

N. S. Rep.]

BOWEN AND WIFE V. SHEARS.

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NOVA SCOTIA.

SUPREME COURT.

BOWEN AND WIFE V. SHEARS.

Trespass to land—Statute of limitations—Adverse possession—Estoppel.

In 1831, C. gave plaintiff's wife a piece of land, part of a farm. In 1833 the plaintiffs went into actual possession, C. helping them to build the house, and so continued until 1870, when defendant entered. Plaintiffs brought trespass, and defendant set up title in himself under the will of C. (made in 1859), by which the farm, "then owned and occupied by the testator," was devised to the defendant. In 1838 the plaintiffs conveyed to C. in trust, to preserve the right title and interest of plaintiff's wife for their daughter, free from the father's debts, &c., the rents and profits to the wife during her life, and after her death for the support and maintenance of the daughter. By this deed C. had power to call for and receive the rents and profits. Before his death C. recognized in a survey he made the fact that he had given the land in dispute to plaintiff's wife.

Held that although the plaintiffs were estopped by the deed made in 1838 from claiming title by possession before that time, they were entitled so to claim, being in effect, a tenant at will, after the lapse of one year from that date; and the plaintiffs could maintain their action against defendant as a wrongdoer, having held adversely to him for more than twenty years.

Trespass by Bowen and wife against Philip Shears. At the trial of the cause a verdict was taken by consent for the plaintiffs for \$4.00—damages subject to the opinion of the Court on the whole case with all the powers that could be exercised by a jury, and power also to set aside the verdict or give judgment in accordance with it, or to order a nonsuit or judgment for defendant.

The facts of the case as proved at the trial were substantially as follows: The plaintiffs were married in 1831, and the day after the marriage Philip Cheppard, the godfather of the plaintiff Mary Ann Bowen and for whom she had previously worked, took her to the piece of land now in dispute, and said, "I am going to give you this." It was then called pasture and had a fence round it. He divided the land between her and her brother, the present defendant, giving to her one half, between five and six acres. In 1833 the plaintiffs went into possession of the land thus made over to the wife Mary Ann, and continued in quiet possession of it until the trespass complained of by the defendant in April 1870, showing a continuous possession of thirty-seven years. The plaintiff Edward Bowen built a house on the land, urged to do so by Cheppard, who helped him to build the cellar, and the plaintiffs went into the house in 1834, and occupied it from

that time until five years before the trial, when they rented it at £9 a year. The defendant Shears helped to shingle the house, and two years afterwards assisted to erect the barn, and since then there has been a fence round the property and the whole now under cultivation. The trespass by the defendant was proved. His defence under his plea was title in himself. This he claimed under the will of Philip Cheppard, who, by a will dated 29 Nov. 1859, devised to him all the farm lot that the testator then owned and occupied containing about 400 acres with the buildings, &c., excepting out of the said devise, about 2½ acres. To hold to the said defendant the said lot and premises during his natural life, and after his decease to his daughter Mary Shears in fee simple. When the testator made his will he had been out of that part of the property claimed by the defendant under the devise to him of the 400 acres for a period of 28 or 29 years, unless, under the conveyances to which hereafter referred to, he became revested of the property given to the plaintiff's wife in 1831. This deed, dated 26th Oct. 1838, was proved on the part of the defence to be between the plaintiffs on the one part, and Philip Shears on the other. It recited, that "Whereas Philip Cheppard has allowed Edward Bowen to erect a dwelling house and barn on a piece of land belonging to him, and whereas the said Edward Bowen and Mary Ann his wife are anxious that the said premises should be conveyed to the said Philip Cheppard in trust for the benefit of Eliza Jane Bowen: they, the said Edward Bowen and Mary Ann his wife for divers good causes, &c., and in further consideration of the sum of ten shillings, &c., granted, bargained, &c., to the said Philip Cheppard, his heirs and assigns, all the estate right title and interest whatever of the said Edward Bowen and Mary Ann Bowen both at law and in equity of, in to or upon the said premises. To have and to hold to the said Philip Cheppard his heirs, &c., but to for and upon the uses and trusts to be specified and declared by a certain Indenture of even date therewith and thereto annexed. The deed also assigned to Philip Cheppard certain personal property to and upon the same uses and trusts as are mentioned in the conveyance already referred to. That conveyance commenced with stating "that the right title and interest of the said Mary Ann Bowen in the house and barn erected on the land belonging to the said Philip Cheppard, shall be preserved for Eliza Jane Bowen, daughter of the said Edward and Mary Ann Bowen, exempt from any liability of the debts,