.R. 31; *Doe d. Baxter v. Baxter* (1858) 9 N.B.R. 131; *Heyland v. Scott* (1869) 19 U.C.C.P. 165; *Humphreys v. Helmes* (1861) 10 NN.B.R. 59; *Davis v. Henderson* (1869) 29 U.C.Q.B. 344; *Mulholland v. Conklin* (1872) 22 U.C.C.P. 372; *Stewart v. Goss* (1933) 6 MP.R. 72; and *Des Barres and another v. Shey* (1873) 29 L.T. 392.

34. [1912] A.C. 599.

35. *Ibid*, at pp. 602-3.

paid and that he, to use the words of Lord Shaw, "washed his hands of all connection with the property" strongly influenced the court. But is the payment of taxes evidence of possession of land at all? A person pays taxes on land because he claims to own it, not because he is in possession. It is also difficult to see how the execution of the conveyance conferred possession upon the mortgagee as the usual practice in mortgage transactions is for the mortgagor to remain in possession.

While our courts have in a few cases applied the doctrine of colour of title, the limits of this doctrine have scarcely been explored. For example, can a possessor rely on the theory when the deed was received with knowledge that it is defective or that the grantor does not own the property? Must the defective document be a deed containing a metes and bounds description of the land intended to be conveyed? Must the deed be recorded? There have been American cases on all these points but no important Canadian ones.

Generally speaking the cautious approach taken by our courts to the question of possessory title to wilderness lands suggests that they would favour a narrow interpretation of the theory of colour of title. On the requirement of *bona fides* by the possessor, there is a *dictum* of Killam, J. in *Wood v. LeBlanc* saying that *bona fides* is an essential requirement.[36] In all the cases cited above where colour of title has been applied, *bona fides* has existed.[37] The weight of American authority is in favour of *bona fides*.[38] Apart from authority if the courts refuse to give any constructive effect to the acts of a treasurer, why should they give it to someone with colour of title who has acted in bad faith?

The cases do not deal at length with the question whether registration of the invalid deed is necessary or not. Halliburton, C. J., in *Lessee of Cunard v. Irvine*[39] thought it was unnecessary and the court in *Stewart v. Goss*[40] decided that notice of the existence of the deed without actual registration is enough. In most of the cases where colour of title has been applied, however, the deed has been recorded. In the United States some cases say registration is not required and in some States the point is covered by legislation.[41]

36. (1904) 34 S.C.R. 627 at p. 647.

37. *Vide*: *Lessee of Cunard v. Irvine* (1853) 2 N.S.R. 31; *Doe d. Baxter v. Baxter* (1858) 9 N.B.R. 131; *Heyland v. Scott* (1869) 19 U.C.C.P. 165; *Humphreys v. Helmes* (1861) 10 N.B.R. 59; *Davis v. Henderson* (1869) 29 U.C.Q.B. 344; *Mulholland v. Conklin* (1872) 22 U.C.C.P. 372; *Stewart v Goss* (1933) 6 M.P.R. 72; and the two Privy Council cases, *Des Barres and another v. Shey* (18773) 29 L.T. 392 and *Kirby v. Cowderoy* [1912] A.C. 599.

38. See (1909-10) 23 Harv. L.Rev. 56.

39. (1853) 2 N.S.R. 31 at p. 34.

40. (1933) 6 M.P.R. 72.

41. See (1909-10) 23 Harv. L.Rev. 56.

From a practical point of view strong reasons favour the requirement of registration. Is an owner who sees another occupying part of his land which is of little value and who decides to let the occupation continue for the statutory period to run the risk thereby of losing title to a much larger tract of land over which there are no visible signs of occupation simply because the possessor has an invalid deed to it? If the deed is not recorded the owner cannot find out how much land the possessor is claiming to occupy. And the mere fact that the owner knows the possessor has a deed is not noticed of its terms unless it is registered. Again, is a *bona fide* purchaser from the true owner to run the same risk?

Only if registration is not required does the question whether a description of the land in any sort of document will suffice arise. This point has not been discussed by our courts and in all cases where colour of title has been applied there has been a deed. The American courts have extended the doctrine so that a document of any sort containing a description of the land intended to be conveyed is sufficient.[42] In some American cases the doctrine has even been extended to mere verbal descriptions of the land intended to be sold. These cases are, however, against the weight of American authority.[43] This extension is hardly necessary or desirable today and it is unlikely that Canadian courts would adopt it.

Conclusion

The cases on possessory title to wilderness land show that the courts have made important concessions in favour of the possessory claimant. They have recognized that wilderness land must be distinguished from cultivated land and that the evidence required to show an actual possession of the former is less than that required for cultivated land. Although mere woodcutting is not sufficient for this purpose, something less than clearing and enclosing the wild land is. They have also adopted and applied the American theory of colour of title. Although these concessions have been narrowly interpreted and cautiously applied, their practical importance should not be overlooked when considering questions of possessory title.

---

42. See (1909-10) 23 Harv. L.Rev. 56.

43. Cf. Tiffany The Law of Real Property, 3rd Ed., vol. 4, pp. 459-462.