PATRICK RYAN.....APPELLANT; 1880

AND *Nov. 16.

MICHAEL RYAN.....RESPONDENT. 1881

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO. *Feb'y. 12.

Statute of Limitations—Possession as Caretaker—Tenancy at will—Finding of the Judge at the trial.

The plaintiff's father, who lived in the Township of *T.*, owned a block of 400 acres of land, consisting respectively of Lots 1 in the 13th and 14th Concessions of the Township of *W.* The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else, or allow any one else to take it. He settled in 1849 upon the south half of Lot 1 in the 13th Concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one *M. K.* In December following he moved to the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres of the lot by the father's will, entered upon it, where upon the plaintiff brought trespass, claiming title thereto by possession. The learned Judge at the trial found that the plaintiff entered into possession and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent up to remove plaintiff off the land because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father.

Held,—Reversing the judgment of the Court of Appeal for *Ontario*, that the evidence established the creation of a new tenancy at will within ten years.

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* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and ynne, J. J.

1880

RYAN
v.
RYAN.

Per *Gwynne*, J., that there was also abundant evidence from which the judge at the trial might fairly conclude as he did, that the relationship of servant, agent, or caretaker, in virtue of which the respondent first acquired the possession, continued throughout.

APPEAL from the Court of Appeal of *Ontario*. The action, which was for trespass to realty, was brought by the respondent *Michael Ryan* in the Court of Common Pleas for *Ontario*, and was tried at the Fall Assizes of 1878, at *Berlin*, before the Honorable Chief Justice *Hagarty*, without a jury, when a verdict was entered for the defendant with leave reserved to move to enter a verdict for the plaintiff for such amount of damages as the Court might deem proper. In Michaelmas Term following, a rule *nisi* was granted calling upon the defendant to show cause why the verdict for the defendant obtained at the trial should not be set aside, and a verdict entered for the plaintiff for such amount as the Court might deem the plaintiff entitled to recover pursuant to the Common Law Procedure Act, and to the leave reserved at the trial, on the grounds that the verdict is contrary to law and evidence, and that the plaintiff established a title by the Statute of Limitations under the evidence given at the trial, and that such possessory title to the land in question was made out as against the plaintiff's father, the late *Thomas Ryan*, under whose will the defendant claimed, and that on the evidence the plaintiff was entitled to a verdict.

In the same Term the rule was argued, and judgment, which was reserved, was delivered on the eleventh day of February, 1879, when, the Court being equally divided, the rule dropped.

On the seventh day of March, 1879, the Court again delivered judgment discharging the rule *nisi*, without costs, for the purposes of appeal. The plaintiff appealed to the Court of Appeal, when the appeal was allowed

with costs, and a verdict ordered to be entered for the plaintiff (respondent), for $10.00 damages.

The facts and pleadings will be found in the judgments hereinafter given (1).

Mr. *King* for appellant :—

The only question to be determined is whether the respondent (the plaintiff) has acquired a title to the *locus in quo* by length of possession. The question is one of facts or inferences of fact, and I shall have to refer to the evidence.

I contend that the respondent was the servant, agent, or caretaker of his father, the owner of the land, and that his occupation was in fact the possession of the father, and not adversely to him, or as tenant under him.

[The learned Counsel then reviewed the evidence bearing on this point.]

The learned Chief Justice of the Queen's Bench, before whom this action was tried without a jury, found as a fact that "whatever occupation plaintiff had "of this land was acting as agent and caretaker for his "father, and, as between the father and a stranger, I "think plaintiff's possession would be the father's pos- "session. On the evidence it seems the father used to "send up money to pay the taxes till 7 or 8 years "ago. He then said, knowing plaintiff was using it, "that he must pay the taxes for the use of the land. I "find as a fact that plaintiff, even to his father's death "in 1877, did not occupy or claim it as his own against "his father, but merely as acting for him, living on the "south 50 acres and using this north 50 (now in suit,) "clearing some of it, taking timber off some part and "protecting it."

This finding was approved of by Mr. Justice *Gwynne*,

(1) See also reports of the case, 29 U. C. C. P. 449 and 4 Ont. App. R. 563.

1880
RYAN
v.
RYAN.

then one of the judges of the Court of Common Pleas, and subsequently by Mr. Justice *Patterson* in the Court of Appeal.

In so far as the evidence on this, or in fact any other, branch of the case is conflicting, the appellant would merely refer to the well known rule which is indicated by Mr. Justice *Patterson* where he says : "The solution "of these questions depended upon evidence, which "was conflicting, and the details of which have been "discussed in the judgments. From that discussion it "is obvious that the reliance to be placed on the testi- "mony of one witness or another became a very mate- "rial element in the decision. It was, therefore, a case "in which the opinion of the Judge who heard and "saw the witnesses would have been of great value, "and ought to have been conclusive whenever the "choice lay between conflicting versions of the same "incident."

The following cases all bear on this branch of the argument:—*Perry* v. *Henderson* (1); *Quincey* v. *Caniff* (2); *Silverthorn* v. *Teal* (3); *Heyland* v. *Scott* (4); *Ellis v. Crawford* (5); *Moore* v. *Doherty* (6); *Allen* v. *England* (7), quoted in *Keffer* v. *Keffer* (8).

Then if, on the facts, the proposition already contended for that the respondent was the servant, and not the tenant, of his father the testator, is not the proper conclusion to be drawn from the evidence, it should be assumed that the respondent obtained possession under such circumstances as to create a tenancy between the testator and him, such tenancy would be a tenancy at will; and such tenancy at will was determined, and a new tenancy created, by what took place between the appellant, as the testator's agent, and the respondent in

(1) 3 U. C. Q. B. 486.
(2) 5 U. C. Q. B. 602, 664.
(3) 7 U. C. Q. B. 370.
(4) 19 U. C. C. P. 165.
(5) 5 Ir. L. R. 404.
(6) 5 Ir. L. R. 449, 451.
(7) 3 F. & F. 49.
(8) 27 U. C. C. P. 272.

the year 1872, before the eleven years had expired, and this constitutes a *terminus a quo* since which sufficient time has not elapsed to constitute a statutable bar.

Assuming therefore a tenancy at will, the tenant not having any rent to pay on the original taking of possession, there is clearly evidence of an agreement made between the appellant, acting as his father's agent, and the respondent, that, from the time of their interview, the respondent would pay as rental the taxes on the adjoining property of his father. This was a new tenancy, which, if followed by payment of the taxes, would become a tenancy from year to year,—and there is evidence that subsequently the taxes were paid by the respondent. Mrs. *Ryan*, after speaking to the father of the appellant's business up to the time the new arrangement was made, proceeds: "The old man told me he could not trust *Patrick* (the appellant) to pay taxes and get the receipt for it. He asked me if I would look after 14 and pay the taxes.....I paid the taxes several times."

The cases of *Doe dem. Stanway* v. *Rock* (1) ; *Locke* v. *Matthews* (2) ; *Hodgson* v. *Hooper* (3), shew that such an arrangement or agreement would constitute a new tenancy.

Another view of the case presented by the evidence may be more in accord with the reading that some may be inclined to give to it. From the first taking possession of this half lot in the latter part of 1864, until the testator's death, there were, from time to time and from year to year, dealings between the testator and the respondent, which establishes that the original tenancy at will (and for the purposes of this contention a tenancy at will is conceded) continued, the tenant acknowledging as he did from year to year that he was

(1) 4 M. & G. 30.
(2) 13 C. B. N. S. 753.
(3) 3 E. & E. 149.

1880

RYAN v. RYAN.

but a tenant at will, and that he was ready at any moment to give up possession to his landlord. This, it may be said, cannot avail unless under the 13th sec., of the Statute of Limitations, the acknowledgment is in writing. But it is insisted that the distinction is this: If the tenancy at will by force of the statute is terminated, so that the tenant, ceasing to hold as tenant, holds adversely to the true owner, then the acknowledgment, in order to interrupt the statute running, must be in writing. If on the other hand the tenant, by continual dealings or in other ways, acknowledges the title of the owner and his position as tenant at will, so that the statute does not operate to terminate the tenancy, the acknowledgment need not be in writing; the statute has never commenced to run: *Foster* v. *Emerson* (1).

Mr. *Bowlby*, for respondent:—

In 1863, plaintiff leased to one *Richardson* the land in question, and in 1864 plaintiff put *Richardson* off the land at great cost to himself and then took possession of the land not as caretaker, but for his own use. I contend that on the 3rd of December, 1864, most certainly the statute began to run. The actual occupation of this land by the plantiff on the 3rd December, 1864, did not begin with the permission of his father, who (according to the evidence of the defendant and his witnesses) was always opposed to the plaintiff's occupation of this land. The plaintiff was not let into possession as a tenant at will in 1864, but he then entered as a trespasser, holding adversely. If the plaintiff did not then enter as a trespasser, then he must be held to have been in possession as a tenant at will before that date, and in that view, the statute began to run on the 17th September, 1850. The plaintiff's father, after December, 1864, was

(1) 5 Grant 135.

merely passive and simply allowed the plaintiff to remain in possession after he became aware of his actual occupation thereof. There is nothing in the evidence to show that subsequent to *Richardson's* occupation of this land in 1864, the plaintiff was ever bound by any agreement, either by parol or by deed, to hold this land at the will of his father as lessor. A statement to the plaintiff by his father, long after the plaintiff was in adverse possession as a trespasser, to the effect that plaintiff must leave the land whenever any of his brothers wanted it (even if made) without proof of anything having been said in reply by the plaintiff, would not create a tenancy at will, and it is submitted that no tenancy at will existed between the plaintiff and his father after the 3rd December, 1864, and that the statute began to run on that date, and there having been no written acknowledgment of title under C.S.U. C., cap, 88, sec. 15, the statute did not cease to run by reason of the expression first made by the father about Christmas, 1865, of his willingness that the plaintiff might build upon and continue to occupy the lands in question till the plaintiff would get another place, and other similar expressions made by the father at other times, and that such expressions on the father's part would not create a tenancy at will between him and the plaintiff, nor would the conversation between the parties in the presence of *Clark*, in 1871, have that effect, indeed nothing would stop the running of the statute except a written acknowledgment of title, and it is therefore submitted that the plaintiff acquired a title by possession on the 3rd December, 1874, under 28 *Vic.* c. 16, (*Vide* R.S.O. (1); *Coke Litt.* 55 a ; *Banning's* Limitation of Actions (2); *Sugden's* Real Property Statutes (3).

If it should be held that a tenancy at will was created

(1) Cap. 108, secs., 4, 5, and 15.
(2) Ed. 1877, cap. 9, pp. 88, 96; cap. 16, p. 141.
(3) Ed. 1862, p. 16, *et seq.* 23, 57, 59, 77, 78, 80.

1880

RYAN
v.
RYAN.

by the letter of the 14th January, 1865, from the father, in which he was silent as to the fact that plaintiff had gone into possesssion and actual occupation of the land, although knowing this fact from the plaintiff's letter to him and from information received by him from *Kennedy*, or if a tenancy at will should be held to have been created by virtue of the assent given by the father to the plaintiff's occupation of this land, in his conversation with the plaintiff or his wife about Christmas, 1865, then such tenancy at will must have commenced on the 3rd December 1864, or on the 14th January 1865, or else at Christmas, 1865, and for the purposes of this action it is immaterial which of those dates be taken as the date of the commencement of such tenancy at will, if any such tenancy ever existed, and the right of action under the statute (1) must be deemed to have first accrued to the father one year after such dates, being at latest Christmas, 1866, at which time the alleged tenancy at will, under which the plaintiff's actual occupation and dwelling or residing upon this land began, must, for the purposes of the bar of the statute, be deemed to have determined, and the statute then began to run, and the operation of the statute, having so begun to run, can be stopped only by the creation of a fresh tenancy at will after the determination of the original tenancy at will, and within the period of limitation, and so the plaintiff's title became complete at Christmas, 1876, at the latest, unless before that date the original tenancy were determined and a fresh tenancy created, and it is submitted that a conclusion could not be drawn from the evidence that there was legally any determination of the tenancy at will by what took place between the plaintiff and defendant in the presence of *Clark*, some seven years before the trial (in or about 1871), and that no new

(1) R. S. O., cap. 108, sec. 5, sub-sec. 7.

tenancy between the plaintiff and his father was then created, and that the circumstances attending that interview between the parties to this action did not constitute a new *terminus a quo*, *Doe d. Perry* v. *Henderson* (1); *Keffer* v. *Keffer* (2); *Gray* v, *Richford* (3); *Doe d. Baker* v. *Coombes* (4); *Truesdell* v. *Cook* (5); *Williams* v. *McDonald* (6); and especially *Day* v. *Day* (7); *Banning's* Limitation of Actions (8); *Foster* v. *Emerson* (9) relied upon, is overruled by *Truesdell* v. *Cook* (10). As to whether a fresh tenancy at will was created some seven years before the trial, between the plaintiff and the defendant as agent for his father, although the defendant alone said there was a promise then made by the plaintiff that he would pay the taxes in future, if left on the land, yet in this he is contradicted not only by the plaintiff but also by his own witness, *Clark*. In the letter of the 14th January, 1865, written by the father to the plaintiff, after he, the father, knew from the plaintiff's letter to him, and from *Kennedy*, that the plaintiff was then living on this land now in dispute, and that in consequence thereof the plaintiff would always be obliged to pay the taxes to avoid a distress, the father says "*it is the last taxes I will pay on it*," indicating thereby that he threw upon the plaintiff one of the burdens of ownership, that of paying the taxes from that date, and consistently with this letter the land in dispute was ever afterwards assessed in the name of the plaintiff only, who thereafter was alone liable to pay such taxes. It is submitted that the alleged agreement or promise to pay the taxes is clearly disproved by the evidence, and that even if such an agreement had ever really existed it would not

(1) 3 U. C. Q. B. 486.
(2) 27 U. C. C. P. 257.
(3) 1 Ont. App. R. 112.
(4) 9 C. B. 714.
(5) 18 Grant 532.
(6) 33 U. C. Q. B. 423.
(7) L. R. 3 P. C. 751.
(8) Pp. 96, 98, 103, 118, 140 and 141.
(9) 5 Grant 135.
(10) 18 Grant 532.

1880

RYAN. v. RYAN

have made any difference, because *primâ facie* the plaintiff, as the occupant of the land, was bound to pay the taxes. See the observations on this head of *Richards*, C. J., in *Williams* v. *McDonald* (1); also, the observations of *Robinson*, C J., in *Doe d. Henderson* (2), which was a case in almost all respects resembling the present case, and in which it was held that the running of the statute was not interrupted by the fact that the father had, during the period of limitation, required the son to pay the taxes for him, which the son had done. If it were agreed (although it was not proved) that the plaintiff should pay the taxes on the 200 acres in the 14th concession as an uncertain yearly rent for the 100 acres in the 13th concession after the 14th January, 1865, (as intimated in the father's letter) then there is no evidence that he paid such taxes during the period of limitation (3).

The view taken of the language of the statute (R S. O. c 108, sec. 5, sub.-sec. 7,) by Mr Justice *Patterson* in the Court of Appeal, is not justified by authority, but on the contrary is in direct antagonism to a long line of authority, both in this country and in *England*. It is difficult to conceive that the legislature intended to make new bargains for parties, and where it is agreed that there shall be a tenancy at will without any fixed period, to say that the parties are not in the relative positions they have agreed they shall be, but are under an entirely different arrangement—the creature of the statute. The correct view appears to be that held by all the other judges of the Court of Appeal, that the tenancy at will determined at the end of the year for the purposes of the bar of the statute only and not for all purposes.

Mr. *King* in reply :—

(1) 33 U. C. Q. B. at p. 43. (2) 3 U. C. Q. B. at p. 492.
(3) R. S. O. cap. 108, sec. 5, sub. sec. 6.

The respondent starts out with the statement that there was some new arrangement in 1864, all I can say this is not borne out by the evidence. As to the case of *Truesdell* v. *Cook* (1), it is not very difficult to distinguish it from this case, for here we say that from the acts and dealings of the parties a new tenancy was created. An arrangment made with the agent of the owner of the property is proved, and there was no such evidence in *Truesdell* v. *Cook*.

RITCHIE, C. J.:—

The declaration sets forth that the defendant broke and entered certain land of the plaintiff, called the northerly half of lot number one, in the thirteenth concession, western section, of the township of *Wellesley*, in the County of *Waterloo*, and Province of *Ontario*, and cut down and removed from off the said lot, and applied to his own use, a large number of timber and other trees standing, growing and being upon the said land.

Pleas—1. Not guilty. 2. Land was not the plaintiff's as alleged. 3. Land was the freehold of the defendant. 4. Did what is complained of by the plaintiff's leave.

The plaintiff joined issue on the defendant's pleas.

The trial took place before the Hon. Mr. Chief Justice *Hagarty*, without a jury, at *Berlin*, on the 24th day of September, 1878.

The dispute was confined to the south 50 acres of the north 100.

Hagarty, C. J., at the trial found as follows:—

For the present I enter verdict for the defendant. * * *

The difficulty arises as to the effect of this occupation for over 10 years before the bringing of this action, and that will require serious consideration. The claim to these 50 acres seems very unjust. The plaintiff never was promised over 100 acres which he got and sold in 1859, and his father, as I understand, devised the south 50 acres of

(1) 18 Grant 532.

1881

RYAN v. RYAN.

Ritchie, C.J.

this half lot to him in addition. Whatever occupation plaintiff had of this land was acting as agent and caretaker for his father, and as between the father and a stranger I think plaintiff's possession would be the father's possession. On the evidence it seems the father used to send up money to pay the taxes till 7 or 8 years ago, he then said, knowing plaintiff was using it, that he must pay the taxes for the use of the land. I find as a fact that plaintiff, even to his father's death in 1877, did not occupy or claim it as his own against his father, but merely as acting for him living on the south 50 acres and using this north 50 (now in suit) clearing some of it, taking timber off some part and protecting it. Within the 10 years it is sworn by defendant that he was sent by his father to complain to plaintiff of his cutting timber, &c., and told him so, and plaintiff promised to forbear and to pay the taxes if he was left on this place until the father would want it (see defendant's evidence on this head).

In Michaelmas term following, a rule *nisi* was granted.

On the 11th of February, 1879, the Court delivered judgment, when the court was equally divided in opinion, and the rule *nisi* dropped. And on the seventh day of March, 1879, the court again delivered judgment, discharging the said rule *nisi* without costs, for the purposes of appeal.

Of the judgments delivered on the 11th February, 1879, *Wilson*, C. J., was of opinion that the plaintiff "was not his father's servant or agent as to the land which he held in possession. He was a trespasser, if he were there wrongfully, or a tenant at will, if he were there rightfully, but he was not a caretaker of that land. He and he alone was in the sole and beneficial occupation of it. The first question then is, whether the plaintiff was a trespasser or a tenant at will."

After summing up the evidence on this point the learned Chief Justice says: "It is quite clear to me then, the plaintiff was not a trespasser and wrong-doer from the first. If he were to be considered so, it would not prejudice the plaintiff's claim, but it would seriously endanger the defendant's rights." And he finds that the plaintiff was tenant at will to his father of the north

50 acres, as well as of the south 50 acres of the same north half lot from December, 1864. The next question he says is: "Whether the plaintiff has had possession of the disputed 50 acres for a period of ten years from one year from December, 1864, that is until December, 1875, and his father was dispossessed for the same period."

He says: "I name these dates without continuing the time to a period after December, 1875, because if the plaintiff's possession were broken at all and the father's possession restored these events happened about seven years before the trial, and the plaintiff's possession subsequent to December, 1875, would not affect the case.

"If the plaintiff's possession were put an end to between December, 1865, and December, 1875, by his becoming tenant at will again to his father, and it is not said it was put an end to in any other manner, then the plaintiff as to the disputed fifty acres fails in his action. If it were not, he is entitled to the verdict. That question depends entirely upon the evidence."

After reviewing the defendant's evidence and referring to *Clarke's* evidence, he says: "That is no evidence of a new tenancy at will having been created between the parties; firstly, because the plaintiff refused to leave unless he got the acre of land he asked, and secondly, because he never promised to pay the taxes."

"There is no further point for discussion or argument than the one last mentioned, namely, whether the tenancy at will, which was determined in one year from December, 1864, when the statute began to run, a new tenancy at will was created between the father and the plaintiff at the time mentioned, seven years before the trial, and as a fact I am of opinion, for it is not a matter of law, it was not. It was neither proved nor found as a fact.

1881

RYAN v. RYAN.

Ritchie, C.J.

"If I am to pronounce my opinion upon this evidence, which I think the learned Chief Justice ought to have pronounced, that opinion is that the verdict should be entered for the plaintiff."

Mr. Justice *Galt* delivered a judgment prepared by *Gwynne*, J., before leaving the common pleas, thoroughly concurring in it, and reading it and adopting it as his own. After saying that the whole question as it appeared to him was one of facts and of inference from facts to be decided by the court as a jury would, and after carefully considering the evidence, the learned judge says:

> The learned Chief Justice of the Queen's Bench, before whom this action was tried, without a jury, found as a fact that the plaintiff, down to his father's death in 1877, did not occupy, or claim to occupy, the land for which this action is brought on the north fifty acres of the north half of the lot, otherwise than as agent of his father, living on the south 50 acres of the north half, and protecting the north half, clearing some of it, taking timber off some of it, but in the character merely of agent of his father. There is much in the above evidence, as it appears to me, in support of this finding. The plaintiff's own account, that he was authorized by his father to take timber for his own use, and to cut down timber to pay the taxes upon the block, and his account of his habit every time he would go down to see his father, that is every year or every second year, of telling him everything he was doing, what he chopped, and what he cleared, and the repeated injunctions he received not to allow any stranger to take off any timber, seems to me to be very consistent with what would be natural and likely to occur in the case of a steward, caretaker, or agent, giving an account of his stewardship, which was compensated by his being allowed to live on the south 50 acres and by using the cleared part of the land for the support of his family. I am not prepared to hold that a son might not occupy land as the steward or agent of his father under an arrangement of that description, and so that the statute of limitations should not begin to run against the father. But I do not think it necessary to hold that, in this case, the occupation of the plaintiff was only as steward or agent of his father; for assuming him to have been tenant at will of his father, even from his entry in December, 1864, if the evidence given upon the part of the defendant be true, and I see no reason to doubt it, there is, as it appears, abundant evidence; the proper inference

1881

RYAN
v.
RYAN.

Ritchie, C.J.

from which is that about six or seven years ago that tenancy was determined, and a new tenancy at will created between the plaintiff and his father.

And after referring to the evidence bearing on this point, the learned judge says:

Now it appears to me that there is no reason to doubt the truth of the evidence for the defence, and that there should be no difficulty in arriving at the following conclusions, namely: That about 7 years ago the plaintiff, in violation of the express orders of his father, the owner of the land, was cutting down, or permitting to be cut down, the timber upon the lot, to the injury of the land, and that the father sent up the defendant in consequence, as his agent, with authority to enter upon the land on behalf of the father, and to remove the plaintiff therefrom, unless he should come to terms satisfactorily to the father's agent; that accordingly the defendant did go up and did enter upon the land in assertion of his father's title, and did prevent persons who were cutting and taking away the timber from doing so, and that this entry and assertion of right was done by the authority of the father and enured to his benefit, and determined any tenancy at will then existing in virtue of which the plaintiff had then possession, and that thereupon the defendant saw the plaintiff and communicated to him that he had come up with power and authority to remove him, unless he would cease cutting timber and would pay the taxes, and that thereupon the plaintiff came to an understanding and agreement which was satisfactory to the defendant, as his father's agent, that if he was allowed to remain on the place until such time as his father or any person claiming under him, should want the place, he would cut no more timber and would pay the taxes, and would give up the place whenever required so to do; and so that the proper inference to draw is, that then a new tenancy at will under the father was created, to which new tenancy the plaintiff being permitted to continue thereafter upon the place is to be attributed, and that consequently the father's title was not barred in his lifetime, and, I think, what passed between the brothers after the father's death, the manner in which they dealt with the land and the reference to arbitration is more consistent with this being the true state of the case than with the plaintiff having obtained a title by the statute of limitations, acting as he would now seem to wish to represent under advice throughout with that view.

Again, he says:

For, believing as I do the evidence of the defendant, that in reply

1881

RYAN v. RYAN.

Ritchie, C.J.

to his informing the plaintiff that he had authority from his father to remove him because of his wrongful cutting the timber and neglecting to pay the taxes, the plaintiff undertook not to cut any more timber and to pay the taxes, and to give up the possession whenever required to do so by his father, I think no other construction can be put upon this conduct than that then a new tenancy at will was agreed to in order to avert the threatened eviction, and that this did take place I see no reason to doubt.

If plaintiff was in as a mere trespasser, then entering into this agreement made him a tenant at will.

If he was in as a tenant at will, on the terms of not cutting any timber but for his own use, and of not suffering or permitting others to cut timber on the land, and he did cut on his own account, contrary to his agreement, and without the assent or authority of his father, the owner, and did suffer and permit others to cut, did he not by such acts and conduct become a trespasser, and so put an end to the tenancy at will? And the father being cognizant of this, and sending his son with authority to put him off the premises, did not the new agreement by which his father, through his agent, permitted him to remain, constitute a new tenancy? So that in any view of the case, whether originally caretaker, or trespasser, or tenant at will, he was tenant at will from the time of the last agreement.

The defendant, in my opinion, was not in the full possession of his lot nor occupying it as his own. On the contrary, I think that his possession was the possession of the father; he held it subject to the control of his father, and under him, as his agent or caretaker; that as his father's agent, and for his father's benefit, he kept off trespassers; that by the direction and under the authority of his father he sold timber off it to pay the taxes; that the timber he took was, by agreement with his father, confined to timber for his own use only, and was taken under the authority and by the permission of his father; and when the father heard he was cutting more than he ought, *Patrick*, the other

son, was sent by the father to stop him and others, which he did; all of which doings in connection with the property he continuously, from time to time, if not every year, reported to his father and received from him, as owner, directions respecting the management of the property. That about seven years ago, the father hearing that, in opposition to his orders, plaintiff was cutting or permitting timber to be cut and taken off the lot, the father sent his son, the defendant, as his agent, to prevent the plaintiff and others from cutting and taking any timber, and if need be to remove the plaintiff off the land; and he did enter on the land as agent of the father, the owner, and did prevent the plaintiff and others from further cutting and taking away the timber, and did permit the defendant to continue under a new agreement, that he should be allowed to remain on the place till his father or any person claiming under him should want the place, if he would cut no more timber, and would pay the taxes, and would give up the place when required so to do. If he did not from this time continue in possession as agent or caretaker of his father, continuing in under this new agreement, he must be considered holding under the agreement as tenant at will.

Chief Justice *Wilson* in his judgment says:

"I am quite sensible the plaintiff's claim is a most unrighteous one. He is setting it up against his father, who has all along dealt kindly by him, and who has left him a portion of land by his will, because he could not bear so large a family should want if not further helped."

Chief Justice *Moss* says:

"He took posession for his own benefit, and in order to derive his sustenance from the land as long as his father did not interfere. He commenced and continued to use it according to his own pleasure. He communi-

1881

RYAN v. RYAN.

Ritchie, C.J.

cated to his father the fact that he had taken possession and impliedly asked his assent to continuing in possession, but he said nothing of being a bailiff or guardian of the property."

If this is so, did not he cease to use it according to his own pleasure, at any rate after defendant was sent to turn him off unless he ceased cutting timber, kept off trespassers and paid the taxes? And when he agreed to do this did he not from that time become a tenant at will? He was permitted to continue the occupancy of the land, limited as to the timber, performing the service of keeping off trespassers and taking in recompense the profits of the land; does not this arrangement create a tenancy at will?

Be this as it may, *Michael Ryan* was on the land as a mere caretaker for his father, and if so the statute did not run, or he was on as tenant at will to his father on the terms as stated by himself: "I was to take care of the other land; to mind it; let no timber be cut off it; see that no timber was taken off it, or harm done to it. He sent me up money to get some chopped on the north half. I was allowed to take timber off any part of it, but not to give it to any one else, or let any one else take it away." He did cut and sell timber off the land and allow others to cut. This, in my opinion, determined the tenancy: and when *Patrick* went up to put him off for so doing, and he agreed to pay the taxes and cut no more, a new tenancy was created.

FOURNIER and TASCHEREAU, J.J., concurred.

HENRY, J.:

The plaintiff in this action took this property admittedly belonging to his father. He first settled on 100 acres, got a deed of the same from his father and then sold them, and he remained caretaker as to the balance

1881

RYAN v. RYAN.

Henry, J.

of the property, some 300 acres. After selling his own 100 acres, he settled on another 50 acres, not the portion of the lot in question, but on running his lines it was found that he had cut trees and that a portion of the land in dispute was in his possession. He then applied to his father for permission to remain in possession, which was granted on certain conditions. Subsequently he got by devise from his father, the 50 acres he had gone to settle on, and by the same will the defendant got the 50 acres now in dispute.

I cannot see that there is any evidence that he ever got these 50 acres otherwise than as caretaker for his father, and he therefore could have no title against his father. I consider for this reason the appeal should be allowed.

I consider further that, whether he is regarded as trespasser or tenant at will, he could not set up his possession beyond a certain date, because at that time his brother, by direction of his father, went to him, complained of allowing the trees to be cut and entered with him into a new arrangement and a new contract. Some of the Judges of the Court below seem to have been of opinion that the original tenancy at will could not be set aside unless there was evidence of a demand of possession or notice to quit. I do not think it was necessary and therefore the appellant is entitled to the land and to our judgment in his favour on this appeal.

GWYNNE, J.:—

When the facts of this case are thoroughly understood it appears to be free from difficulty. Both parties relied mainly upon *Day vs. Day* (1) and *Keffer vs. Keffer* (2), but the appellant with greater reason. Both of these cases proceeded upon the admitted basis that

(1) L. R. 3 P. C. 781. (2) 27 U. C. C. P. 272.

1880

RYAN v. RYAN.

Gwynne, J.

the estate of the party claiming to have acquired a statutory title was at its commencement a tenancy at will, whereas here, as appears very clearly, the possession of the respondent in its commencement was that of servant, agent, or caretaker for his father. The learned Chief Justice of the Court of Queen's Bench, who tried the case without a jury and himself heard all the witnesses give their evidence, found as a matter of fact that, not only was the respondent's possession in its commencement that of a servant, agent, or caretaker for his father, but that this relationship continued throughout until the father's death in 1877, and so that the respondent never had any estate of the nature of a tenancy whether by the year, or at will, or otherwise. Now, this is just one of those cases in which a Court of Appeal should not reverse the finding upon matters of fact of the Judge who tried the cause and had the opportunity of observing the demeanour of the witnesses, unless the evidence be of such a character as to convey to the mind of the Judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. So far from that being capable of being said in this case, the finding of the learned Chief Justice appears to be perfectly justified by the evidence. It appears that the respondent's father, who lived with his family, consisting of several children, in the Township of *Tecumseh*, and owned a block of 400 acres in the Township of *Wellesley*, which is very remote from *Tecumseh*, sent the respondent his eldest son in the year 1849, up to *Wellesley*, to take care of the block of land under an arrangement then made of which the respondent himself gives this account :—

> When I first went up I got instructions from my father. He told me to go up and take my choice of the 400 acres. I picked out the south half of lot 1 in the 13th concession. I was to take care of the other land—to mind it—to let no timber be cut off it—to see that

no timber was taken off it or harm done to it. I was allowed to take timber off any part of it, but not to give it to any one else or to let any one else take it away. In November 1864 I sold the S½ of the lot 1 in the 13th concession and I moved on to the north half in December 1864. I wrote a letter to my father before I moved on telling him that I was going to move on.

He then, altho' no foundation was made to enable him to give secondary evidence in his own favor of the contents of the letter, proceeds to say :

The substance of my letter that I sent to my father was that I had sold out the place and was going to move on to the next one. I did not say how long I was going to stay, or what I was going to do on it. I wrote to get some money to pay the taxes. I had not asked him for this lot. I had not intimated to him that I would like another hundred acres.

Now, in all this, there is not a suggestion that he contemplated making any, the slightest, difference in respect of the relationship then existing between himself and his father as regards this land, or that he contemplated converting his possession as caretaker for, into a tenancy under his father, if the latter would consent. At the time of his selling the S½ of the lot he was in possession of that piece as his own by deed from his father, given in pursuance of the arrangement whereby he was in possession of the other 300 acres as the agent, servant, or caretaker for his father. This relationship still existed at the time of his writing to his father the letter of November and at the time of his going on to the N½ of this lot 1 to live in December 1864. A letter written by his father in January, 1865, was produced, but there is nothing in it at all inconsistent with the continuance of the relationship of master and servant, or caretaker, as before. In it the father intimates that the respondent must not expect to get a deed of the N½ as he had got of the S½. It was quite consistent with that letter and with everything of which there is any evidence up to its receipt by the respondent, that the

1881

RYAN v. RYAN.

Gwynne, J.

relationship of master and servant, or caretaker, was to continue between the father and son as before. The onus therefore lay upon the respondent to show precisely when, if ever, that relationship was changed and that of tenancy was first created. That it continued throughout until the death of the father in 1877, as was found by the learned Chief Justice who tried the cause, there is evidence to justify the conclusion.

The respondent himself says that he thinks he went down to see his father the next winter after he had moved on to the N½. He says :

Either my wife or I went down every second winter. I cannot tell which of us went down first after December 1864. It was not more than two years after that, that I went down myself.

And again :

I told him, [his father] everything I was doing. I would tell him when I had so much chopping or clearing done. *I would tell him every time I went down. He told me to take care of the place and to let no one take lumber off it.* People had gone to him and complained that I was allowing too much timber to be taken off. *He told me I could sell timber to pay the taxes,* but I was not to let others haul it away.

Now, this occurring every time the respondent went down is exactly what would be natural between a steward or caretaker and his master, and is quite consistent therefore with the relationship in virtue of which the respondent first entered still continuing. Then there is the evidence of *Duncan McKenzie*, which is very strong. He says :

Somewhere about 8 or 9 years ago, a man of the name of *West* and I went to buy some timber. *Michael* [that is the respondent] was then living on the south fifty of the north half. *He told us, his father allowed him to sell the timber on the place,*—that referred to the whole bush as I understood it, wherever we could get timber to suit. Then, two years ago, my cattle got into that bush—the bush of the hundred that *Pat* is on, and the bush of the 50 *Michael* disputes about, was all in one,—he said they had got through it a number of times, he told me he would put them in pound. I told him,

it did not belong to him any more than to me. He told me that made no difference, he *was the agent of his father* and if I did not keep them out, he would put them in pound.

Now here is abundant evidence from which a jury might fairly conclude, as the learned Chief Justice who tried the case did, that the relationship of servant, agent or caretaker, in virtue of which the respondent first acquired the possession, continued throughout. The respondent's own evidence of what passed between him and his father from time to time after December 1864 is quite consistent with the continuance of the original relationship of master and servant, and this is confirmed by the evidence of *Duncan McKenzie*, by which it appears that upon two different occasions within the last 8 or 10 years the respondent asserted the right to deal with the land as *the agent of* his father, upon one of which occasions he sold timber to the witness, asserting that his father allowed him to do so, and it is part of his own evidence that by the arrangement in virtue of which he became and was caretaker for his father he was authorized to sell the timber, as well to enable him to pay taxes as for his own use, and this permission was continued apparently upon every occasion that the respondent visited his father after December, 1864, accompanied with the peremptory injunction against the son permitting other persons to cut and haul away the timber except for the purposes aforesaid.

It is contended, however, that the evidence of *Duncan McKenzie* is valueless as relating only to a verbal admission by the son of the father's title which, as is contended, is not admissible under the statute, and *Doe Perry* v. *Henderson* (1) is referred to in support of this view: but the contention involves a manifest *petitio principii*, and indeed a misconception of the provisions of the statute and of the decision in *Doe Perry* v. *Hen-*

(1) 3 U. C. Q. B. 486.

1881

RYAN v. RYAN.

Gwynne, J.

derson, for although true it is that the statute enacts that "*where any person is in possession &c., &c., as tenant* " *at will* the right of the person entitled subject thereto, " or of the person through whom he claims to make an " entry, &c., &c.. shall be deemed to have first accrued " either at the termination of such tenancy or at the " expiration of the year next after the commencement " of such tenancy," and that where any acknowledgment of the title of the person entitled to any land is given to him or his agent *in writing* the right to make an entry or to bring an action to recover such land shall be deemed to have first accrued at and not before the time at which *such* acknowledgment, or the last of such acknowledgments, if more than one was given, and although true it is that *Doe Perry* v. *Henderson* determines that when the statute has begun to run a mere verbal acknowledgment while it is running by the person in possession that the land is the property of the true owner will not stop the running of the statute, still where the question is whether or not the relation of tenancy ever existed?—whether the possession to which the provisions of the statute are sought to be applied was that of a servant, agent or caretaker, or on the contrary that of a tenant?—there is no case which excludes evidence of the fact that the person seeking to avail himself of the statute has verbally acknowledged that his possession was not at all that of a tenant, but was that of a servant, agent or caretaker. In *Doe Perry* v. *Henderson* the late learned Chief Justice *Robinson* draws plainly the distinction between the two cases. He there says : " The son was in fact occupying for his own " benefit *and not as the servant or agent of his father.*"

Now, the principle of *Day* v. *Day* and of *Keffer* v. *Keffer* is this : that acts which were quite consistent with the continuance of the original relationship created between the father and son could not be relied upon

as putting an end to that relationship, and in *Day v. Day* it was held to be a proper question of fact to submit to the jury, (and it is therefore a proper one for a judge trying a case without a jury to determine) whether the acts relied upon as terminating the first relationship existing between the father and son as regarded the possession of the land were consistent with the continuance of that relationship ; and in *Day* v. *Day*, the jury having decided that they were, it was held that the first relationship was not determined. This decision, when applied to this case, supports the contention of the appellant, and not that of the respondent, and it is quite right that it should be so, for it would certainly tend to render the title to land very insecure if it should be competent for a person who obtains the possession of land in the character of servant, agent or caretaker for another, at his own sole pleasure, without the knowledge and consent of the other, to convert that relationship into one of *tenancy at will* so as to enable the agent, who is confided in as such by his principal, to dispossess his principal, and in process of time to extinguish his title.

Then, we have the evidence of the appellant, who says that he was sent up by his father who had heard that the respondent was cutting more timber than was right, and that he was destroying the land, with instructions to tell him to stop cutting the timber, and that if he would not pay the taxes the father would put somebody else on the land. That accordingly the respondent did go up to the land as his father's agent ; that he found a man hauling timber off the place for rafters, and that he interfered and forbid him, and that he promised to desist ; that he next saw the respondent and told him the purpose for which he had come up, and the instructions he had from his father, and he forbid the respondent to sell or dispose of any more

1881

RYAN v. RYAN.

Gwynne, J.

timber off the place. That in reply the respondent promised that he would cut no more timber, and that he would pay the taxes if he should be left on the place until such time as his father or the boys, his brothers, wanted it. The respondent, having been himself examined in his own interest upon this point, admitted that he may have said that he would give up the place if his father wanted it, but he could not swear whether he did say so or not. The appellant, however, swears that he did say so, and it is plain that the interview resulted in an arrangement whereby the respondent was allowed to remain on the land, for this is the only natural inference to draw under the circumstances, from his being permitted to continue in possession and from the mutual occupation of the land for a short time before and after the father's death. Now, this evidence of the appellant is also quite consistent with the fact that throughout the respondent continued in possession in the same character of caretaker in virtue of which he had originally obtained the possession.

It is however urged, that there is that in the evidence of the respondent's wife which tends to shew that there was at some time a change made in this relationship; if there be, it must be said that her evidence is defective in a most important point, namely, in not shewing *when precisely* that change occurred, for upon that turned the question whether or not the statute had run for a sufficient time from that event occurring to give to the plaintiff in the action a statutory title, the onus of establishing which wholly lay upon the respondent, who was the plaintiff; but further, it is only necessary upon this point to say that the judge who tried the case had the best opportunity of determining from the demeanor and manner of the witnesses in giving their evidence which appeared to be most worthy of credit, and he has adopted the evidence, of which it

1881

RYAN
v.
RYAN.

Gwynne, J.

must be admitted there is abundance, which supports the continuing existence of the original character of caretaker, and a Court of Appeal cannot in such a case with propriety say, that his finding, which is in such plain accord with justice and the integrity of parties originally placed in a fiduciary relation, is in point of fact plainly erroneous. Nor would it avail the respondent if it should be established beyond all doubt that the relation of landlord and tenant did exist between the father and himself, for, assuming the respondent had been tenant at will to his father and that the statute was running in his favor at the time that the appellant was sent up about six years before the action brought, there is abundant evidence to justify a jury in coming to the conclusion that what occurred then evidenced the creation anew of the relationship of landlord and tenant, and that is the inference which under the circumstances a jury should draw. The fact of the respondent being allowed to continue to remain upon the land at all after the appellant had been sent up for the purpose detailed in the evidence, and the subsequent dealings of the brothers in relation to the land shortly before and after the father's death, and when the respondent was aware that the father had left by his will the south fifty acres of the N½ of the lot in question to the respondent and the residue to the appellant, tend to support the evidence of the latter, and that evidence, if believed by a jury, and I see no reason to disbelieve it, would justify the conclusion, as the proper inference to be drawn, that a new tenancy at will was created and was then acknowledged to be in existence between the father and the respondent so as to create a new point of departure for the running of the statute. The question in such case, as said by Lord *Denman* in *Doe Groves* v. *Groves* (1), is merely one as to which

(1) 10 Q. B. 491.

1881

RYAN v. RYAN.

Gwynne, J.

of two suppositions is most consistent with the facts in evidence, and that which appears to be most consistent with those facts is, that if not then in possession as agent or caretaker for his father the respondent by what passed between him and the father's agent acknowledged himself to be and agreed to be a tenant at will to his father. The learned counsel for the respondent seemed to be of opinion that, assuming the statute to have begun to run in favor of the respondent before that interview, a verbal acknowledgment made by the respondent in that interview with the father's agent, though made as detailed in the evidence of the appellant, would not have been sufficient within the authority of *Doe Perry* v. *Henderson*. But what *Doe Perry* v. *Henderson* decided upon this point was, that the mere acknowledgment by the party in possession verbally made that another person was the true owner of the land was not sufficient to stop the running of the statute, such an acknowledgment though made to the true owner would be quite consistent with the fact that the person making it was nevertheless availing, and intending to avail, himself of the *continual* running of the statute in his favor, it would involve no acknowledgment of there existing at the time the relation of landlord and tenant between him and the true owner, it would be no more than if he said to the true owner: "You certainly have the title, but I "am acquiring it under the statute," but *Doe Perry* v. *Henderson* does not, nor does any case, decide that the verbal acknowledgment by a party in possession made to the owner or his agent, that the relation of landlord and tenant is *then existing* between the person in possession and the true owner is not good evidence, as against the person making it, of the fact of the present existence of the relationship so as to give a new departure for the run-

1881

RYAN v. RYAN.

Gwynne, J.

ning of the statute—equally as does the payment of a sum of money by way of rent, it may be for the first time several years after the statute had begun to run, but before its efflux, which is but an *act* in acknowledgment of the existing relationship of landlord and tenant. Again, it was urged that in *Day* v. *Day* it is said : " When the statute has once begun to run it " would seem on principle that it could not cease to " run unless the true owner, whom the statute assumes " to be dispossessed of his property, shall have been " restored to the possession," but the judgment goes on to explain that he may be restored to the possession so as to control the continuance of the running of the statute by three different ways—either, 1st, " by enter- " ing into the actual possession of the property, or 2nd. " by receiving rent from the person in occupation," the payment of which is but an act in acknowledgment that the party paying it is then tenant of the party to whom he pays it, or 3rd. " by making a new lease to " such person which is accepted by him, and it is not " material whether it is a lease for a term of years, from " year to year, or at will."

Now, *Hodgson v. Kosper* (1) and *Day v. Day* are authorities that the fact of such new lease having been made and accepted by the person in possession may be implied from acts and conduct, and certainly it appears to me that the acts and conduct, to which I add expressions from which a tenancy at will should be implied to have been then created, unless as I have said the respondent was then still invested with the character of agent and caretaker for his father, are stronger than were the circumstances which were held to be sufficient for that purpose in *Doe Groves v. Groves* (2), *Doe Bennett v. Turner* (3), and *Doe Shepherd* v. *Bayley* (4).

(1) 3 E. & E. 149.
(2) 10 Q. B. 486.
(3) 9 M. & W. 643.
(4) 10 U. C. Q. B. 310.

1881

RYAN v. RYAN.

Gwynne, J.

As to the further point which was urged in favor of the respondent's contention, namely, that he had been assessed and paid the taxes upon the land for several years, it is only necessary to say, that by his own shewing it was provided by the arrangement in virtue of which he originally became agent and caretaker of the land for his father that he should be at liberty to sell timber to pay the taxes, and there is ample evidence to shew that he exercised this privilege to an amount greater, as it would seem, than was necessary to pay taxes.

Upon the whole I am of opinion that the majority of the Court of Appeal for *Ontario* erred in reversing the verdict rendered by the learned Chief Justice who tried the case, and that this appeal should be allowed and the verdict and judgment thereon of the Court below in favor of the appellant, the defendant in the action, should be restored with costs.

Appeal allowed with costs.

Solicitor for appellant: *John King.*

Solicitors for respondent: *Bowlby, Colquhoun & Clement.*