

FEBRUARY 1ST, 1909.

DIVISIONAL COURT.

SHUNK v. DOWNEY.

Limitation of Actions—Real Property Limitation Act—Adverse Possession—Evidence — Legal Estate — Fences—Boundaries—Isolated Acts of Ownership—Series of Trespasses—Acts not Exclusive of True Owner—Insufficiency.

Appeal by plaintiff and cross-appeal by defendant from judgment of LATCHFORD, J., dismissing without costs an action for trespass and to recover possession of about 5 acres of uncleared land.

The appeal was heard by BOYD, C., BRITTON, J., MAGEE, J.

L. F. Heyd, K.C., for plaintiff.

K. F. Mackenzie, for defendant.

BOYD, C.:—According to the evidence of Campbell, his father first got possession of the 5 acres in dispute when he bought from Whitmore's estate, of which he was executor, about 20 acres which was alongside of the 5 acres, and that was in 1876. About 30 acres in all, of which this 5 was part, had been stripped of its good timber, and was lying wild, scrubby land, forming a "slash"—which is indeed the present condition of the 5 acres. At that time a fence existed, formed of brush and piles, of most irregular shape, which was on Shunk's land, and which separated his grain fields from his "slash" of five acres, which was all within the boundary of his lot of about 160 acres in all. The plaintiff has lived there since 1860, and he tells us that this old fence was put there to protect Shunk's cleared fields from the cattle pasturing in the slash. That, I have no doubt, looking at the plan and the evidence, was the real object of the brush fence—for the plaintiff's own convenience. A line was run by Gibson, O.L.S., in 1874, which defined the boundary of the Whitmore land, afterwards acquired by Campbell in 1876, by a line running to the north of these 5 acres. Thus it is quite indisputable that the true boundary between Campbell (now Downey) and Shunk runs along the north limit of the 5 acres, excluding it from Downey's deed