THOMAS WEBB AND OTHERS (DEFENDANTS)..... } APPELLANTS; 1893

*Mar. 18, 20.
*Nov. 20.

AND

GEORGE H. MARSH AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Crown grant—Disseisin of grantee—Tortious possession—Conveyance to married woman—Effect of execution of, by husband—Statute of Maintenance, 32 Hen. 8, c. 9—Statute of limitations.

In 1828 certain land in Upper Canada was granted by the crown to King's College. In 1841, while one M. who had entered on the land was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land the defendants, claiming title through M., set up the statute of limitations, alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the statute of maintenance, and G. had, therefore, nothing to convey in 1849.

Held, that it was not proved that the possession of M. began before the grant from the crown, but assuming that it did M. could not avail himself of the statute of maintenance as he would have to establish disseisin of the grantor and the crown could not be disseised; nor would the statute avail as against the patentee as the original entry not being tortious the possession would not become adverse without a new entry.

Held further, that if the possession began after the grant the deed to G. in 1841 was not absolutely void under the statute of maintenance but only void as against the party in possession and M. being in possession a conveyance to him would have been good under sec. 4 of the statute and the deed to his wife, a person appointed by him, was equally good. Further, M. by his assent to the conveyance to his wife and subsequent acts was estopped from denying the title of his wife's grantor.

* PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

1893

WEBB v. MARSH.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the plaintiffs.

The action in this case was to recover possession of land to which defendants claimed title through one George S. Marsh, and plaintiffs through his wife.

In 1828 the land was granted by the crown to King's College, who conveyed to one Greenshields in 1841. Greenshields conveyed to Mrs. Marsh in 1849, and Marsh executed the conveyance though a party to it. Marsh had been in possession of the land since about 1831, though defendants claimed, and some of the judges in the courts below held, that his possession dated back to 1823 or 1824.

The defence set up was the statute of limitations, founded on possession for twenty years before 1849, and that the conveyance to Greenshields was void under the statute of maintenance, 32 Hen. 8, ch. 9, and the conveyance to Mrs. Marsh was necessarily void also as Greenshields had nothing to convey.

The trial judge held that defendants' claim under the statute of maintenance was valid and gave judgment in his favour. This judgment was reversed by the Divisional Court, and the latter decision was affirmed by the Court of Appeal.

Riddell and Webb for the appellants. As to the statute of maintenance, see *Elvis* v. *Archbishop of York* (3); *Johnson* v. *McKenna* (4).

The execution by Marsh of the conveyance to his wife cannot be invoked as an estoppel. *Doe d. Chandler* v. *Ford* (5); *Doe d. Preece* v. *Howells* (6); Bigelow on Estoppel (7).

(1) 19 Ont. App. R. 564.
(2) 21 O. R. 281.
(3) Hobart 322.
(4) 10 U.C.Q.B. 520.
(5) 3 A. & E. 649.
(6) 2 B. & Ad. 744.
(7) 5 ed. p. 530 *et seq.*

1893

WEBB v. MARSH.

Roaf, for the respondent, referred to *Bishop of Toronto* v. *Cantwell* (1); *Kennedy* v. *Lyell* (2).

The Chief Justice.

THE CHIEF JUSTICE.—I am unable to concur in the view taken by Mr. Justice Maclennan in the able judgment delivered by him, though I entirely agree in the statement of the law contained in that judgment. I differ from him, however, in the conclusion at which he arrived as to the evidence. I do not think it is established with sufficient certainty that George S. Marsh was in possession at a date anterior to the crown grant to King's College in 1828. The learned judge who tried the action, Mr. Justice Rose, says in his judgment that Marsh "was in possession as early as 1831 and probably prior to 1829." Abraham Singleton, a witness for the plaintiff, does indeed say that he was at the date of the trial in May, 1891, seventy-three years old and that he could remember "from when he was five or six years old and that as long back as he can remember George S. Marsh was living there." This would carry back Marsh's possession to about 1823 or 1824. It was for the learned trial judge to say whether or not he considered this evidence entitled to weight. If he had considered it safe to act upon it he would no doubt have given effect to it by placing his judgment on the Statute of Limitations which was pleaded and which was relied on by the defendants' counsel at the trial. For that it was so relied on appears very clearly from the record before us where Mr. Riddell is reported as saying: "And we rely on the Statute of Limitations as well." Case p. 10 line 2.

Had the learned judge considered that there had been a possession of upwards of twenty years by George S. Marsh subsequent to the patent and prior

(1) 12 U.C.C.P. 607. (2) 15 Q.B.D. 491.

1893

WEBB v. MARSH.

The Chief Justice.

to the conveyance by Greenshields to Mrs. Marsh of the 9th of May 1849, as there would have been had Marsh been in continuous possession from a date prior to the patent, we should, I feel sure, have found him fixing the commencement of that possession with certainty in his judgment, and also taking some notice of the defence under the Statute of Limitations to which he, however, makes no reference. I therefore conclude that the learned judge was not prepared to find that there was a possession beginning earlier than 1831. The appellant in his factum before this court insists on the same view of the evidence as that which I have indicated. Paragraph 18 is as follows: "Mr. Justice Maclennan in his judgment appears to consider that George S. Marsh went into possession in 1823 or 1824. It is submitted that there is no evidence of this, nor evidence that the entry of Marsh was an intrusion or made before the patent." The conclusion must, therefore, in my judgment be that Marsh did not take possession until after the patent was issued and that he is not proved to have acquired a title under the Statute of Limitations to the four acres he was originally in occupation of at the date of the conveyance to his wife. Had the evidence and finding warranted a contrary conclusion I should have found it difficult to say that the title he might have so acquired under the statute would have been divested by his affixing his signature and seal to a deed to which he was not a formal party.

This conclusion, whilst against the appellant so far as the Statute of Limitations is concerned, is, however, in his favour inasmuch at it displaces the foundation of fact upon which Mr. Justice Maclennan's judgment rests. Had the facts in evidence warranted a contrary conclusion I should have entirely agreed with that learned judge in his statement of the legal conse-

quences. The law as laid down by him is, I think, clear, and his position is amply supported by the authorities he quotes. In order that a deed operating under the Statute of Uses should be void, either under the Statute of Maintenance or by force of that rule of the common law in affirmance of which the statute was passed, it was essential that the grantor should have been disseised. The crown could not have been disseised; such a thing as a disseisin of the crown is, and always has been, unknown in law. A person entering on the possession of the crown is a mere intruder having a possession which can no more be said to be a disseisin than can that of an overholding tenant. Then the possession if not originally tortious would not without any new entry have become so against the grantees of the crown, King's College, nor for a like reason against Greenshields the grantee of King's College. This proposition is established by the quotation from Bacon's Abridgement cited in Mr. Justice Maclennan's judgment. This however does not apply to the present case for the reason before given that there is no foundation in fact for it; and if there had been the same facts would have established the appellants' case under the Statute of Limitations, a defence which he insists on in the factum he has lodged in support of the present appeal.

The decision of the appeal must, therefore, depend on the legal effect of the evidence showing what occurred at the time of the conveyance by Greenshields to Mrs. Marsh. Marsh who had, however, been previously in possession of only four of the five acres comprised in that deed must clearly be taken to have assented to it; although not technically a party to the instrument he signed and sealed the deed. There could be no presumable object in this unless it was for the purpose of showing his assent to it. Moreover

1893

WEBB v. MARSH.

The Chief Justice.

the evidence shows that he actually did assent to the conveyance which was made under an arrangement between Greenshields and himself and which it is a reasonable inference was made to his wife at his instance. Then he allowed Greenshields to covenant for a good title and he not only remained in possession under this deed by virtue of which he took an estate for his life in the lands, but in subsequent conveyances made by him he refers to it as a deed under which he derived title. This, in my opinion, is ample not only to create an estoppel in *pais* or an equitable estoppel, but also as regards this particular conveyance to take the case out of the law of maintenance. Had the conveyance been to Marsh himself for an estate in fee it would be absurd to say that it was void as against any person and I fail to see why it should be said to be void when with Marsh's assent it conferred upon him, not indeed a fee but an estate for life. This conveyance from Greenshields to the extent of the four acres comes, in my opinion, clearly within the fourth section of the Statute of Maintenance (1) which both the learned Chief Justices have invoked, and I entirely concur in their observations upon it. I feel quite safe in saying that neither the Statute of Maintenance nor the common law made it illegal to release a right of entry in favour of a person actually in possession or to assign it to a person assented to by him. A contrary doctrine would have been most unreasonable since the provision of the common law as well as that of the statute was designed entirely for the protection of the party so assenting. The statute always received a liberal construction restricting its operation to the obvious mischiefs against which it was enacted. *Anson* v. *Lee* (2) and *Cook* v.

(1) 32 H. 8 c. 9.

(2) 4 Sim. 364.

Field (1), although cases differing in their facts very widely from the present, illustrate this principle. I also refer to Tapp's treatise on the law of Maintenance (2) as an authority to the same effect. The observations of Draper C. J. in *Bishop of Toronto* v. *Cantwell* (3) also go far in the same direction.

It is, however, argued that Greenshields had nothing to convey inasmuch as the conveyance of 1841 by the College to him was void. Upon this ground both the trial judge and Mr. Justice Burton base their judgments in favour of the present appellant. I cannot concur in this view. The deed of 1841 was not absolutely void but only as against Marsh and Devlin the parties in possession. Now, had Marsh and Devlin contemporaneously with the execution of that deed attorned as tenants to Greenshields, nobody could reasonably deny that the effect of their doing so would be to make that conveyance which they alone had a right to impugn perfectly valid and effectual. Then upon what reasonable principle should it make any difference that they did not assent by formally attorning by some contemporaneous act but did so after the conveyance was executed, and if they could have effectually done this a day after the deed was executed why should not the same consequence follow when their assent is proved to have been unequivocally given, not a day, but some eight years after the execution of the deed? I am of opinion, even in the absence of direct authority, that we ought not to give such an effect to a statute and rule of law now obsolete as would defeat an honest title, and that on purely technical grounds, by an application at variance with the spirit and the letter of the law itself.

(1) 15 Q. B. 460.
(2) P. 44.
(3) 12 U. C. C. P. 607.

1893

WEBB v. MARSH.

The Chief Justice.

Marsh, before the deed of May 1849, had not been in possession of more than four acres. The additional acre comprised in the conveyance to Mrs. Marsh had with 94 acres more been in the possession of Bernard Devlin. Devlin was examined as a witness in the cause; he swears that he was in possession of this one acre and that he came to an arrangement with Adam Henry Meyers the solicitor acting for Mr. Greenshields in pursuance of which the whole five acres including this one acre were assigned by Greenshields to Mrs. Marsh with Marsh's assent, the arrangement having in fact been made by Marsh himself, and that in further pursuance of the same agreement the remaining 94 acres were conveyed by Greenshields to Devlin himself.

With this evidence before us it is in my judgment impossible to say that those claiming under Marsh are not estopped from impugning the deed of 1841 and the title which Greenshields *primâ facie* took thereunder.

In conclusion I would add that I am not at all satisfied that the appellant has established that the possession of Marsh and Devlin amounted to disseisin. An adverse possession amounting to disseisin of the grantor would be indispensable to shew a deed void for maintenance and in a case such as the present the party attacking the deed on such a ground should be held to very strict proof. I do not, however, place my judgment on this ground.

I would further say that it must be remembered that we have not to deal with this case on strict common law principles but that equitable considerations are open on the record before us. This being so I have no doubt that the facts proved are such as to constitute a binding equitable estoppel.

I cannot close my judgment without adding that the case was argued with great learning and ability by the learned counsel on both sides.

The appeal must be dismissed with costs.

FOURNIER AND TASCHEREAU JJ. concurred.

GWYNNE J.—Assuming it to have been competent for George S. Marsh in his lifetime, or for his heirs, to dispute as against his wife or her heirs the validity of the deed of the 9th May, 1849, procured by Marsh to be executed to and in favour of his wife by Greenshields, as to which I express no opinion, it must be admitted that the onus of clearly establishing the facts asserted by the appellants and relied upon by them as invalidating the deed rested upon the appellants, namely, the onus of establishing that at the time that Marsh was negotiating with Greenshields for the purchase, by and in the name of his wife, of the land by that deed expressed to be conveyed by Greenshields to Marsh's wife, and that, at the very time that Greenshields, by Marsh's procurement, executed that deed purporting to convey the lands therein mentioned to Marsh's wife and to her heirs forever, he, Greenshields, had no title, at least as to four-fifth parts of the land, which he could convey, for that he, Marsh, was then himself in actual adverse possession of such four-fifth parts, having acquired such possession by a previous disseizin of Greenshields or of his predecessors in title, and this the appellants, in my opinion, have utterly failed to establish.

From the facts of Marsh negotiating with Greenshields for the purchase by and in the name of his, Marsh's, wife, of the whole of the land purported to be conveyed to her by the deed, and of his procuring Greenshields to execute the deed to his, Marsh's, wife,

1892

WEBB v. MARSH.

Gwynne J.

the reasonable inference to be drawn is that whatever possession Marsh may have had of any part of the land so purported to be conveyed was for and on behalf of his wife, and was by Greenshields' permission and consent and not at all by a title adverse to the title of Greenshields.

I concur, therefere, in the judgment of the Chief Justice of Ontario and of Mr. Justice Maclennan in the Court of Appeal for Ontario, and am of opinion that this appeal should be dismissed with costs.

SEDGEWICK J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Webb, Hooey & Mills.*

Solicitors for respondents: *Roaf & Roaf.*