JOHN J. SHIELDS ..... APPELLANT;

AND

THE LONDON AND WESTERN TRUSTS COMPANY, ADMINISTRATOR OF THE ESTATE OF WILLIAM B. SHIELDS DECEASED ..... RESPONDENT.

1923
*Nov. 15.
*Dec. 4.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Statute of Limitations—Possession of land—Interruption—Proceedings for partition—Declaratory judgment.

In 1916 proceedings were taken for partition and sale of land which had belonged to the deceased father of the parties. S., one of the parties thereto and a tenant in common with the others, had then had exclusive possession of the land for less than ten years. The proceedings resulted in a judgment declaring five of said parties, including S., to be the owners of the land and the partition and sale were not

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

1923

SHIELDS v. THE LONDON AND WESTERN TRUSTS CO.

proceeded with. In 1922 proceedings were again taken for partition in which S. claimed a statutory title by possession of the whole land.

Held, that the former judgment had interrupted the continuance of possession by S. and his title had not accrued.

Whether or not a summary proceeding for partition and sale shall be fully tried by a judge in chambers or an issue be ordered to try some important matter raised is a question of practice and procedure with which the Supreme Court will not, as a rule, interfere.

Per Anglin and Mignault JJ. It is also a matter of judicial discretion and it cannot be said that the order of the Appellate Division in this case, that it should be tried in chambers, was a wrongful exercise of such discretion.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment of a judge in chambers directing the trial of a question of law and ordering the partition and sale of land as applied for.

Proceedings by originating summons were taken for the partition and sale of land. When the case came before the judge in chambers the appellant claimed title to the whole land by virtue of the Statute of Limitations and the judge directed a trial to determine the title. On appeal his order was set aside, the Appellate Division directing that the case should be tried summarily and also deciding the question of title in favour of the respondent and directing a reference to take the necessary proceedings for partition and sale. From that judgment the appeal was taken to this court.

Betts K.C. for appellant.

John C. Elliott K.C. for respondent.

THE CHIEF JUSTICE.—I think this appeal fails and should be dismissed with costs.

I am inclined to think that the judgment of the Divisional Court from which this appeal has been taken dealt substantially with matters of procedure and practice of the courts of Ontario and in accordance with our practice would not be interfered with by this court, unless some manifest injustice was shown of which there is here no evidence whatever.

Without, however, basing my judgment upon that ground, I am of the opinion, on the substantial question in this appeal, as to whether the Statute of Limitations ceased running in favour of the appellant and his mother and sister by reason of the judgment for administration and partition or sale pronounced in the proceedings of

1916-1919, that it did and that consequently the appellant's claim that a statutory title by possession had subsequently ripened and accrued to him cannot be upheld.

That judgment for administration and partition of sale was one for the benefit of all parties interested (including the present appellant) and they were all bound by it. Appellant's claim to add the years of his possession of the lands and premises in question previous to that judgment in order to make up his statutory possessory claim cannot, therefore, be allowed in my view of the effect of the 1916-1919 proceedings and judgment.

IDINGTON J.—The appellant raises very many points relative to the correct practice and procedure to be taken in Ontario courts by those seeking partition of real estate held by tenants in common as respondent does herein as administrator of the estate of one William B. Shields, deceased, and one of five who had been duly declared owners of the equity of redemption in certain lands.

Indeed on a motion of the four surviving owners, including the appellant, and respondent as representative of said deceased, the said equity of redemption had been declared to be vested in the appellant and his said co-owners.

The uniform jurisprudence of this court has been to refuse to exercise its jurisdiction in such matters unless some grave violation of natural justice has been involved in the departure from the correct practice or procedure.

Therefore the appellant has no grounds of complaint herein, in his vain attempt to get a very serious injustice done to the respondent, one of his co-tenants.

His attempt to set up the Statutes of Limitations is rather absurd as well as unjust in face of the past history of the property in question and the litigation it has gone through.

And in face of his repudiation of any claim thereunder for himself in his answer by affidavit to the originating motion below, it seems rather absurd.

I think the judgment of Mr. Justice Middleton speaking for the majority of the court below is right.

This appeal should be dismissed with costs.

1923

SHIELDS v. THE LONDON AND WESTERN TRUSTS CO.

Duff J.

DUFF J.—The appellant has failed to advance adequate reasons for interfering with the decision of the Appellate Division on the ground principally relied upon in support of the appeal, namely, that the procedure followed is not a procedure sanctioned by the Ontario practice. The procedure approved by the majority of the Appellate Division seems to be a convenient one, and the controversy raised in relation to it is not a controversy as to rights or as to the jurisdiction of the Supreme Court of Ontario, but one as to whether this or that mode of bringing the points in dispute up for adjudication is the correct one. It would not be in consonance with the principles which have governed this court in dealing with such matters to examine questions of this character in the absence of some very special circumstances such as are not present in this case.

Another ground of appeal is set up, and that is that the Appellate Division is wrong in its conclusion that the appellant has failed in his contention based upon the Statute of Limitations. A judgment for administration and partition was pronounced in 1916, and a vesting order was granted on the 29th May, 1919. I am not satisfied, having regard to what took place before the Master in 1917, that by virtue of the master's report in that year a new starting point did not arise for the running of the statute. It is at least arguable that the case is within the last paragraph of Lord Cairns' judgment in *Pugh* v. *Heath* (1), where it is laid down that sec. 6 of the Act

in defining when the right shall be deemed to have accrued is not necessarily exhaustive.

I do not read the judgment of Middleton J. as proceeding upon the ground that what took place amounted to a statutory acknowledgment of title. However that may be, I am satisfied that in effect what was done amounted to the bringing of the action within the meaning of sec. 5, "action" being defined by the first section as including "any civil proceeding."

The appeal should be dismissed with costs.

ANGLIN J.—The Ontario Consolidated Rule of Practice No. 615 reads, in part, as follows:—

615. (1) An adult person entitled to compel partition of land or any estate or interest therein may, by originating notice served on one or more of the persons entitled to a share therein, apply for partition or sale.

(1) 7 App. Cas. 235, at page 238.

(2) The Master shall proceed in the least expensive and most expeditious manner for partition or sale, the adding of parties, the ascertainment of the rights of the various persons interested, the taxation and payment of the costs and otherwise.

Rule 606 reads, in part, as follows:—

606. (1) The judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case may require or may give such directions as he may think proper for the trial of any questions arising upon the application.

Rule 615 confers a special summary jurisdiction. The conditions of its exercise are:—

(*a*) that the applicant shall be "an adult person entitled to compel partition."

(*b*) that the notice of application shall be "served on one or more of the persons entitled to a share" in the land, estate or interest sought to be partitioned.

By an originating notice of motion, served only on the appellant, the respondents, as administrators of the estate of the late William B. Shields, applied in November, 1922, to a judge of the High Court Division of the Supreme Court of Ontario for a judgment for the partition or sale of the north part of lot 6, Con. 9, Tp. Mosa, Co. Middlesex, containing about 100 acres and said to be worth some $4,000 or $5,000. This farm had belonged to the late James Shields, father of the appellant and of the late William B. Shields. James Shields died intestate in 1895, leaving him surviving a widow, now dead, and eight children.

In 1916 a judgment for the administration and partition or sale of the estate of the late James Shields was pronounced on the unopposed application of two of his sons, Andrew J. and George Shields. Upon the reference then directed the Local Master at London reported that the persons entitled to the equity of redemption in the lands formerly owned by the intestate James Shields were

Jessie Shields, John J. Shields, James Shields, the estate of William B. Shields and Catherine Leitch, as tenants in common, subject to the dower interest of Annie Shields, widow of the intestate.

Andrew and George Shields, the applicants for administration and partition, were found to have no interest in the lands of their deceased father. This report was upheld on appeal by Mr. Justice Kelly, the Appellate Divisional Court and eventually by this court. Subsequently on the 29th of May, 1919, Mr. Justice Sutherland, on the application of the several heirs so found entitled, including the

1923
SHIELDS
v.
THE LONDON AND WESTERN TRUSTS CO.
Anglin J.

present appellant and Annie and Jessie Shields, made an order (suggested to have been inofficious) confirming the report of the local master and vesting *inter alia* the lands now in question in the persons who had been found entitled by the local master. No further steps appear to have been taken in those proceedings.

On the return of the application now before us made by the present respondents, the appellant filed an affidavit in which he deposed in part as follows:—

4. Since the death of my said father, the occupation of the said land has been as follows:

Ever since the death of my said father and up to the month of September, 1921, I and my sister Jessie, and my mother, Annie C. Shields, resided continuously upon the said lands as our home and farmed the same in conjunction with the remaining lands constituting the farm of my said late father and adjoining the land in question herein. Up to the year 1909, various other members of the family also resided upon the said farm and helped to do the work thereon.

5. Since the year 1909 the said farm, including the lands in question herein have been occupied and farmed exclusively by myself and my said sister, Jessie Shields, and my said mother, Annie C. Shields, up to the present time, with the following exceptions:

(*a*) My mother, Annie C. Shields, died on the said farm in the month of September, 1921.

(*b*) My brothers, William Shields and James Shields, paid occasional visits in the winter months to the vicinity of the said township of Mosa and on such occasions stayed with me at the said farm, but never on such occasions exercised any acts of ownership over the said farm or any part thereof or claimed to be the owners thereof.

6. It was always the understanding in the family, with the exception perhaps of my brothers Andrew J. and George, that the lands and premises in question herein were to be the property of my said sister Jessie, and my said mother, Annie C. Shields.

7. I claim that my sister, Jessie Shields, and my said mother, Annie C. Shields, and myself, if I desired to assert such a claim, which I do not, have by reason of the exclusive occupation by our three selves of the said farm for a period exceeding the last ten years, have acquired an absolute title by possession to the said lands.

8. My said sister, Jessie Shields, and myself are at present in exclusive possession of the said farm, including the lands in question herein.

Notwithstanding this disclaimer, however, the appellant in his factum says:—

They (the respondents) are aware that the land in question has been the home of the present appellant and his sister, Jessie Shields (to the exclusion of all other members of the Shields family), for a long series of years and that *these two claim absolute ownership of the said lands* and deny any title whatever thereto in the applicant.

And again:

The said appellant and the said Jessie Shields have continued in exclusive possession of the said lands as owners thereof, and they claim that in or about the year 1920 * * * the ten years prescribed by the

Statute of Limitations expired and that they became forthwith invested with the absolute title to the said lands.

I take it, therefore, that the disclaimer of the appellant was intended to operate only in favour of his sister, Jessie Shields, and that, if possessory title in her should not be established, he intends to retain and assert his interest as a co-owner. Service on him was, therefore, probably a sufficient compliance with the requirement of Rule 615 that the notice of the application for partition or sale should be "served on one or more of the persons entitled to a share."

The substantial objection raised to the application is that the applicants' title to the land has been extinguished since the former administration proceedings were had, by the expiry of the ten years' period prescribed by the Statute of Limitations, which was running when those proceedings were taken. The question for determination was whether they stopped the running of the statute and established a new point of commencement.

When the application came on for hearing before Mr. Justice Smith, in chambers, he took the view that the allegation of the appellant challenging the title of the respondents as barred by the Statute of Limitations raised a question that should not be disposed of on a summary application. He accordingly dismissed the motion for partition and directed that the costs of it should be costs in any action to be brought by the appellant for the determination of the question that had arisen.

On appeal this order was reversed by a Divisional Court which held (the Chief Justice of the Common Pleas dissenting) that the question of title was purely one of law and could readily and conveniently have been disposed of by the judge in chambers, all the necessary material having been before him, and could then be so dealt with by the Divisional Court—in fine, was such a question arising on the originating notice as r. 606 contemplates should be so dealt with.

The court held that the possession of the appellant and Annie C. Shields and Jessie Shields had been so interrupted by the proceedings for administration and the investigation and the determination of title therein, that the running of the Statute of Limitations in their favour had been thereby stopped. Mr. Justice Middleton, de-

1923

SHIELDS v. THE LONDON AND WESTERN TRUSTS CO.

Anglin J.

livering the reasons for judgment of the majority of the court said:—

> I regard this (the Master's report in the earlier proceedings determining the interests of several parties, confirmed on appeal) as a judicial declaration of the rights of the co-owners, which is not now subject to review. It is true that nothing is said in the report as to the actual occupation of the lands and that it is quite consistent with the Master's finding that some one or other of the tenants in common may have been in exclusive possession and that if nothing had intervened this possessory title would in the end have ripened into a title under the statute good as against other tenants in common. But I think this gave a new starting point for the statute for no more effective acknowledgement of title can be imagined than a declaratory judgment of a court having competent jurisdiction.

Speaking of the vesting order, the learned judge added:

> Much might be said as to the necessity of the application for this order or as to its operative effect, but at any rate it is an acknowledgement by John J. Shields of the title of his co-tenants for he was a party to the application.

The Chief Justice dissented from the judgment on both points.

So far as the present appeal challenges the propriety of the Divisional Court determining the issue under the Statute of Limitations, the question presented is purely one of the discretion to be exercised under r. 606. It is essential to the summary jurisdiction conferred by r. 615 that the applicant should be "an adult person entitled to compel partition." Whether the respondents met that requirement was controverted by the present appellant setting up title by possession in himself and his mother and sister. That question had to be determined before the special jurisdiction conferred by r. 615 could be exercised. Should the determination of it be by the judge applied to or the court hearing an appeal from his order, or should a trial to decide it be directed? Obviously the matter was one for the exercise of judicial discretion and, having regard to all the circumstances, it is impossible to hold that the discretion of the Divisional Court was wrongly exercised, if, indeed, the matter be not one of practice and procedure on which we are not accustomed to entertain an appeal.

But I entirely agree with the view, which I understand to be held by Mr. Justice Middleton, that if there be any serious difficulty in ascertaining the applicant's status to apply under r. 615 or the rights of the parties, and especially if material facts are controverted (*Lewis* v. *Green*

(1)), the discretion given by r. 606 would be properly exercised by directing that an action be brought or an issue tried to determine these matters. To such cases the practice approved in *Smith* v. *Smith* (2), and *Stroud* v. *Sun Oil Co.* (3), is still applicable—Rule 606 (1) was in force as Rule 941 of the Consolidation of 1897, when those cases were before the court.

As to the substantial question whether the Statute of Limitations ceased running in favour of the appellant and his mother and sister by reason of the proceedings of 1916-19 for administration, etc., with the utmost respect, I am inclined to think that an affirmative conclusion cannot be based on anything in the nature of an acknowledgment. The only acknowledgment recognized by the Statute of Limitations (R.S.O. [1914], c. 75, s. 14) is an acknowledgment in writing *signed by the person in possession*. Because the answer to a Bill in Chancery required to be signed by the defendant it was accepted as a sufficient acknowledgment. *Goode* v. *Job* (4); and so with an affidavit, *Tristram* v. *Harte* (5). The notice of motion for the vesting order in the present case does not serve as such an acknowledgment because not signed by the applicants in person. The signature of it by their solicitors, as agents, is insufficient. *Ley* v. *Peter* (6). I fail to find in the administration proceedings anything in the nature of an acknowledgment which would satisfy the statute.

But the judgment for administration and partition or sale, pronounced in 1916, I think stopped the running of the statute. Admittedly the appellant's mother and sister had not then acquired title by possession. The present respondents and the other persons found entitled by the master still owned their respective interests in James Shields' estate. The judgment for administration, etc., was, when pronounced, a judgment for the benefit of all parties interested and they were all bound by it. Any action which the present respondents could have brought to recover possession of their interest in the land or to try the question of title thereto would have been stayed

(1) [1905] 2 Ch. 340.
(2) 1 Ont. L.R. 404.
(3) 7 Ont. L.R. 704; 8 Ont. L.R. 748.
(4) [1858] 1 E. & E. 6.
(5) [1841] Long & T. 186.
(6) [1858] 3 H. & N. 101.

1923
SHIELDS
v.
THE
LONDON AND
WESTERN
TRUSTS CO.
Anglin J.

by the court on application, because such matters were proper subjects for determination in the administration proceedings and full relief could be had under the existing order, r. 615 (3) Williams on Executors, 11 ed. pp. 1624-6. The administration judgment operated not only in favour of the applicants for it and of creditors but also in favour of the estate—that is, of the personal representative. Re *Ballard* (1). It was effective as a judgment in favour of all the heirs of James Shields who might substantiate their respective rights and interests in his estate in the course of the proceedings. The present respondents' interest was so established and in their favour the statute ceased running when the judgment for administration was pronounced. *Finch* v. *Finch* (2); *Uffner* v. *Lewis* (3).

The order for sale, likewise for the benefit of all parties interested, was quite inconsistent with the Statute of Limitations continuing to run in favour of one or more of them. In re *Colclough* (4); *In re Nixon's Estate* (5); *Irish Land Commission* v. *Davies* (6).

Rather, therefore, because the administration proceedings of 1916-19 should be regarded as an action (*In re Fawsitt* (7), brought for the assertion and establishment of the present respondents' interest in the lands in question and that interest was therein established, than because any acknowledgment of their title by the appellant and his mother and sister was involved in them, I am disposed to agree with the conclusion of the Appellate Divisional Court that it sufficiently appears that possessory title in Annie and Jessie Shields, such as would destroy the respondents' status as applicants for partition, does not exist.

However, any adverse determination by the present judgment of the claim to a possessory title put forward on behalf of Jessie Shields and of whoever is now entitled to represent her dead mother would not be binding upon them. They are not, as yet, parties to the proceedings and, when brought in in the master's office, will be at liberty to assert whatever rights they may be advised to claim and to require their determination under clause 3 of r. 615.

(1) 88 L.T. Jour. 379.
(2) 45 L.J. Ch. 816.
(3) 27 Ont. A.R. 242, at p. 247.
(4) [1858] 8 Ir. Ch. R. 330, 337-8.
(5) [1874] Ir. R. 9 Eq. 7.
(6) [1891] 27 L.R. Ir. 334.
(7) 30 Ch. D. 231.

For these reasons the appeal in my opinion fails and should be dismissed with costs.

MIGNAULT J.—I am of opinion that the appeal should be dismissed with costs for the reasons stated by my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Cronyn, Betts & Black.*
Solicitors for the respondent: *Ivey, Elliott, Weir & Gillanders.*