JOHN DODS AND HANNAH DODS (DEFENDANTS)..... ..... } APPELLANTS;

1905

*May 3, 4.
*May 15.

AND

RONALD McDONALD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Title to land—Conveyance of fee—Reservation of life estate—Possession—Ejectment.

In Oct. 1853, D. conveyed to his father and two sisters six acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee "saving and excepting" thereout six acres for the life of the grantor's father and sisters or that of the survivor, or until the marriage of the sisters, on the happening of said respective events the six acres to be and remain the property of M., his heirs and assigns under said deed. Three months later M. conveyed the block of land to R. M. in fee, and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants who claimed the six acres on the ground that the deed to M. contained no grant of the same and also because the life tenant had had adverse possession for more than twenty years.

Held, that as the evidence shewed that the life tenants went into possession under R. M. the title of the latter could not be disputed and the statute would not begin to run until the life estate terminated.

Held per Idington J. that R. M. under his deed and that to his grantor had the reversion to the fee in the six acres after the life estate terminated.

The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him and on the trial it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees and no counterpart was proved to be in existence.

Held, that it was properly admitted in evidence.

APPEAL from a decision of the Supreme Court of Prince Edward Island maintaining the verdict at the trial in favour of the plaintiff.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

1905

DODS
v.
MCDONALD.

The facts of the case are sufficiently stated in the above head-note and are fully set forth in the judgments given on this appeal.

McLeod K.C. and *Duvernet* for the appellant, John Dods.

Morson K.C. for the appellant, Hannah Dods.

A. A. McLean K.C. and *Mathieson* for the respondent.

THE CHIEF JUSTICE.—I agree that the appeal should be dismissed with costs for the reasons given by my brother Davies.

GIROUARD J. concurred with Davies J.

DAVIES J.—This was an action of ejectment brought by the respondent McDonald to recover possession from the appellants of six acres of land part of a farm of fifty acres which in the year 1854 he had purchased from one Mutch. Mutch had in the previous year purchased the farm from one Thomas Dods. In the judgment of the Court appealed from, the Supreme Court of Prince Eward Island, Mr. Justice Fitzgerald, who delivered the judgment of the majority and who had also been the trial judge, states the facts very fully. Amongst other facts he finds that Thomas Dods from whom Mutch purchased was in 1853, the time of the purchase, admittedly the sole owner in fee simple in possession of the farm including the locus.

The defendants in their factum on this appeal concede this. In the deed from Thomas Dods to Mutch and also in that from Mutch to McDonald the plaintiff conveying the fifty acre farm, there was a clause about which much dispute arose: it reads as follows:

> Saving and excepting out of the first-mentioned tract of fifty acres, six acres thereof described as follows, namely, (here follows descrip-

tion) for and during the natural life of Robert Dods of Cherry Valley aforesaid, and also during the natural lives of his two daughters Jane and Elizabeth Dods, or until the death of the longest liver of them, or until the marriages of the said Jane and Elizabeth Dods whichever event shall first happen, the said six acres of land being hereby reserved for the use of the said Robert Dods during his life, and of the said Jane Dods and Elizabeth Dods until the death of the survivor of them or until their marriages aforesaid. It being understood that upon the happening of the said respective events, the said six acres of land shall be and remain the property of the said Robert Mutch his heirs and assigns under this deed.

The defendants (appellants) contend first that the true construction of the clause was that the six acres were excepted out of the deed altogether and never passed to Mutch or McDonald at all. Secondly, that as Robert Dods and Jane and Elizabeth Dods in whose favour a life estate or interest was ostensibly being created were none of them parties to these deeds, under the law which existed in Prince Edward Island at the time of the execution of the deed no estate did or could pass to them under it. Thirdly, that the Dods, Robert, Jane and Elizabeth, under whom the defendants claimed were not put into possession and did not accept possession from the plaintiff either under the alleged lease from Thomas Dods to them or under the reservation in the deed; and, lastly, that the statute of limitation began to run one year after they went into possession they being really tenants at will of the plaintiff. Questions were also raised about the effect of the Registration Act which, in the view I take of the facts and the law, become unimportant

The lease above referred to was a document in the form of a lease made between Thomas Dods, the then owner in fee, and his father Robert Dods and his sisters Jane and Elizabeth a few days before the sale and execution of the deed to Mutch by the lessor, whereby the lessor professed to grant to the lessees an estate for their joint lives and the survivor of them reserving a rent of two pence an acre to the lessor.

1905

DODS
v.
MCDONALD.

Davies J

The reservation in the deed was attempted to be explained as having reference to this lease and the estate or term thereby created through it made no reference to the nominal rent reserved by the lease and I am inclined personally to think that, in view of the proved facts, there is very much in the contention. It was however strenuously contended on the other hand that the language of the reservation in referring to the estate "thereby created" was not consistent with its having reference to the lease.

The parties referred to in the lease and in the reservation of the deed as the tenants for life, Robert, Jane and Elizabeth Dods, resided with Robert's son Thomas Dods the owner of the fee on the farm at the time of the execution of the deed of conveyance to Mutch and also of that to plaintiff McDonald.

They claimed no title of any kind living there with Thomas simply as members of the family.

The plaintiff produced as part of his evidence the old lease and proved that it had been handed over to him with the title deeds when he got his conveyance from Mutch to whom it had been handed by Thomas Dods when he sold to Mutch

It was signed and sealed by Thomas and his wife and properly witnessed but was not executed by the grantees or lessees, and as no counterpart could be found or was positively found to have existed its production as evidence was strongly resisted.

It was however admitted in evidence by the trial judge as an ancient document relating to the title and coming from a proper custody after the expiration of the term it purported to create.

The evidence shewed and the trial judge held that Mutch had, on getting his deed, entered into possession of the farm, done some work upon it and assisted his grantor Thomas in moving from one part of the farm

to the *locus in quo*, a dwelling house for his father and sisters to reside in; that he was in possession at the time he sold and conveyed to McDonald, and that the latter had put Robert, Jane and Elizabeth Dods into possession of this house and the six acres under the lease to them for their lives after he purchased the farm and that they had accepted such possession from him under this lease.

There was much controversy as to this latter important fact but after carefully reading all the evidence over I am satisfied there is no sufficient ground to reverse either the ruling as to the admission of this lease or the fact found as to Robert, Jane and Elizabeth Dods accepting possession under it from the plaintiff McDonald. I fully concur in all other findings of fact of the trial judge.

This evidence being admitted proving the lease and supported by the finding of fact as to the acceptance of the possession under the lease by the tenants for life the plaintiff submitted that he had made out a *primâ facie* case at least, and that defendants not having controverted the acceptance of possession as proved, and having put in evidence their title both by will and deed which showed them to claim as devisees and grantees of the life tenants, Robert, Jane and Elizabeth Dods, they were estopped from denying the title of the person from whom these parties through whom they claimed had received the possession or the term or estate for which possession had been given them until they had first on the expiration of the term given up the possession to the person at whose hands they received it.

The original lessees, it is contended, could not deny plaintiff's title to give them the estate and possession they had accepted and the defendants claiming under them were equally estopped.

1905

DODS
v.
MCDONALD.

Davies J.

The case revolves largely around the determination of the question as to how the Dods were put into and accepted possession. Once evidence was given, as I think was properly found by the trial judge and the court below, in this case sustaining the finding that possession was given and accepted under the lease for the lives of the tenants, then most of the legal difficulties vanish. No statutory title by possession has or could be gained by defendants because the plaintiff's right of entry did not arise until the death of the survivor of the life tenants and the twenty years did not until then begin to run. The wholesome doctrine of estoppel applies to prevent parties who accept possession of lands under a certain title from disputing the title under which they accepted possession. If the defendants in this case had not claimed title under the tenants for life much might have been said as to their right to rely solely upon the plaintiff proving a good title in himself, but the doctrine of estoppel which they have invited by their proofs of title through the plaintiff's tenants prevents them raising any question of latent defects in plaintiff's title.

The case of *Board* v. *Board* (1) was called to the attention of the counsel for the appellants and they were asked to distinguish this case in appeal from the principles governing that decision.

If the Dods accepted possession as found under the lease they and those claiming under them were estopped from denying McDonald's title to give the lease. If, on the other hand, they accepted the possession under the reservation in McDonald's deed they would under the authority cited seem to be similarly estopped. The learned counsel for the appellants appreciated the difficulties they were in if that case of *Board* v. *Board* (1) could not be distinguished. They

(1) L. R. 9 Q. B. 48.

called attention to some observations of Jessell M. R. upon the case in *In re Stringer's Estate* (1), at pages 9 to 11. That learned Master of the Rolls does not however question the authority of the case of *Board* v. *Board* (2) but rather confirms it.

However, accepting as I do the findings of the learned trial judge I have no difficulty whatever, under the authorities and on principle, in upholding the verdict and think the appeal should be dismissed with costs.

NESBITT J. concurred in the dismissal of the appeal.

IDINGTON J.—The respondent McDonald brought an action of ejectment against the appellants to recover six acres of land in Prince Edward Island. The judgment being given in favour of the respondent for recovery of the said land and that judgment having been upheld on appeal to the Supreme Court of that province the appellants seek to reverse such judgment. They claim title by virtue of the Statute of Limitations, and the first question suggested is: When did the time begin to run? When did the right of entry of the respondent first accrue?

In one way of looking at the matter the answer to this must depend on the effect to be given to the deed of 31st October, 1853, by which Thos. Dods who was in possession, and his wife, purported to grant to Robert Dods the father, and Jane Dods and Elizabeth Dods the sisters, of Thos. Dods, the lands in question for the "term and time of the natural lives" of the grantees.

As this deed followed to some extent the form of a lease with apt words for demising and leasing as well as granting in the operative part and also for render-

(1) 6 Ch. D. 1. (2) L. R. 9 Q. B. 48.

1905

DODS
v.
MCDONALD.

Idington J.

ing to the grantor a nominal yearly rental of two pence per acre, I will refer to it as the lease. A few days later the grantor conveyed by deed of grant, by way of or purporting to be by way of release made in pursuance of an Act of the General Assembly of Prince Edward Island made and passed in the twelfth year of Her Majesty Queen Victoria intituled

an Act for rendering a release as effectual for the conveyance of Freehold Estates as a lease and release by the same parties,

to one Mutch who within about three months later by a similar deed conveyed to the plaintiff two parcels of land therein described.

Following that description and as a continuous part of the same sentence in each deed were added the following:

Saving and excepting out of the said first-mentioned tract of fifty acres, six acres thereof described as follows, namely, fronting on the said road leading to Cherry Valley and extending from the land of the said Alexander McNeill to land in the occupation of Thomas Wright and from the said road back a sufficient distance by a line parallel with the said road to make or include the said quantity of six acres for and during the natural life of Robert Dods of Cherry Valley aforesaid and also during the natural lives of his two daughters Jane and Elizabeth Dods and until the death of the longest liver of them or until the marriages of the said Jane and Elizabeth Dods whichever event shall first happen the said six acres of land being hereby reserved for the use of the said Robert Dods during his life and of the said Jane Dods and Elizabeth Dods until the death of the survivor of them or until their marriages aforesaid.

And then the next sentence in the deed to Mutch is as follows:

It being understood that upon the happening of the said respective events the said six acres of land shall be and remain the property of the said Robert Mutch, his heirs and assigns under this deed together with all woods, underwoods, ways, waters, watercourses, houses, outhouses, yards, buildings, stables, gardens, fences, profits, commodities, privileges and advantages whatsoever to the said land, hereditaments and premises belonging or in any wise appertaining or therewith usually held, used, occupied, possessed, enjoyed, reputed, taken or known as part, parcel or member thereof or of any part thereof, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every

part thereof, and all the estate, right, title, trust, interest, property, claim and demand whatsoever, both at law and in equity of them the said Thomas Dods and Jessie, his wife, of, in, to or out of the said lands, hereditaments and premises, or any part thereof, to have and to hold the said lands, hereditaments and premises hereby granted and released or intended so to be with their and every of their rights, members and appurtenances unto the said Robert Mutch, his heirs and assigns, to the use of the said Robert Mutch, his heirs and assigns for ever.

The same words were adopted in the deed from Mutch to McDonald save as to the name of the grantee.

It is urged that these deeds must be read as if there merely had been an exception from the lands described and that therefore there was no grant of the reversion or remainder.

I am with due respect unable to understand how these documents can be read as containing or having been intended to contain or express any such meaning or any other meaning than an exception of the life estate merely. If that be, as I think, the correct construction then these deeds operate by way of a grant of the reversion.

That gave McDonald a right of entry only on the determination of the prior estate of freehold created by the lease and that happened on the death of the survivor Elizabeth Dods in March, 1903.

It is stoutly urged, however, that there never was in fact and in law any such freehold estate as this I am assuming was excepted from the conveyances in question and upon which there could be a reversion and grant thereof. The document though not well drawn clearly would have operated if executed by the lessor or grantor and assented to by the grantees so as to create an estate of freehold as above described.

This document was given by Mutch to the respondent along with the other deeds already referred to at the time of respondent's purchase of the lands conveyed by those other deeds and it appears clear beyond any

1905

DODS
v.
MCDONALD

Idington J.

doubt that it was not only so delivered but was brought into existence at or about the time it bears date.

No proof is given of its execution except such as may be presumed in law from its having been produced from proper custody and being such an ancient document.

Was Mr. McDonald the proper custodian of such a deed?

It was a grant to the tenants of the freehold. One would possibly look for such a document in the possession of the grantees rather than in that of the grantor or assignee of the grantor.

One might even look in the registry office as the better place for its safe keeping and safe-guarding the interests of all concerned.

It contained covenants by the grantees with the grantor. For the purposes of these covenants and to secure the grantor and his assigns their due performance he and his heirs and assigns might reasonably claim custody of the document.

In the case of the very events that have happened the existence of this deed as to the six acres was as valuable a muniment of title as any other. The respondent was, therefore, I think within the authorities such a proper legal custodian of this deed as to render it admissible as an ancient document. See *Plaxton* v. *Dare* (1); *Bishop of Meath* v. *Marquess of Winchester* (2); *Croughton* v. *Blake* (3); *Doe d. Neale* v. *Samples* (4); *Doe d. Jacobs* v. *Phillips* (5); *Slater* v. *Hodgson* (6); *Earl of Miltown* v. *Goodman* (7).

Being produced from a proper custody though not what one might think probable, or most proper, as expressed by Baron Parke, in *Croughton* v. *Blake* (3), is

(1) 10 B. & C. 17.
(2) 3 Bing. N. C. 183 at page 200.
(3) 12 M. & W. 205.
(4) 8 A. & E. 151.
(5) 8 Q. B. 158.
(6) 9 Q. B. 727.
(7) I. R. 10 C. L. 27

all that is necessary. And when so produced it is admissible and to be taken as proving itself.

It is said however that its condition on production shows an execution only by the grantors. There are seals where one would expect for the grantees, but no signatures by them.

The attestation clause puts it as if it had been signed as well as sealed by the parties and that is subscribed by a witness, Charles Stewart.

What in law should be presumed from this?

Are we to assume that there was a complete execution by all the parties. The seals without the signatures of the grantees might be taken to be their execution. It would be a good execution. It may be doubtful, however, if without more it would be safe to say that this should be presumed especially as it is said that

> in a case of documents of title, however, acts of possession thereunder should be shewn, though the absence of such evidence goes merely to weight and not to admissibility.

See Phipson on Evidence (3 ed.) p. 468.

It is a fair and reasonable inference, I think, from all that I have referred to and the fact that the document was duly handed to McDonald by Mutch with other deeds, that Mutch got it as a completed document and that it was intended by his grantor Thomas Dods to operate without further execution or signature by the grantees. If that be the case then did these grantees assent to the proffered estate of freehold vesting in them?

Without their acceptance the grant could not operate. Upon this point the evidence of the respondent is conclusive if believed.

He says that when he purchased the grantees or lessees in this lease lived on the property he was purchasing and desired immediate possession of, and

1905

DODS
v.
MCDONALD.

Idington J.

were reluctant to move over on to the six acres but were finally persuaded to do so. In relation to that part of the negotiation his evidence is as follows:

Q. Who was it built the house on the six acre lot?

A. Thomas Dods.

Q. Was that before or after you had bought the place?

A. I think it was before I had bought it; between the time that Mutch bought it and I bought it from Mutch.

Q. While the Dods were in your house—in the house on the homestead—did you have any conversation with them about moving on the six acres?

A. Well, I spoke to them several times for to move *to their own six acres that were reserved for them for their lifetime for their house.* * *

Q. Did you ever have any conversation with Robert, Elizabeth or Jane Dods about the lease?

A. When they went into posession I told them how they had to go into their own place that they held under their lease or agreement for their lifetime. * * *

Q. And they accordingly went into possession of the six acres?

A. They went in, Mr. Beers and I put them in possession. * *

Q. Thomas's two sisters. Was there anything said about a lease between you people?

A. There was.

Q. Tell what it was?

A. I told them more than once or twice that how the lease was all their lifetime of this place, and whenever they would die—the last of them—that how I expected the property to fall into my hands.

By Mr. Mathieson:

Q. That is the six acres?

A. The six acres.

Q. Where were they at the time you had this conversation, on the homestead?

A. I told them of it in their own house.

Q. That is on the six acres?

A. That is on the six acres.

Q. Did you ever have any conversation of a similar kind with them on the homestead while they were living in the house there?

A. Yes; that how they had their life interest in the place, and that is all they had. * * *

Q. And you employed Mr. Beers to help you to get them out of the premises?

A. Yes sir, in a peaceable way.

Q. On account of the conversation that you had with them about the lease, did they do anything?

A. Well no ; they didn't do anything, but they admitted that how the lease was a writing unjust one—that they only had their life out of it.

Q. They didn't do anything about that conversation ?

A. Well the conversation was—that it was as much that they admitted.

Q. What was the object of this conversation with them—what did you wish them to do ?

A. I wished them to go out of the homestead and go to there own house.

Q. Did they do that ?

A. They did.

The learned trial judge implicitly relied upon this and in reading the whole evidence I see no reason why I should disregard his finding.

This evidence can, taken literally, only, I think, have one meaning and that is that the grantees had after due consideration decided to accept the grant tendered them by this deed.

If so they are bound thereby.

The case is thus rendered a very simple one of an estate of freehold that has terminated recently and the respondent as the assignee of the reversion is entitled to eject the appellants who have no longer any rights in the premises and are wrongfully in possession thereof.

It is said, however, by the appellants that there was no grant or conveyance of the reversion.

The evidence shews that the parties met either in relation to the reservation in the deed or the lease and that the plaintiff gave the tenants for life possession of the property.

That brings up the consideration of the title of the respondent and his right to assert claim to the reversion and the right to possession by virtue thereof, upon the determination of the freehold estate.

He must on the facts be presumed to have been in possession when he put the tenants for life there.

The presumption from his possession then would be that of his being then owner of the fee and until such

1905

DODS
v.
MCDONALD.

Idington J.

presumption has been expressly rebutted continues and he is now at liberty to assert it.

There are many other considerations of weight in this case that would or might bring about the same result.

Whilst wholly dissenting from, as already indicated, the view that the saving and excepting clauses in the deeds should be cut in two in the middle of a sentence as we have been asked to do, to give an effect to them, I am not unmindful of the authorities indicating that there cannot be an exception of an estate for life or a reservation thereof.

If that be a proper view to take here then the whole excepting clause is void as repugnant to the grant and the deed of conveyance to respondent operated so as to transfer the fee simple from Mutch to McDonald as that had been by similar deed transferred from Thomas Dods to Mutch.

And McDonald is entitled to claim thereunder and now to enter upon the determination of the life estate he had given Robert Dods and his daughters.

In this way we would be rid of what has occurred to me throughout this case was a difficulty in the way of giving effect to these deeds in the two-fold way of operating to vest a present estate and also by way of grant to transfer the reversion or remainder.

The way in which that troubled me was not raised in argument and therefore possibly the difficulty does not exist.

There is another view presented by the suggestion that the covenant to stand seized, in this deed, may, though with a stranger, have enured in the light of the declared intentions to the benefit of the tenants for life.

See *Thorne* v. *Thorne* (1), approved in *Doe d. Lewis* v. *Davies* (2).

I am not so impressed, in view of the particular wording of those deeds, as to dwell upon this, but would refer to the cases of *Hartman* v. *Fleming* (3), and *Wilson* v. *Gilmer* (4), in each of which very eminent authority relied upon the covenant to stand seized, in a way that might operate here, if necessary, and may be well worthy of consideration here and may possibly be relied upon to support respondent's case.

I think that in order to give effect to the obvious intentions of the parties to these deeds it can be done and that with due regard to the ancient principles of real property law.

The case of *Board* v. *Board* (5) if accepted in its entirety, as good law, might well be held to govern our decision here. But there is an obvious distinction drawn by Jessel M. R. in *In re Stringer's Estate; Shaw* v. *Jones-Forde* (6), at pages 9 *et seq.* that may be applicable here.

Though the appellants made claim through the tenants for life here as in *Board* v. *Board* (5), yet in the case of one of them, Hannah Dods, at all events, the right thus acquired did not accrue till after the determination of the estate for life.

And she may be said to have the right to assert her possessory title quite independently of the devise to her by Elizabeth Dods, and put the respondent, as plaintiff, to rest upon the strength of his own title and proof thereof.

It is to be observed that this distinction made by Jessel M. R., though possibly open to the defendant in

(1) 1 Vern 141.
(2) 2 M. & W. 503 at p. 518.
(3) 30 U. C. Q. B. 209.
(4) 46 U. C. Q. B. 545.
(5) L. R. 9 Q. B. 48.
(6) 6 Ch. D. 1.

1905

DODS
v.
MCDONALD.

Idington J.

Board v. *Board* (1) was not made in argument of that case and may have been overlooked.

I prefer to hold that the lease created an estate of freehold and that the acceptance of that as testified by the respondent related back to the execution of the lease and that the later deeds vested title, in either of the ways indicated, to the reversion thus created in the respondent and that he is entitled now to succeed by virtue thereof.

I am equally satisfied to hold that his possession when he put the tenants for life as such in possession must be held presumptive of his ownership of the fee entitling him to succeed on the termination of the lease.

In either of these events he is entitled to succeed.

I think the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, John Dods: *D. C. McLeod.*

Solicitor for the appellant, Hannah Dods: *W. A. O Morson.*

Solicitor for the respondent: *A. A. McLean.*

(1) L. R. 9 Q. B. 48.