MARY D. ADAMSON (DEFENDANT).....APPELLANT; 1885

AND *Nov. 17.

1886

ALFRED ADAMSON (PLAINTIFF).....RESPONDENT. *Mar. 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute of Limitations—Conveyance to trustees—In trust for tenant for life—Remainder to joint tenants or tenants in common—Possession by tenant for life.

By a deed to trustees in 1837 two lots of land were conveyed in trust for E. A. for her life, with remainder as follows:—Lot No. 2 to G. A. and lot No. 1 to A. A. to the use of them, their heirs and assigns, as joint-tenants and not as tenants in common. E. A. the tenant for life, entered into possession of lot No. 2, and in 1863 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878 A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action against the defendant for the recovery of the said lot No. 2.

Held, that as there was no time prior to the death of the tenant for life when either the trustee or the remainder-man could have interfered with the possession of the said lot, the statute of limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.

* PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

1885

ADAMSON v. ADAMSON.

Held also, that for the purpose of the said action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint-tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs.

APPEAL form a decision of the Court of Appeal for Ontario (1), dismissing an appeal from a decree of the Court of Chancery (2), in favor of the plaintiff.

The facts of the case will be found fully set out in the above head-note and previous reports.

Robinson Q. C. for the appellant.

The appellants was in possession of the land in question here for more than ten years before plaintiff brought his action, paying no rent and never having made an acknowledgment of title. This, under the statute of limitations in Ontario, would bar the plaintiff's right to bring an action unless it is found that the statute did not run against him.

The plaintiff's title to the land is under the trust deed, by which lands are held in trust for Ellen Adamson for life and remainder as follows:—Lot number two to George, lot number one to Alfred, sons, &c., to the use of them, their heirs and assigns as joint tenants.

There is a difficulty here in reconciling a joint tenancy with estates in severalty.

The whole question is whether both trustee and *cestui que trust* are barred by the statute. As to that see Lewin on Trusts (3).

The trustee holds the legal estate and must protect the interests of the *cestui que trust*. If he fails to do so the rights of the latter may be gone. The trustee should have had the possessor of the land attorn to him. Our statute not only takes away the right of action from the one party but it gives an absolute title to the other.

(1) 7 Ont. App. R. 592. (2) 28 Gr. 221.
(3) 8th ed. p. 886.

1885

ADAMSON v. ADAMSON.

Ritchie C.J.

Mowat Q.C., Attorney-General of Ontario, and *McLennan* Q.C. for the respondents.

There are no words of inheritance as to the estates in severalty, and the grantor clearly intended to convey a fee. The words "as joint tenants and not as tenants in common" in the deed cannot be rejected unless no other construction is possible, which is not the case.

Grantor intended survivorship to be an essential element. *Doe* v. *Green* (1), *Doe* v. *Davies* (2).

Then as to the statute of limitations. The words of the deed are "to the parties of the second part, &c., to their use and benefit forever." A use can be limited upon a use; so, if these words had been omitted, grantees would have taken a legal estate.

The policy of the statute was to place legal and equitable estates on the same footing in regard to the act. R. S. O. ch. 108 sec. 29.

The courts always strive to avoid destroying a remainder. *Thompson* v. *Simpson* (3).

Even if the legal estate is barred the equitable is not. *Morgan* v. *Morgan* (4), *Mills* v. *Capel* (5), *Wrixon* v. *Vize* (6).

As to how astute courts are to find relief against the statute see *Gerrard* v. *Tuck* (7), *Re Lowes' settlement* (8), *Locke* v. *Matthews* (9), *Whitmore* v. *Humphries* (10), *Heath* v. *Pugh* (11).

Robinson Q.C. was heard in reply.

Sir W. J. RITCHIE C.J.—I think this appeal must be dismissed. I think the plaintiff's right to recover has not been barred by the statute of limitations. The plain-

(1) 4 M. & W. 229.
(2) 4 M. & W. 599.
(3) 1 Dr. & War. 459.
(4) L. R. 10 Eq. 99.
(5) L. R. 20 Eq. 692.
(6) 3 Dr. & War. 104.
(7) 8 C. B. 231.
(8) 30 Bev. 95.
(9) 13 C. B. N. S. 753.
(10) L. R. 7 C. P. 1.
(11) 6 Q. B. D. 345; 7 App. Cas. 235.

1886

ADAMSON v. ADAMSON.

Ritchie C.J.

tiff's right to the land first accrued in February, 1875, on the death of Ellen Adamson, the tenant for life, as equitable remainder-man in fee, and in January, 1878, he obtained the legal estate in fee by conveyance from the devisees of the surviving trustee under the trust deed of August, 1837; and the time therefore, in my opinion, first began to run against him in February, 1875, when the right to sue first accrued to him. The mother was tenant for life, and had a right to the possession, and had a right to occupy the land, by herself or her tenants, whether such tenants were for her life or at will, and the trustee had no right to interfere with any such tenancy or the possession of the tenant thereunder. That she did occupy by a tenant at will the evidence of the defendant clearly shows. Such tenant never was in as a trespasser against the tenant for life, but, on the contrary, after her husband's death, she occupied with the consent and permission of the tenant for life. Such tenancy at will was never put an end to by the lessor or lessee, and could not have been determined by the trustee.

Under such circumstances, I cannot conceive it possible that the equitable remainder-man can be cut out by any such dealing with the possession by the tenant for life and her tenant at will. Whether the title of an equitable remainder-man could be destroyed by a possession, for the statutory period, by a trespasser on the tenant for life, or whether even, in such a case, it would have any other effect than to bar the tenant for life during the existence of her tenancy, it is quite unnecessary to discuss. Under the Real Property Limitations Act, (1), the right of entry in respect of an estate in remainder shall be deemed to have first accrued at the time at which such estate became an estate in possession. The life estate, in this case, subsisted

(1) R. S. O. ch. 108 sec. 5 sub-sec. 11.

until 1875, consequently, until that date, plaintiff's estate did not become an estate in possession. The tenant for life, by herself through her tenant at will, enjoyed the property during her life time, and on her death the plaintiff, as remainder-man, became entitled to the enjoyment of the estate. During the life time of the tenant for life there was not any point of time, that I can discover, where either the trustee or the *cestui que trust* could enter upon or assert a right of either to the premises.

I think we are not called upon, in this case, to discuss the construction of the deed, as to whether plaintiff was entitled to the whole as joint-tenant with his brother George, or only to one-fourth, as heir of his brother George. It is sufficient for the present action, that as against the defendant he has the legal estate in the whole; and so far as the defendant is concerned, it matters not whether he is entitled to the whole beneficial interest, or whether the other heirs of George have a beneficial interest in three-fourths.

Agreeing then, as I do, with the learned judges of the Court of Appeal, that whether the present plaintiff was entitled in equity to the whole of the lot in question, or merely to a portion, as one of the heirs of his deceased brother George, he is entitled, in this action, to recover the whole lot, having acquired the legal estate from the trustee, to which the statute of limitations is no answer, inasmuch as the defendant, upon her own showing, was tenant at will to her mother-in-law, the tenant for life, and until that tenancy was determined by the death of the tenant for life the statute would not begin to run, which effectually disposes of the case. Therefore, I do not think it necessary to discuss the differences of opinion entertained by the Court of Appeal on another branch of the case. I think the appeal should be dismissed with costs.

1886

ADHMSON v. ADAMSON.

Henry J.

FOURNIER and TASCHEREAU JJ.—Concurred.

HENRY J.—I am of the same opinion. I entirely concur in the judgments delivered by the learned judges who decided the case in the Court of Appeal. I agree with the conclusion that they arrived at in regard to the estate, namely, that it was an estate in common and not joint. It gives a separate lot to each of the two brothers in fee, to them and their heirs, naming them as lot number one and lot number two, and then there is another clause that they should hold as joint tenants. Under that it is attempted to show that the plaintiff took the property by survivorship. The learned judge decided that he took it as heir to his brother who died without issue, and therefore that he took it not by virtue of the deed but as heir.

I think the statute of limitations did not begin to run until 1875. The plaintiff here could not have brought a suit in the lifetime of the tenant for life; she died in 1875 and it is not necessary to inquire how she occupied it, whether by herself or by her tenant.

I entirely concur that the appeal, in every consideration of the case, should be dismissed.

GWYNNE J.—This appeal must be dismissed upon the ground that an equitable remainder-man in fee to whom the legal estate has been conveyed by the trustees upon the decease of the equitable tenant for life, who had been admitted into actual possession for her life by the trustee of the legal estate, is not barred of his right of action by the possession of a person who had entered as tenant of the tenant for life in possession under circumstances that might have been sufficient to have barred an action by the tenant for life. The statute preserves the right of entry of the person entitled to an equitable remainder in fee upon his estate

1886

ADAMSON v. ADAMSON.

Gwynne J.

becoming an estate in possession by the death of an equitable tenant for life, equally as it does the rights of a person entitled to a legal remainder in fee upon the decease of a legal tenant for life. The property in question was granted and conveyed to the use of trustees, their heirs and assigns, upon trust to the use of Ellen Adamson, wife of the grantor, for and during the term of her natural life without impeachment for waste, and from and after her decease, then it was declared that the trustees should stand seised and possessed thereof, to uses, in language which has given occasion to an attempt being made by the defendant to raise upon this record a question, whether the trustees were to stand seised of the remainder upon the decease of the tenant for life to the use of George Adamson, a brother of the plaintiff, in fee in severalty, or to the use of George Adamson and the plaintiff as joint tenants in fee; other lands were by the same deed conveyed to the same trustees to the use in like manner of Ellen Adamson for life, and the remainders on her decease to the use of other persons in fee, and the trusts of the deed were finally declared to be that the trustees should convey and assure the several lands therein mentioned to the persons severally entitled to the remainders in fee upon the decease of the tenant for life. When the trustees admitted the tenant for life into possession of the land in question in this suit, she became and was possessed thereof under and in virtue of the provisions of the trust deed for the term of her natural life, and the trustees had no right or power of interference with such her possession, whether the same was held by herself actually in person, or by any person admitted into possession by her as her tenant. If she had conveyed her estate and interest in the land to the defendant, the latter would have become entitled to the possession thereof during the life of the tenant for life, and could have

1886

ADAMSON v. ADAMSON.

Gwynne J.

held the same free from any interference or interruption whatever by the trustees of the legal estate, so long as the tenant for life should live, but upon her decease the defendant would be liable to be evicted by the trustees in the interest of the equitable remainder man in fee. Now, in this case, defendant's claim having originated in a tenancy at will under the equitable tenant for life, the latter could have determined that estate at her pleasure, and if upon such determination the defendant had refused to surrender possession to the tenant for life, the latter could have evicted her by an action of ejectment at law without the interposition of the trustees of the legal estate, for in such case the defendant would have been estopped from denying the title of the equitable tenant in fee under whom the defendant had entered as tenant at will, and the effect of the defendant having been suffered by the tenant for life to remain in possession for such a length of time, and under circumstances that would be sufficient to bar the right of the tenant for life to recover in such an action, would simply be to vest in the defendant the right of possession during the life of the tenant for life, that is to say, to vest in the defendant the possession of the land and the right thereto during the estate and interest of the tenant for life, upon whose decease such the defendant's title would determine equally as if the tenant for life had by deed conveyed the land to the defendant for the estate of the tenant for life, and upon the decease of the tenant for life the right of the trustees to enter and evict the defendant in the interest of the equitable remainder-man in fee would attach. George Adamson having died intestate and without issue during the life of the tenant for life, the persons seized of the legal estate in trust shortly after her decease conveyed the land in question to the plaintiff in fee simple, upon the assumption that by the

trust deed the remainder in fee therein had been vested in George Adamson and his brother, the plaintiff, as joint tenants in fee; but whether the estate in remainder in the land in question was so vested in the plaintiff in joint tenancy in fee with his deceased brother George we are not called upon to decide in the present action, for the whole legal estate having been conveyed to the plaintiff by the persons seised thereof upon the trust purposes of the trust deed, he is entitled to recover the whole of the land in question, which he will hold to his own use if the remainder was conveyed in such joint tenancy; and to the use of himself and the other persons who are co-heirs with him of his deceased brother George if the remainder in the land in question was conveyed by the trust deed to the use of George in fee in severalty. The persons who are interested in raising with the plaintiff a question upon this point not being before the court, no such question can arise upon the present record.

Appeal dismissed with costs.

Solicitors for appellant: *Bethune, Moss, Falconbridge and Hoyles.*

Solicitors for respondent: *Mowat, MacLennan & Downey.*