CHARLES B. RANDALL *(Defendant)*.....APPELLANT; 1949 *Nov. 9, 10

AND

LORNE T. McLAUGHLIN *(Plaintiff)*.....RESPONDENT, 1950 *Jan. 30

AND

EFFIE MITCHELL, BLANCHE SUMMERS and MADELINE LATIMER, EXECUTRICES of the ESTATE OF IRENE HILL, deceased, and CHARLES B. RANDALL *(Defendants)* ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Joint Tenancy and Tenancy in Common—Whether conduct of parties inconsistent with Joint Tenancy—Whether title of survivor of Tenancy in Common barred by The Limitation Act or by laches—Limitation of Actions—Declaration of Ownership of Land and Judgment for Rents and Profits—When cause of Action arose—The Limitations Act, R.S.O. 1937, c. 118.

H and M made a joint purchase of a property in 1919, each contributing one half of the purchase price. The deed was drawn by a solicitor acting on H's instructions and he retained the deed. During his lifetime H collected the revenues paying over one half of the net proceeds to M. H died in 1928 and his widow appointed agents, who were adopted by M. These collected the rents, paying one-half of the net rents to M. The widow died in 1937 having by her will devised a life interest in one half of the property to her sister with remainder over to R. The agents continued to collect the rents, paying one half to M and the remainder to the widow's devisees. In 1946 M decided to sell his share in the property and on searching the title found that under the deed to H and himself he held as a joint tenant and not as a tenant in common. He sued for a declaration of title as sole owner, and for an accounting from the executrices of H's widow, R, by order of the trial court, being added as a party defendant. R counter-claimed for a declaration that he was entitled to an undivided one-half interest in the property.

Held: (Affirming the judgment of the Court of Appeal) that the appeal and the counter-appeal be dismissed.

Per: The Chief Justice, Kerwin and Estey JJ., the decision of the trial judge (1) and that of the Court of Appeal (2), that M was the sole owner of the lands in question should be affirmed—his title was not barred by *The Limitations Act,* and he had not been guilty of laches.

(1) [1948] O.R. 330. (2) [1949] O.R. 105.

*PRESENT:—Rinfret C.J., and Kerwin, Rand, Estey and Locke JJ.

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Per: Rand J., where there is joint possession by an owner and third persons under the erroneous belief that they hold as tenants in common, there is unity of possession *de facto* but not *de jure,* and such an actual unity does not permit of possession against the owner within *Baldwin* v. *Kingstone,* 18 A.R., 63.

Held, also by the Chief Justice, Kerwin and Estey JJ., that the claim against the executrices of the widow's estate was barred by The Limitations Act, s. 48 (1) (*g*).

Per: Rand J., that the claim against the executrices must fail as on the evidence M and the widow's heirs dealt directly with the rents through their joint agent and the executrices had withdrawn entirely from any connection with them.

Locke J., agreed with the reasons for judgment delivered by Laidlaw JA., with whom Aylesworth JA., concurred.

APPEAL by the defendant Charles B. Randall from a judgment of the Court of Appeal for Ontario (1) whereby it was declared that the plaintiff McLaughlin was the sole owner of certain lands and premises known as 154 Cowan Ave., Toronto, and cross-appeal by McLaughlin from the dismissal by the Court of Appeal of his claim against the executrices of the Estate of Irene Hill for the rents and profits of the property.

E. P. Brown, K.C., and *Charles Kappele* for the appellant Randall.

R. R. McMurty, K.C., and *D. A. Keith* for the respondent and cross-appellant McLaughlin.

John J. Robinette, K.C., for Executrices of the Estate of Irene Hill, deceased, respondents on the cross-appeal.

The judgment of The Chief Justice, Kerwin and Estey, JJ., was delivered by:—

KERWIN J.:—On December 1, 1919, lands and premises in the City of Toronto were purchased jointly by Laurent T. McLaughlin (also known as Lorne T. McLaughlin) and Thomas Hill and the conveyance was made to the two of them as joint tenants and not as tenants in common. At that time Hill was a widower without children and McLaughlin was not married. Hill was about twenty years older than McLaughlin and had known the younger man intimately ever since his very early youth. When the

(1) [1949] O.R. 105.

latter returned from the first Great War as lieutenant-colonel and with a fine war record, the older man was very proud, and since he had no children looked upon McLaughlin as one of his own. Hill had been successful in investing in real estate and it was his suggestion that the two should purchase the property and, as he was the one who had the experience, everything was left to him and his were the instructions that went to the solicitor who prepared the conveyance. McLaughlin knew nothing of joint tenancy or tenancy in common but testified at the trial of this action that Hill told him that on his (Hill's) death, McLaughlin alone would own the property.

Each provided a like amount for the purchase and received one-half of the rents after an allowance of five percentum to Hill as a management fee, which McLaughlin insisted should be retained by the older man. Subsequently Hill married again. Upon his death, McLaughlin not hearing anything about a will, assumed that the matter must have been overlooked by Hill. He received one-half of the net rents collected by agents appointed by Hill's widow, Irene, but which agents, on the evidence, must be taken to have also been adopted by McLaughlin as his own. It was only early in 1946, when he decided to sell what he thought was his one-half interest, that he ascertained that the conveyance had been made to Hill and himself as joint tenants. Even upon the death of Hill and Hill's widow, this fact had not been discovered by the personal representatives of either as the succession duty forms in connection with each estate stated that Hill, and then his wife, owned a one-half interest.

This action was commenced on May 2, 1946, by McLaughlin against the executrices of Mrs. Irene Hill, asking for the one-half of the rents received by Mrs. Hill from December 13, 1928, the date of the death of Thomas Hill, until her death, viz., April 24, 1937, and thereafter by the defendants. When the case was first ready for trial, at the suggestion of the presiding judge, Charles B. Randall was added as a party and the trial postponed but the statement of claim was not amended. By her will Mrs. Hill had devised the lands and premises in question

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to her sister, Elizabeth Randall, for life, and thereafter to her nephew Charles B. Randall, who was the added defendant.

According to a statement of the collection agents filed at the trial, Mrs. Hill received one-half of the net rents to the time of her death; thereafter the "estate of Mrs. I. Hill" received as its one-half share of the rents four cheques from May 21 to August 17, 1937; Elizabeth Randall received twenty-two cheques for her share from September 3, 1937, to August 17, 1943; and thereafter Charles B. Randall received six cheques until this question arose. During all this period, as during Hill's lifetime, McLaughlin received one-half of the net rents. The executrices severed in their defence but all set up *The Limitations Act,* R.S.O. 1937, c. 118. Randall, upon being added a party, adopted the defences of his co-defendants and by way of counter-claim sought a declaration that he was entitled to an undivided one-half interest in the property.

The trial judge (1) and the Court of Appeal (2) decided that the plaintiff was the sole owner, that his title was not barred by *The Limitations Act,* and that he had not been guilty of laches. With these conclusions I agree. The conveyance of December 1, 1919, is clear and unambiguous. The solicitor who drew it had died before the trial and there is nothing in the evidence to substantiate the claim of the defendant Randall that it does not carry out the intention of Hill who gave the instructions to the solicitor. As to *The Limitations Act,* none of the defendants, or their predecessors, was ever in exclusive possession of the lands and premises or any particular part of them since the plaintiff regularly received one-half of the net rents. As to laches, the plaintiff never knew of his rights until shortly before the writ was issued.

The trial judge also gave judgment for the plaintiff against all the defendants for "$936.96, being a one-half portion of the amount of the rents and profits of the entire property from May 2, 1940, together with the sum of $100.30, simple interest thereon at 3%, a total in all of

(1) [1948] O.R. 330; [1948] 3 D.L.R. 834.

(2) [1949] O.R. 105; [1949] 1 D.L.R. 755.

$1,037.26". So far as the defendant Randall is concerned, this is clearly an error as he received only $491.11, the total of the six cheques sent him by the agents. In any event, as has been pointed out previously, the statement of claim was not amended after the addition of Randall as a party defendant and at the trial it was stated that no claim was advanced against him. Under these circumstances, the plaintiff is not entitled to secure anything from him. Within a period of six years prior to the issue of the writ, the only other person who was paid one-half of the net rents was Elizabeth Randall now deceased, and no one representing her is a party. As to all these payments, none went directly through the hands of the executrices of Irene Hill and the agents at this time were not their agents but at the highest the agents for the individuals mentioned and the plaintiff. To any claim that might otherwise have exised against the executrices, section 48 (1) (*g*) of *The Limitations Act* is a complete defence as the action was not commenced within six years after the cause of action arose.

In the result, the appeal of the defendant Randall and the cross-appeal of the plaintiff fail. At the trial, the executrix Blanche Summers severed in her defence from that of her co-executrices and she was separately represented in the Court of Appeal. That Court made no order as to the costs of the action or counter-claim or of the appeals to it. Before this Court, all the executrices were represented by the same counsel. The appellant Randall should pay the costs of the appeal to the plaintiff respondent but the latter should pay the costs of his cross-appeal to the parties hereto.

RAND J.:—The deed conveying the property to the respondent and the deceased, Hill, as joint tenants is shown to have been prepared under the instructions of the latter who and whose successors in title retained it until after the death of the deceased and his widow. The respondent knew nothing of its provisions, and until within a short time of commencing these proceedings assumed that with Hill he was in fact, though not in name, a tenant in common, and that the interest of the deceased had been transmitted to the widow and to the appellant, Randall.

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From this the unassailable fact that emerges is that neither Hill nor his successors had any standing to challenge the joint tenancy so created; and even if the respondent could have done so, he is free to waive such an equity.

The further question is whether or not the appellant acquired the title of a tenant in common by the fact that he and his predecessor had been in receipt of one-half of the rents for over ten years. This question was dealt with in *Baldwin* v. *Kingstone* (1), in which a strong court, after argument by outstanding counsel of that day, held that the statute did not apply where part of the rents during the period for which the benefit of the statute was claimed, had been paid to the owner: that where there is joint possession by the owner and third persons, it is, for the purposes of the statute to be attributed to him. The facts were identical with those here except the circumstance that instead of the owner having the entire estate he was himself a tenant in common; but it was a fractional share of his interest that was in question. The rents had been collected by his co-tenant and had been paid one-sixth to him and one-sixth each to a brother and sister. The latter were in precisely the same relation to him as the appellant here was toward the respondent, McLaughlin; and there as here the parties acted under an erroneous belief that the lands were held by them as tenants in common. In the conception of that tenancy, there is unity of possession and although there was no unity *de jure,* there was in both cases a *de facto* possession of that nature. That actual unity does not permit a possession against the owner within it. The appellant's only answer to this case is that it was one of tenancy in common, but, as I have observed, that was not so in relation to the interests claimed to have been acquired adversely. The appeal must, therefore, be dismissed.

The cross-appeal claiming one-half of the rents against the executrices of the will of the widow must also fail on the simple ground that the evidence makes it clear that the appellant and the respondent dealt directly with the rents through their joint agent, and that the executrices

(1) (1890) 18 A.R. 63.

had withdrawn entirely from any connection with them. The receiver was not their agent at any time within six years of the bringing of the action, and the only ground on which, in the circumstances, they could be held liable is absent. As against Randall, the respondent did not plead a claim for rents received, in fact at the opening of the trial counsel expressly disclaimed any such relief, and he cannot on appeal set it up.

The respondent, McLaughlin, will be entitled to his costs of the appeal and the respondent executrices and the appellant, to their costs against the respondent, McLaughlin, on the cross-appeal.

LOCKE J.:—I agree with the reasons for judgment delivered by Mr. Justice Laidlaw and with his conclusions and would dismiss both the appeal and the cross-appeal. As to costs, I agree with the order proposed by my brother Kerwin.

Appeal and cross-appeal dismissed with costs.

Solicitors for appellant and respondent on cross-appeal, Randall: *Kappele & Kappele.*

Solicitors for the respondent, and appellant on cross-appeal, McLaughlin: *Chitty, McMurtry, Ganong & Keith.*

Solicitors for respondents on cross-appeal, the Executrices of the Estate of Irene Hill, deceased: *John J. Robinette.*