EDMUND HOLYOKE HEWARD AND OTHERS (PLAINTIFFS) ... } APPELLANTS ;

AND

JOHN O'DONOHOE ..... DEFENDANT ;

AND

MICHAEL O'DONOHOE, *Administrator ad litem* ..... } RESPONDENT.

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*Feb. 2, 3, 4.

*June 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Possession—Nature of—Statute of Limitations—Evidence.

In an action against O. to recover possession of land it was shown that O. had been in possession for over twenty years; that he was originally in as caretaker for one of the owners; that afterwards the property was severed by judicial decree and such owner was ordered to convey certain portions to the others; that after the severance O. performed acts showing that he was still acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways.

Held, reversing the judgment of the Court of Appeal and restoring that of Rose J. at the trial, that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker and he had acquired no title by possession. *Ryan* v. *Ryan* (5 Can. S.C.R. 487) followed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment in favor of the plaintiff at the trial.

The facts of this case, which are stated at length in the report of the Court of Appeal are briefly as follows:—

The action was one to recover possession of land

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

(1) 18 Ont. App. R. 529.

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claimed by defendant under title by prescription. The land had belonged to the father of plaintiffs, and the plaintiff Francis Heward had for several years been in possession of it exercising various acts of ownership, when in 1866 a suit was brought against him by the other heirs of his father resulting in a decree by which the land was declared to belong to the plaintiffs as tenants in common, and the said Francis was ordered to convey to the others their proportions.

The defendant was first put in possession of the land in 1853 by one Munro, who had purchased timber from F. Heward, to look after such timber and prevent its being stolen. The evidence showed that he remained in possession ever since, and that in several acts which he performed he professed to be acting under instructions from Heward. Nothing was proved as indicating an assertion of ownership in himself until about 1884 when he fenced a large portion of the land.

The Court of Appeal held that the decree made in the suit in 1866 effected a severance of the property, and that from that time the possession of the defendant ceased to be that of the plaintiffs, who could not, thereafter, contend that he was in as their caretaker. Accordingly, they reversed the judgment of the trial judge and held that the defendant had acquired title by possession. The plaintiffs appealed.

McCarthy Q.C. and *MacMurchy* for the appellants. O'Donohoe originally took possession of the property as caretaker, and never having disclaimed that position he must be supposed to retain it. *Lyell* v. *Kennedy* (1).

The leading case in Ontario is *Harris* v. *Mudie* (2); *Ryan* v. *Ryan* (3) is decisive in our favor.

Trustees and Agency Co. v. *Short* (4) and *Wall* v. *Stanwick* (5) were also cited.

(1) 14 App. Cas. 437.
(2) 7 Ont. App. R. 414.
(3) 5 Can. S. C. R. 387.
(4) 13 App. Cas. 793.
(5) 34 Ch. D. 763.

Reeve Q.C. for the respondent referred to *Sands* v. *Thompson* (1); Lewin on Trusts (2); and *Beckford* v. *Wade* (3) to show that O'Donohoe could not be considered a trustee for the owners of the land; and *Coyne* v. *Broddy* (4) as reviewing all the cases on the subject of title by possession.

Sir W. J. RITCHIE C.J., FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice GWYNNE.

GWYNNE J.—For the purposes of this case it is quite unnecessary to inquire into the title or condition of the land which is the subject of this action prior to the suit in Chancery of *Heward* v. *Heward* mentioned in the case, which was a suit instituted in the court of chancery at Toronto by the brothers of the late Mr. Francis Heward, of one of whom, since deceased, the present plaintiffs are the children and heirs at law, against the said Francis Heward, to have him declared to be seized of the legal estate in fee of certain land mentioned in the pleadings in the Township of Scarboro, in the County of York and Province of Canada, in trust to divide and convey the lot to and among his brothers and himself in certain proportions. In that suit a decree was made on the 5th October, 1866, whereby it was in short substance and effect declared and adjudged that the said Francis Heward was seized of the legal estate in fee in the said land in trust as to one-eighth part thereof to the use of each of his brothers named respectively William B. Heward, John D. Heward, Stephen Heward and Augustus Heward, and as to the balance or four-eighths to his own use, and he was by the said decree ordered to convey the several one-eighth parts to his said respective brothers, free from

(1) 22 Ch. D. 617.
(2) 8 Ed. p. 63.
(3) 17 Ves. 96.
(4) 13 O. R. 173.

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all incumbrances done or suffered by him, and it was referred to the master to divide the said lot of land into the several parcels aforesaid, and it was ordered that each of the parties to the suit should execute mutual conveyances of their respective portions to each other, and the master was further directed to inquire as to incumbrances, and if there should be any the said Francis was directed to indemnify the other parties in respect thereof, and to account for rents and profits. Now that the defendant, at the time of the above decree having been made, was in the occupation of an old log house and of about half an acre of land around it, situate upon that portion of the said lot which is the subject of the present suit, solely by the mere license and permission of the said Francis Heward whose servant he was, to look after and protect the whole lot from trespassers, and that he had no possession otherwise than as such servant and caretaker of the said Francis Heward, has been found as a fact by the learned judge who tried the present case, the correctness of which finding is moreover, I think, established by the most undoubted evidence. In fact the defence of Francis Heward to the suit in chancery was that he had acquired title to his own absolute use by reason of his possession of the lot by the defendant as his servant and caretaker, and the defendant who was called by him in that case as a witness in support of that contention himself gave evidence that he was on the land solely by the permission of the said Francis Heward without any other claim to possession.

Besides this evidence of the defendant himself in that suit there was most ample evidence given in the present action, altogether unimpeachable, which I think most conclusively establishes that both before and long subsequently to the making of the above decree,

and during the lifetime of the said Francis Heward, the defendant continued to act and claimed the right to act in the same manner after the decree as before against persons whom he considered to be trespassing on the lot, and in the character of caretaker of and for the said Francis Heward or, as he in 1874-5 and 6 described himself and his occupation on the lot, as caretaker of the Heward "property" or "estate."

At the time then of the above decree having been made it must be taken as conclusively established that the defendant's connection with the said land and his occupation of the old log house and the half-acre or thereabouts enclosed round it was solely as the servant of the said Francis Heward and caretaker of the property for him. Now as the said Francis Heward was by the decree declared to be a trustee for his four brothers as to their respective one-eighth shares and was bound by the decree to convey, and to give possession of, those several one-eighth parts, when ascertained, to his said brothers respectively and their heirs, his servant could never set up any title by possession in himself as against any of those to whom the said Francis Heward, his master, was bound to convey their respective shares so long as he contested the decree or failed to fulfil the requirements thereof by conveying their respective shares to the parties declared by the decree entitled to have the legal estate therein vested in them. From the above decree Francis Heward appealed to the Court of Appeal, and in the meantime Augustus Heward, one of the brothers of Francis, having died an order of revivor was made on the 23rd of October, 1867, whereby the above plaintiffs, other than Frances Marie Heward, together with another brother of theirs, also named Augustus but since deceased, being the children and heirs at law of Augustus Heward then deceased, were made parties to the said

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suit in his stead; and thereupon and pending the said appeal of Francis Heward proceedings were instituted in the master's office under the references and inquiries directed by the decree. Upon the 30th June, 1868, the master reported among other things that he had divided the lands in the decree mentioned and that he had set apart four-eighth parts by metes and bounds for Francis Heward and the remaining four-eighths parts by metes and bounds for Francis Heward's three brothers William B. Heward, John D. Heward and Stephen Heward, and the children of the deceased Augustus Heward, who had been made parties to the suit by order of revivor. During the progress of the inquiries before the master it appeared that Francis Heward had mortgaged the property to one Col. Atcherley, which mortgage remained in full force unpaid and unsatisfied. By the decree Francis had been adjudged and directed to indemnify the other parties to the suit from all incumbrances done and suffered by him. He was, therefore, bound to have all the land, except so much as had been set apart for his own use, released from the operation of this mortgage. The master in his said report further reported that he found that there was due from Francis in respect of monies received for the piece of a portion of the land sold and conveyed by him, to the Grand Trunk Railway Company, and for timber growing on the land and sold by him, the sum of $3,004.87 over and above the amount payable by him upon the security of the said mortgage. When this report was made the appeal of Francis was still proceeding and continued so pending until the 22nd of January, 1869, when an order was made therein by the Court of Appeal, whereby the said cause was remitted back to the Court of Chancery to inquire whether the said defendant Francis Heward had, since the death of his father, had a continuous

unbroken possession for twenty years of the land and premises in question in the said cause; and the court did further order that in case the evidence of such continuous and unbroken possession of the said Francis should be satisfactory to the said court the bill should be dismissed with costs, but that in case the said evidence should not be satisfactory as to such continuous and unbroken possession then the said appeal should be dismissed with costs.

This order was made an order of the Court of Chancery on the 22nd February, 1869, and thereupon the case was again tried upon the issue by the said order in appeal directed to be tried. At this trial the defendant was again examined as a witness on the part of Francis Heward, and gave his evidence to the like effect as that given by him upon his examination at the previous trial of the case. This trial resulted in an order being made in the said Court of Chancery whereby it was adjudged and declared that the said Francis Heward had not had such continuous and unbroken possession of the said land and premises. The case subsequently appears to have been again remitted to the master's office for the purpose of procuring effect to be given to the decree, for by a report made by the master dated the 23rd September, 1873, he reported that he had divided by metes and bounds the west half of the said lands and premises in the decree mentioned among the then parties to the suit other than the defendant Francis Heward according to their respective rights and interests therein as declared by the said decree, and that he had allotted the parcel of land described and set out in a schedule annexed to his report as parcel No. 2 to the children of Augustus Heward deceased, who had been made parties defendants by the order of revivor, as tenants in common. This last piece of land is that which is in question in the present ac-

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tion, and it contains ten acres of land. One of the parties to whom it was allotted, who was also named Augustus, died at the city of Montreal on the day before that on which the above report bears date. The others are plaintiffs in the present action.

In what condition the mortgage to Col. Atcherley was at this time does not appear in the appeal case as laid before us, otherwise than it is said in the judgment of one of the learned judges of the Court of Apppeal at Toronto that the mortgagee executed the statutory certificate of discharge of the mortgage so far as it effected the premises other than those allotted to Francis himself shortly after the date of the master's report, which report is not said but it would seem to be that dated the 23rd Sept., 1873, which is meant, for it is not likely that Francis should have procured to be executed, or that the mortgagee would have executed, a certificate of the discharge of the mortgage as to the part of the premises mentioned while Francis was insisting upon his own absolute title to the whole, and was contesting the claim of his brothers to have any interest whatever therein. But whenever the certificate of discharge was executed it only operated, when registered, as a conveyance or release to the mortgagor himself of the original estate which he had when he executed the mortgage; and that estate the decree in the original suit, and in that upon the inquiry directed by the Court of Appeal, has conclusively established to have been as to three several one-eighth parts in trust for three of his brothers, and as to another one-eighth part in trust for the children of his deceased brother Augustus, who had been made parties to the suit by the order of the court.

A certificate of discharge of a mortgage when registered operates as a release of the mortgage and a conveyance of the original estate of the mortgagor to the mort-

gagor, his heirs or assigns, or any person lawfully claiming by, through or under him or them; but neither the brothers of Francis Heward, the mortgagor, nor the plaintiffs, children of his deceased brother Augustus, with whom alone we are concerned in the present action, were ever in the position of persons claiming as the assignees of Francis, the mortgagor, nor by, through or under him. Their claim was of quite a different nature, and wholly independent of Francis, quite hostile in fact to him, and adverse to the claim asserted by him. Their claim was founded upon the decree made in the chancery suit against him and which he resisted to the utmost, and during his life never obeyed by executing conveyances of the portions of which the decree adjudged him to hold as a trustee upon the trust to convey to the plaintiffs the children of Augustus, with whom alone we are concerned, and to the others the several shares to which they were by the decree declared to be entitled, when the same should be ascertained and set apart by metes and bounds in the manner directed by the decree. No estate passed or was conveyed to the plaintiffs, children of Augustus, by force of Col. Atcherly signing the certificate of discharge mentioned in the judgment of Mr. Justice Burton, the plaintiffs, the said children, not having been persons claiming as assignees of the mortgagor or by, through or under him. The effect of the certificate of discharge was simply to revest in Francis, the mortgagor, the original estate which he had in that portion of the lands mortgaged which was mentioned in the certificate; which estate, the decree of the Court of Chancery conclusively adjudged to be, so far as the plaintiffs, the children of Augustus, are concerned, as trustee upon trust to convey to them the share which the decree adjudged them to be entitled to. It has been objected that the decree inaccurately declared Francis to hold the lands

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as *trustee* for *himself* and his brothers, whereas as was contended no one could be a *trustee for himself*, but refined criticisms of this nature cannot prejudice the rights of the plaintiffs in the present action for the obvious substantial meaning and effect of the decree is to declare that although the legal estate in possession was in Francis he held such estate as a trustee only, and upon trust to divide the property with his brothers and himself in certain stated proportions and upon trust to convey to his brothers respectively and their heirs their several portions when ascertained by metes and bounds in the manner directed in the decree. Upon the execution of the certificate of discharge of the mortgage by Francis's mortgagee Francis remained as much affected and bound by the decree as if the mortgage had never been executed by him, and he continued so to be until his death in 1880 in so far as the plaintiffs, the children of his deceased brother Augustus, were concerned, a trustee for them of their share, for he never during his life fulfilled the requirements of the decree by conveying to them the portion assigned to them by the master's report of the 23rd September, 1873, and as the defendant occupied the old log house only by permission of Francis, and as his servant, he could not, without showing clearly that relationship to have ceased, of which no evidence whatever was given, convert, at his pleasure, that possession into one which during the life of Francis, the trustee, could mature into a statutory title good against the *cestuis que trustent* of Francis. But there was, I think, abundant evidence that in point of fact the defendant had not, and that he did not claim to have, at any time between the making of the decree in the suit in which he had given his evidence and the death of Francis in 1880, nor for some years after his death, any possession whatever of any part of

the ten acres in question in this suit other than the old log house and the patch of garden ground around it, which was enclosed with an old brush fence; all the rest had grown up into a wild waste piece of ground covered with scrubby bush of second growth, unenclosed; and that he still claimed to occupy the old log house by no other title than as caretaker of the property by permission of Francis, and for him or the Heward estate, as he sometimes spoke of his position in connection with the property, of the condition of which he seems to have been well aware. In conversation he spoke of the old log house as being on the piece of the land allotted to the children of a brother of Francis who had died in Montreal, and whose children still resided in Montreal, and that their portion could not be sold until the youngest should come of age. This referred to the plaintiffs, children of Augustus, three of whom at the time of the conversation referred to taking place were under age. He seems also to have been well aware that Mr. John Heward was looking after the interests of these children, so far as the taxes upon the land set apart for them were concerned, and there was evidence also that the defendant claimed to be acting by the authority of Mr. John Heward, equally as of Francis, as caretaker of the property and to protect it from trespass and injury for all parties interested in the "Heward estate" or "property" as he called it.

Mr. John Heward paid all the taxes assessed on the ten acres from 1876 to 1884 inclusive, but the defendant appears to have been taxed and to have had himself assessed for the old log house independently of the ten acres under the circumstances following.

In 1877 the defendant was assessed for the old log house and garden as one-tenth of an acre, and the ten acres were assessed as wild unoccupied land. In 1878

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the defendant was assessed in like manner for the one-tenth of an acre, and by his direction Mr John Heward was entered upon the assessment as the owner of the piece so assessed, and the ten acres were assessed as wild unoccupied land. In 1879 John O'Donohoe, jr., was the name entered on the roll for the log house and garden, one-tenth of an acre, and John Heward as owner, as in 1878. Both the defendant and his son John directed the assessor to enter John Heward as owner. The ten acres were again assessed this year as wild unoccupied land. In 1880 the defendant was assessed for the house and garden one-tenth of an acre, and John Heward as owner, and the ten acres were assessed as in the year previous as wild unoccupied land; the same precisely was the assessment in 1881 and 1882. In each year the assessor always asked the defendant whether there was any alteration to be made in the mode of assessment from that in which it was made when he was directed to enter John Heward on the roll as owner, and being informed that there was not he entered the assessment on the roll accordingly. In 1883 a change was made the origin of which it will be convenient to state here. In that year the defendant had a conversation with one Melbourne who had purchased some land adjoining to the ten acres, part of the land allotted to Francis Heward; and the defendant, (apparently afraid that Melbourne would buy the ten acres upon which the log house in which he lived was situate, which possibly he himself contemplated buying when the youngest of the plaintiffs should come of age,) said to Melbourne, "you wont buy this place over my head," to which Melbourne replied that he would not, that he was going no further than he already had. In another conversation with Melbourne the defendant suggested that he thought he could make a claim to the ten acres; Melbourne replied that

he did not think the defendant could make any claim to the place. "Why can't I?" said the defendant; to which Melbourne replied: "Did you not go to the court and swear that you were in charge of it for Heward?" Melbourne then advised him that if he wanted to get the place he must get himself assessed for it and pay the taxes some years and that he should fence in the place. Melbourne also said to the son John that unless they put a fence round the place they never could do any good, that is as to getting a title to the place—that the only way was by fencing the place round and getting assessed for it; and he advised the defendant and his wife and his son John, all together, that they should have the land assessed in the son John's name, so that in case a title should be got for it he, who was a support to the father and mother in their old age, should have it. In accordance with this advice the defendant and his son John set about fencing the ten acres, which then for the first time was enclosed during the time that Melbourne knew it, namely, from 1872. This fencing was done some time in 1884. Now, in 1883 a change was made in the assessment and that change in perfect accordance with Melbourne's advice, namely, the son John O'Donohoe, jr., was entered upon the roll and assessed for the ten acres; no separate assessment this year for the log house and garden. This change was made at the request of the son with the consent of his father; both were present when the assessment was entered on the roll, and both of them were consulted by the assessor as to its correctness as soon as it was made. In the following years down to 1888 the assessment was made in the same manner. Mr. John Heward in May, 1886, without any knowledge of the above mode of assessment, paid at the treasurer's office the taxes for 1883 and 1884. He did not

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pay for 1885 or subsequent years, because for those years the defendant or his son paid the taxes.

Now, the plain conclusion, in my opinion, to be deduced from the evidence is:—

1st. That the plaintiffs never had the legal estate in the ten acres in question vested in them until the vesting order in their favor was issued by the Court of Chancery in the suit of *Heward* v. *Heward* in 1888.

2ndly. That until 1884, when the defendant first enclosed the ten acres, he was not, in point of fact, in possession or occupation of any part of the ten acres other than the old log house and garden attached, which he had assessed to himself in 1877 and subsequent years as one-tenth of an acre; and

3rdly. That during the lifetime of Francis Heward, at any rate, as whose servant the defendant was in occupation as caretaker in 1869, he had not, in point of fact, nor did he claim to have, any possession of the log house otherwise than as such caretaker by the permission of Francis Heward for him and the parties for whom he was by the decree in the suit of *Heward* v. *Heward* adjudged to be a trustee, and that during the life of Francis the possession which the defendant had of the log house was the possession of Francis Heward as trustee for the plaintiffs, his *cestuis que trustent* under and by force of the decree in the chancery suit, and therefore the appeal must be allowed with costs and the judgment of the learned judge who tried the case, in favor of the plaintiffs, restored.

PATTERSON J.—I concur in allowing this appeal. I do not propose to add anything to what has been said respecting the facts and the law as applied to those facts. I think the decision of *Ryan* v. *Ryan* (1) in this court covers the ground as far as the law is concerned.

(1) 5 Can. S.C.R. 387.

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That decision reversed the judgment of the Court of Appeal for Ontario, of which I was then a member. I delivered a dissenting judgment in the Court of Appeal (1), and I refer to the report of it as containing a pretty full exposition of views upon some of the provisions of the Ontario statute of limitations to which I adhere, and which I believe to be substantially those acted upon by this court in allowing the appeal in that case.

Appeal allowed with costs.

Solicitors for appellants: *Wells & McMurchy.*

Solicitors for respondent: *Reeve & Woodworth.*

(1) 4 Ont. App. R. 563, 574.