SOLOMON WHITE AND JAMES O'NEIL (DEFENDANTS)..... ..... } APPELLANTS;

AND

HENRY E. NELLES (PLAINTIFF).....RESPONDENT.

1885

*Feb'y. 25.

*June 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Possession fraudulently obtained by defendant—Plaintiff not put on proof of title—Tax sale—Rev. Stats. Ont. ch. 40 *sec.* 37; 33 *Vic., ch.* 33.

N., respondent, as assignee in insolvency of H., who bought a lot of land from the purchaser at a sheriff's sale for taxes, filed a bill in Chancery under the Ontario Administration of Justice Act against W. & O'N. (appellants), who were in possession, praying *inter alia* that defendants be ordered to deliver up possession of the lands and to account for the value of trees, &c., cut down and removed. W. by his answer adopted O'N.'s possession and claimed under conveyance from the Crown and impeached the validity of the sale for taxes. O'N. by his answer alleged he was in possession under W. At the trial it was proved that H. gave a lease of the lot to one T. for four years, and that O'N. went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place and thereby obtained possession for the benefit of W. The Court of Chancery for Ontario held that appellants were obliged to yield up possession to the respondent before asserting any title in themselves. The Court of Appeal for Ontario varied the decree by declaring that the decree was to be without prejudice to any proceeding the appellant W. might be advised to take to establish his title to the lands in question within two months from the date thereof.

Held, Per Ritchie C.J., and Strong, Fournier and Henry JJ., affirming the judgment of the Courts below,—that the appellants, having gone into possession under T., were estopped in this suit from disputing their landlord's title, and that the respondent was entitled to an injunction to restrain appellants from committing waste and to an account for waste already committed.

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

1885

WHITE v. NELLES.

Per Strong J.—The decree made by the Chancellor would have constituted no bar to a subsequent action at law or suit in equity by W. to impeach the tax sale, and should not have been varied by the Court of Appeal.

Per Gwynne J.—The case should have been disposed of upon the issue as to the valibility of title upon which the plaintiff had by his bill rested his case; and as the appellants had failed to prove that the taxes had been paid before the sheriff's sale, the Ontario statute, 33 Vic., ch. 23, had removed all errors and defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and pursuant to the provisions of ch. 40, sec. 87, R.S.O., the respondent was entitled to recover possession of the land in question and to have execution therefor, but not to an order for an injunction or any direction for an account, the statute authorizing title to real property to be tried in a Court of Chancery not justifying a judgment of a more extensive character than would have been pronounced in a court of common law if the action had been brought there.

APPEAL from the judgment of the Court of Appeal for Ontario varying a decree of Chancellor Spragge (1) in favor of the respondent.

This suit was commenced on the 23rd day of December, 1880, in the Court of Chancery for Ontario, by the respondent Nelles against the appellants White and O'Neil, to recover possession of the north 100 acres and the south 30 acres of lot No. 1, in the 10th concession of the township of Colchester.

The respondent by his bill set up that he claimed title from one John Hargreaves, an insolvent; that Hargreaves held possession of the lands from the time of his acquiring the same, in the year 1876, down to the month of October, 1880, when, as alleged in the 4th paragraph of the bill of complaint, the respondent contended that the said land becoming unoccupied, the appellant Solomon White, wrongfully and without any color of right, put the appellant James O'Neil into posssession of the lot.

The respondent by the said bill also alleged that the

(1) 29 Gr. 338.

appellant O'Neil resided upon the land and held possession of it as tenant to or agent of the appellant White, and that he refused to deliver up possession to the respondent.

In the fifth paragraph of the said bill the respondent alleged that the appellant White claimed to have some interest in a part of the land, but denied the appellant White's title, and alleged that if he ever had any title it had been barred by the statute of limitations.

The bill also alleged that the title of Hargreaves was founded upon a sale of the land for taxes, and that the appellants contended that the sale was invalid for the reasons alleged in the answer.

The respondent by the said bill set up that all the proper proceedings had been taken under the statutes respecting the sale of lands for taxes, and that the tax sale was valid. The respondent also alleged that the purchaser at the said sale, and his assignees and Hargreaves, had paid taxes and made large, valuable and lasting improvements upon the lands.

The prayer of the bill was that the appellants might be restrained from committing acts of waste; ordered to account for the value of timber and other trees cut down and removed; to deliver up possession of the lands, and that, in that event, the respondent's title being defective, the respondent might be declared entitled to a lien upon the lands and premises for the improvements, taxes and interest.

The appellants answered the said bill disclaiming the title to that part of the land described as the south 30 acres of lot No. 1; but the appellant White claimed to be entitled as owner in fee simple in possession of the north 100 acres of the said lot. And the appellant O'Neil claimed title as his tenant. The appellants also set up as a defence that the said alleged tax sale under

1885

WHITE v. NELLES.

which the said respondent claimed title was invalid and void, for the reasons in the said answer referred to.

The case was heard before Spragge, Chancellor of Ontario, at Sandwich, on the 26th day of April, 1881.

His Lordship held, as will appear from his reported judgment (1), where the facts will be found more fully stated, that the tax sale was invalid, but that the respondent was entitled to succeed upon another point, namely, that Hargreaves, claiming to be entitled under the tax sale, had, in 1872, put one Thompson into possession of the land; that afterwards, in 1878, he gave him a lease for four years, from the 1st April, 1878; and the defendant O'Neil went to Thompson, while he was still in possession, and by fraudulent representations had induced Thompson to leave the place, and that O'Neil had entered under White, and that upon the authority of *Doe Johnson* v. *Baytup* (2), the appellants were obliged to yield up possession to the respondent before asserting any title in themselves.

A decree was then drawn up ordering a perpetual injunction as against the appellants, and ordering the appellants forthwith to deliver up possession of the land to the respondent, and to account for the timber and other trees cut upon the same.

The appellants then appealed to the Court of Appeal for Ontario, which dismissed the said appeal with costs, but varied the decree complained of by declaring that the said decree was to be without prejudice to any proceedings which the appellant White might be advised to take to establish his title to the lands and premises in question within two months from the date thereof, and also declaring that in the event of the appellant, White, paying such costs, and taking any proceedings to establish his title to the land, he should have liberty

(1) 29 Grant 338. (2) 3 A. & E. 188.

to bring any action for that purpose within the time thereinbefore limited as of the 27th day of April, 1882.

J. Bethune Q. C. for appellant:

The respondent having based his right to recover upon the tax sale, and not having raised any question whatever as to any fraud on the part of the appellant O'Neil in taking possession of the land in question, it was not open to the respondent at the trial to raise the point upon which the decree proceeded; and the court having found that the title of the respondent was bad, ought not to have acted upon the principle referred to by *Doe Johnson* v. *Baytup*, (1) even if the evidence established the facts to be within the law as laid down in that case, because the point was not made by the pleadings, and in any event was not one which could be relied upon in a suit in chancery, which was brought for purposes of determining finally and conclusively the question of title, and not merely the question of possession. If the decree as originally made had stood, the appellants' title would have been extinguished, and the appellants would have had to account to the respondent for trespass committed upon the lands in question, even although the respondent did not possess a scintilla of title to the land. It is quite clear, however, that no ground existed for applying the authority of the case *Doe Johnson* v. *Baytup*.

The appellants, however, contend that even trying this suit as an action of ejectment, the respondent ought not to have been allowed to recover possession, because the unexpired term which had been granted to Thompson by Hargreaves from the 1st of April, 1878, for four years, had not expired; and so it appearing that there was a present right of possession in Thompson, even if Hargreaves' title was valid, the respondent ought not to

(1) 3 A. & E. 188.

1885

WHITE v. NELLES.

have been allowed to recover even possession of the land; and contend also for the reasons referred to by the learned Chancellor in his judgment (1), that the tax sale was invalid.

Further, the appellants, I claim, have proved a paper title to the lands in question, which if not strictly proved was sufficient to have warranted the Court of Appeal in allowing the appellants to give further evidence by production of title deeds to show clear proof of their title under the Crown, and that if it were necessary to establish a title to the lands, the Court of Appeal ought not to have refused the cross relief sought by the appellants in this action, and directed the bringing of another action; because it will be observed that by the 15th clause of the answer, the appellants sought, by way of cross relief, that their title might be declared valid and that the title of the respondent might be declared invalid, and there was therefore no reason why that question ought not, even if the cause had been sent back for trial, to have been determined in the cause, instead of being required, as the Court of Appeal did not require it, to be determined by independent suit.

S. H. Blake Q.C., and *Lash* Q.C., for respondent:

At a time when the respondent was in the lawful occupation of the premises in question the appellants procured possession thereof under such circumstances as warranted the court of first instance in holding that the appellants were bound to restore such possession to the respondent, and that finding has been affirmed by the Court of Appeal.

The learned counsel cited the following authorities:—As to the effect of the wrongful possession, see Cole on Ejectment (2); Adams' Ejectment (3); *Doe dem. Hughes*

(1) Pp. 341 to 346 of 29 Grant. (2) P. 213.
(3) Pp. 28 & 276.

v. *Dyball* (1); *Johnson* v. *Baytup* (2); *Loveland* v. *Knight* (3); *Walker* v. *Friel* (4).

As to validity of sale some taxes in arrear for the time mentioned in statute, *Edinburgh Life Association* v. *Ferguson* (5); *McKay* v. *Chrysler* (6); *Fenton* v. *McWain* (7).

As to irregularities not vitiating sale, *McKay* v. *Chrysler* (8); *Bank of Toronto* v. *Fanning* (9); *Silverthorne* v. *Campbell* (10).

As to confirmation of the title of respondent by payment of taxes, making improvements, &c., *Fraser* v. *West* (11).

As to confirmation of title by possession and delay in attacking tax deed, Statutes of Limitations (12); Tax Statutes (13); *Hamilton* v. *Eggleton* (14).

Sir W. J. RITCHIE C.J.—After stating the facts as hereinbefore set forth, proceeded as follows:—

The appellants submit that the decree, originally made by the Court of Chancery and varied by the Court of Appeal, was erroneous and should be reversed, and the bill dismissed with costs.

The plaintiff's evidence is to the following effect:—

Hargreaves purchased from Meyer and gave him a farm worth over $1,000 for it.

Some few years after, in 1872, he placed Thompson as tenant. He was there continuously till he made lease in 1879. The lease is dated 11th April, 1879, to be computed from 26th April, 1879, for four years, with provision that he should not assign, sub-let, or transfer without permission; that he never gave permis-

(1) 3 C. & P. 610.
(2) 3 A. & E. 188.
(3) 3 C. & P. 110.
(4) 16 Gr. 105.
(5) 32 U. C. Q. B. 253.
(6) 3 Can. S. C. R. 476.
(7) 41 U. C. Q. B. 239.
(8) 3 Can. S. C. R. 476.
(9) 18 Gr. 391.
(10) 24 Gr. 17.
(11) 21 U. C. C. P. 161.
(12) R. S. O. ch. 108.
(13) R. S. O. ch. 180.
(14) 22 U. C. C. P. 536.

1883.

WHITE v. NELLES.

Ritchie C.J.

sion. That he paid the taxes from 1865 till 1877 and failed to pay in 1878, in all thirteen years. He had a shanty and a stable put up and eight acres cleared. The shanty was put up the year Thompson was put in possession and no deed was ever tendered him, and he never heard of White's claim previous to 1870. White came to his house about 1873 or 1874 and did not then offer to pay the taxes. No possession till 1872 —wild land in 1873.

Thomas Adair, who was asked by Nelles to get possession of land from O'Neil, in his evidence says:—

He did not get possession, and found O'Neil in possession in December, 1880, and he refused to go off, and says he found timber had been cut and that O'Neil admitted he had cut it. After O'Neil was made a prisoner White said that the wrong man was taken up, that he was the party.

James Thompson in his evidence says he rented the place from Hargreaves and went on in 1872, and stayed on between seven and eight years steady, and then was off and on the balance of the time, and cleared off a piece and fenced it, and put up a log stable and shanty.

Thomas Thompson gave the following evidence:—

Q.—You rented this place from Mr. Hargreaves? A.—Yes.

Q.—When did you first go on? A.—It would be in 1872.

Q.—How long did you stay on? A.—Well, it was between seven and eight years steady and then I was off and on the balance of time afterwards.

Q.—And were there any improvements done or made during the time you were there? A—Yes; I cleared off a piece and fenced it and put up a log stable and shanty.

Q.—O'Neil is in possession there now for Mr. White; how did he get in? A.—Mr. O'Neil came down to me, it would be last June some time, and he told me about Hargraves and the assignee, some party of his coming down, and they were going to seize the things that I had there, that is on the place, and that I had better let him have possession and he would remove the things; so I gave up a day or so afterwards, and O'Neil was in possession.

Q.—He told you that who was going to seize? A.—It was the assignee's party, he didn't know his name, but he had sent him down there and was going to seize my things.

Q.—That Hargraves had become insolvent? A.—Yes.

Q.—How did he get in, had you any one living in the house or had you the house locked? A.—The house was locked.

Q.—Did he get into the house? A.—Yes.

Q.—How? A.—I cannot tell you exactly; I told him to go and get the key; there was a family going in previous to that and this party had locked up the house and I told O'Neil to go to him and they would give him the key and they had not done so, for the party brought the key to me afterwards.

Q.—What did he say about his taking possession? A.—He said it was likely there would be some dispute about it and he would hold it for a term.

His Lordship.—Did he say in what capacity he proposed to act?

Mr. Boyd.—How was he going, what claim did he make? A.—Well, he did not say to me, not then exactly, I think he did afterwards.

Q.—What did he say? A.—He told me that Mr. White had given him power to come and take possession.

His Lordship.—Is he a defendant?

Mr. Boyd.—Yes, my Lord.

Mr. Gibbon.—He disclaims any right in himself.

Mr. Boyd.—You had a lease at that time from Hargreaves? A.—Yes.

Q.—And by the terms of that you were not to assign or transfer without his leave? A.—Yes.

Q.—Did you get his leave? A.—No; but I wrote to Mr. Hargreaves and did not get any answer back.

Q.—And you thought that this was the best thing to do to keep out of trouble? A.—Well, when I get no answer.

Q.—He said there was a man coming down to seize? A.—Yes.

Q.—Did you believe that at the time? A.—Yes, and I told O'Neil to remove part of my things and he did take them up to his place.

Q.—Why did you want them removed? A.—I did not want them seized, for I did not want any trouble at all.

Mr. Boyd.—Did you find out it was true what O'Neil told you, that there was going to be a seizure? A.—Well I did not get any satisfaction, but I did not see any parties.

Q.—There was no seizure? A.—No.

His Lordship.—When was it that O'Neil came? A.—It would be in June last, June sometime.

Mr. Boyd.—You were living in possession up to that time? A.—Yes.

Q.—And had your things in the house? A.—Yes; I had some things there.

Q.—A sleigh? A.—Yes; it was not in the house, but there were other things; a stove, etc.

1885

WHITE v. NELLES.

Ritchie C.J.

On behalf of the defendants Solomon White in his evidence says, that he sent to Messrs. Harris & McGee the deed and money for taxes to be tendered to Mr. Hargreaves; and Labadie, another witness, says he sold the lot to Charles Baby in 1855 and paid all the taxes.

I quite agree that the defendant White, having obtained possession through O'Neil by the means detailed, cannot be permitted to dispute the plaintiff's title until plaintiff is first placed in the situation he was before the possession was taken by O'Neil. White, through O'Neil, came into possession under Thompson or in collusion with him both White and O'Neil obviously well knowing that Thompson was in possession under Hargreaves, and could no more dispute plaintiff's title than Thompson could. He could neither by purchasing Thompson's right, nor by colluding with him, put himself in a position to dispute the landlord's title. This case, it is clear, comes quite within the principle of the case of *Doe Johnson* v. *Baytup* (1), referred to by the learned Chancellor and on which he acted, as also *Doe Hughes* v. *Dyball* (2); *Doe Bullen* v. *Mills* (3), and of the case of *Doe Bliss* v. *Estey* (4), which last case seems to me on all fours with this case, the marginal note of which is:

The defendant obtained possession of land from the plaintiff's tenant by representing that he had the title to it and threatening to eject the tenant. Held, in an action of ejectment by the landlord, that the defendant was estopped from disputing his title and setting up an adverse title in himself.

I was a party to this judgment and I have not since its delivery heard anything to make me doubt its correctness.

The case of *Doe Knight* v. *Lady Smythe* (5) is also in point. Dampier J. says:

It has been ruled often that neither the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put

(1) 3 A. & E. 188.
(2) 3 C. & P. 610.
(3) 2 A. & E. 17.
(4) 3 Allen N. B. 489.
(5) 4 M. & S. 347.

1885

WHITE v. NELLES.

Ritchie C.J.

another person in possession, but must deliver up the premises to his own landlord. This (he says) I believe has been the rule for the last twenty-five years, and I remember was so laid down by Buller J. upon the western circuit, and I have no doubt has been the rule ever since.

I am of opinion that the appeal should be dismissed.

STRONG J.—This was a suit in chancery instituted under the Ontario "Administration of Justice Act," by Nelles as assignee in insolvency of Hargreaves against White & O'Neil. The Bill was filed on the 31st December, 1880. The suit was a mixed one being an amalgamation of an action of ejectment to recover possession of land, and a bill for an injunction to restrain trespass in the nature of waste, and for an account of the waste committed.

The facts are as follows: The plaintiff's title is under a sale for taxes of the 100 acres sought to be recovered, being the north 100 acres of lot No. 1, in the 10th concession of the township of Colchester. It is designated as lot 1 and 4, because it is lot 1 of the original survey by Barwell, and lot 4 of a subsequent survey of the 1st concession by Smith. The sale for taxes took place in 1860, and the sheriff's deed was given in pursuance of it. The real purchaser at the tax sale was Jeffreys, who purchased in the name of Godbold, Godbold having assigned his nominal purchase to Jeffreys, the sheriff's deed was made to Jeffreys, who afterwards conveyed to Brunton. Brunton subsequently conveyed to Heathfield and Heathfield to Meyer, from whom Hargreaves purchased and obtained a conveyance. This is the plaintiff's title so far as the paper title is concerned. It is impeached by the defendants who were in possession, upon the ground that the tax sale was invalid. 1st. because some of the taxes for which the land was sold had been, as is sworn by Labadie, a former owner, paid by him. These taxes so alleged to have been paid

1885

WHITE v. NELLES.

Strong J.

were the taxes from 1852 to 1856, the sale having been for an arrear of taxes from 1853 to 1858. 2nd. The tax sale is impeached on account of an alleged misdescription of the land.

The plaintiff, however, sets up an alternative title by estoppel against the defendants, which, if well founded, precludes them from questioning the validity of the sale for taxes, at least in the present suit. This title by estoppel is said to arise under the following circumstances: Hargreaves leased the land to one Thompson, who remained in possession until 1880 (some seven or eight years he says in his evidence) when he gave up possession to the defendant, O'Neil, who was a tenant to or in some way claimed under the defendant White, White himself asserting a title derived from the original owners of the land, and which, if sufficiently proved and if no estoppel were in the way, would entitle him to impeach the tax sale. After Thompson had been in possession for some time, a formal lease from Hargreaves to Thompson for four years, from 20th April, 1879, was executed, and the term created by it was therefore an existing term, when the defendants obtained possession from Thompson. It is contended by the plaintiff that the defendants, having thus gone into possession under Thompson, were estopped from disputing their landlord's title.

If this contention is well founded, it is obvious that it will be immaterial to consider the sufficiency of the proof of White's paper title, some deeds in which are proved only by secondary evidence, consisting of memorials executed by the grantees, and respecting which an important question in the law of evidence might have to be determined. And we shall also be relieved from considering the validity of the sale for taxes, which indeed would only, in any case, have had to be determined in the event of the defendant White's

title being held to be established by legal proof.

Reverting, then, to the question of estoppel, upon which, as it appears to me, this appeal can well be disposed of, let us consider it in its bearing upon the suit in both the aspects of an action of ejectment, and a suit in chancery for an injunction and account, which the bill presents.

First, as regards the plaintiff's right to recover in ejectment.

Upon the evidence the facts cannot be disputed, that O'Neil obtained possession from Thompson; that when he so obtained possession he was in privity with White; that the possession he obtained was for the benefit of White, and that at the time of the filing of the bill he was in possession under White, and claiming as his tenant, as he admits in his answer. Upon this state of facts the law is clear. As a tenant is estopped from setting up a title paramount, so all persons acquiring possession from the tenant, are in like manner estopped. This is so very elementary a principle of the law of landlord and tenant, that it scarcely requires to be vouched by a reference to authority. The case cited in the respondent's factum (1) is, however, at once a sufficient authority on the law and an example of its application directly to the point. The only difficulty in the plaintiff's way would arise from the fact that the four years for which the lease was granted not having expired when the bill was filed in December, 1880, the defendants would be entitled, at all events, to retain the possession during the residue of the term. This objection is, however, susceptible of two conclusive answers. White in his answer confines his defence to an assertion of his title paramount, as the purchaser at the sheriff's sale of the interest of one Pratt, in whom, as he alleges, the title of the patentee

(1) *Doe Johnson* v. *Baytup*, 3 A. & E. 188.

1885

WHITE v. NELLES.

Strong J.

of the Crown had by mesne conveyances become vested; and to an impeachment of the validity of the sale for taxes. He nowhere claims title as the assignee of Thompson. The other defendant, O'Neil, by his answer merely alleges that he is in possession under White. This mode of pleading his defence would alone amount to a disclaimer by White of any right of enjoyment for the residue of the term to which he might otherwise have been entitled. But there is a still more conclusive answer than this arising from the terms of the lease by Hargreaves to Thompson. This lease was produced and proved at the trial; it is referred to in the depositions of both Hargreaves and Thompson. The reference to it in the evidence of the former is as follows:—

Q.—Then after you bought what did you do with the property, Mr. Hargreaves? A.—With this 100 acres?

Q.—What did you do with it? A.—Some time afterwards—some few years afterwards I placed on Mr. Thompson as a tenant.

Q.—Were there two lots? A.—There were.

Q.—When did you first place him on there? A.—In 1872.

Q.—And was he on from that till you made this lease in 1879? A.—He was.

Q.—Continuously on there? A.—Yes.

Q.—Is this (now produced) the lease you made to him, your signature? A.—Yes. (See lease dated 11th April, 1879, to be computed from the 20th April, 1879, for four years.)

Q.—And there is a provision in this that he should not assign or sublet or transfer without your permission? A.—Yes.

Q.—Did you ever give your permission to any transfer under this, or assignment of it to O'Neil? A.—No.

And Thompson, in his deposition, speaks of it thus:

Mr. Boyd.—You had a lease at that time from Hargreaves? A.—Yes.

Q.—And by the terms of that you were not to assign or transfer without his leave? A.—Yes

This lease although thus produced has not, however, been printed in the case as it undoubtedly ought to have been, and we are left to ascertain its terms as we best can by inference or presumption. It will be observed that it

1885

WHITE v. NELLES.

Strong J.

is said both by Hargreaves and Thompson, that the lease contained a provision against transfer or assignment, but whether such provision was a mere personal covenant not to assign, or extended to the term itself either made it unassignable or provided for its cesser on assignment, we have nothing to tell us. This is, of course, very material on the present question. It was incumbent on the appellant in printing the case, to comprise in it all material evidence, and as he has thought fit to suppress this exhibit, the lease, which was of course attainable by him, even if it was not in the possession of the officer of the Court, we are, I think, authorized in making against him the presumption that the proviso in question was in such a form as to operate as cesser or avoidance of the term upon an assignment being made, more especially are we entitled to do so, as having regard to the well known practice of conveyancing, of which we can take notice, such a proviso would be in the ordinary course, and the presumption thus made would be consistent with the probable fact. It follows that the appellant could have no benefit from the lease, and that upon the ground before indicated a recovery in ejectment would have been inevitable.

Then as regards the equitable side of this composite suit, it is clear that the right which a landlord has to an injunction restraining his tenant from committing waste and to account for waste already committed, extends to all persons claiming under the tenant, and who like him are incapacitated by the doctrine of estoppel from setting up a superior title, and for the reasons already given, the defendants here are in the position of such persons.

I am of opinion, therefore, that the decree of the Court of Chancery was entirely right and should be affirmed.

1885

WHITE v. NELLES.

Strong J.

With regard to the variation or addition made to that decree by the Court of Appeal, I must add that I think no such addition was called for since the decree made by the Chancellor would have constituted no bar to a subsequent term at law or writ in equity by White to impeach the tax sale. It could, however, if limited to a mere saving of the appellant's right to bring such action or suit, do no harm as it would be merely expressing what the law implied, but in limiting a term within which the action or suit was to be brought to two months, I think the order of the Court of Appeal was wrong. Any question of the statute of limitations as a bar to a future suit was a proper question to be determined in that proceeding. I am of opinion the order of the Court of Appeal should be varied by striking out this limitation of the appellant's right to sue to two months, and that in other respects the appeal should be dismissed with costs.

FOURNIER and HENRY JJ. concurred.

GWYNNE J.—This was an action in the nature of an action of ejectment instituted in the Court of Chancery for the Province of Ontario, under the provisions of ch. 40 of the Revised Statutes of that Province, entitled "An Act respecting the Court of Chancery." The 86th section of that Act enacts that:

The Court of Chancery shall have jurisdiction in all matters which would be cognizable in a court of law.

And the 87th section that:

Where a suit is instituted or where a petition is filed in the court for the purpose of establishing the title of the plaintiff or petitioner to any real property, no objection to such suit or proceeding shall be allowed upon the ground that the plaintiff or petitioner should first have sued at law or would have an adequate and complete remedy at law by action of ejectment or otherwise; and if it appears upon the hearing or other determination of such suit or proceeding, that the plaintiff or petitioner is entitled to the possession of such real

property, he may obtain an order against the defendant or respondent for the delivery of such possession, and writs of execution shall issue accordingly.

The plaintiff in his bill claims title as assignee in insolvency of one John Hargreaves, against whom a writ of attachment under the Insolvency Act of 1875, issued upon the 24th day of January, 1880, and that the said John Hargreaves acquired an estate in fee simple in the land in question by purchase in the year 1867, and from the time of his so acquiring the said land, held possession of the same up to the month of October, 1880, "when the said land, becoming unoccupied, the defendant Solomon White wrongfully and without any color of right, put the defendant James O'Neil into possession of the said lot, and the said James O'Neil now resides thereon, and holds possession as tenant or agent of the defendant Solomon White; and the defendants, notwithstanding the plaintiff has requested them to deliver up possession to him, refuse to do so, and continue in possession of the said land as trespassers." The bill further alleged that the defendants contend that Hargreaves' title was founded upon a sale of the land for taxes, and that the said sale was invalid, but the plaintiff alleged that all proper proceedings were had and steps taken and things done as required by the statutes in that behalf, and that the said sale was and is valid.

And the bill further alleged that since the said sale for taxes the purchaser at the said sale and his assignees, and the said Hargreaves, were, and had been, in continuous occupation of the said land, and had paid the taxes continuously to the present time, and the plaintiff relied upon the various statutes relating to sales of land for taxes, and covering defects in such sales. The bill further alleged that Hargreaves, and those through whom he claimed under title derived from the

1885

WHITE v. NELLES.

Gwynne J.

tax sale, had paid taxes and had made large and valuable lasting improvements, and the plaintiff claimed that in the event of plaintiff's title proving defective, he is entitled to a lien on the said land for the taxes so paid, and interest at ten per cent. and for said improvements. The bill also alleged that since the defendants had been in possession of the land, they had cut down and removed, and applied to their own use divers valuable timber and other trees, which were growing on the land, and that they threaten to continue so to do. And the bill prayed:

1. That the defendants might be restrained by injunction from committing such acts, and that they should account for the value of the timber and other trees cut down, &c.

2. That they should be ordered to deliver up possession of the said land to the plaintiff forthwith.

3. That in the event of the plaintiff's title being defective, he might be declared to be entitled to a lien on the said land for the value of the improvements made thereon, and the taxes paid and interest.

4. That all proper directions might be given, and accounts taken, and for further relief.

The defendants by their answer insisted that the defendant Solomon White had title in himself to the land in question under title derived by divers mesne conveyances from the patentee of the Crown, and that the plaintiff's title depended on the validity of a tax sale, which was had on the 13th March, 1860, which sale, as they alleged, was invalid for divers errors and defects in the assessment and proceedings, to have the land sold for arrears of taxes, and, further, for the reason that as the defendants were informed and believed the taxes for the years 1853, 1854, 1855, 1856 and 1857, and for which the land was sold, had been duly paid, and satisfied prior to the said sale—and the defendant

1885

WHITE v. NELLES.

Gwynne, J.

Solomon White prayed by way of cross relief that the said tax sale and the registered proceedings regarding the same might be declared invalid and void.

At the trial a warrant from the treasurer of the county of Essex, bearing date the 1st December, 1859, addressed to the sheriff of that county, in which county the land in question is situate, directing the sheriff to sell the land in question with other lands for arrears of taxes, was produced. The treasurer of the county proved that by the books in his office (he himself was not treasurer prior to, or at the time of, the sale) the taxes in arrear at the time of the sale which took place in March, 1860, were taxes which accrued due in the years 1853 to 1858, both inclusive. The sheriff's deed, dated the 18th March, 1861, to one Jeffery, as assignee of the person to whom as highest bidder at the sale the land had been knocked down, was produced and deeds passing the title from Jeffery to Hargreaves were also produced. The deed to Hargreaves was dated the 4th November, 1867, and was executed by one Meyer, who had purchased from one Heathfield, on the 14th May, 1862. It was also proved that Meyer paid up all the taxes which had accrued from 1859 to 1865, inclusive, and Hargreaves all the taxes which accrued due from 1865 to 1877 inclusive.

The defendant, White, gave evidence of the title in virtue of which he claimed to be seised of an estate in fee simple in the land in question.

The learned Chancellor, before whom the trial took place, instead of adjudicating upon the tax title, in virtue of which the plaintiff claimed and which the defendants disputed, and as to the validity of which they had joined in an issue which they had gone down to try, and in support of which the plaintiff had given all the evidence that he could give, rendered a verdict for the plaintiff upon a ground not taken or suggested

1885

WHITE v. NELLES.

Gwynne J.

by the plaintiff on the record or at the trial, namely, that it appeared in the evidence that the defendant O'Neil, upon Hargreaves becoming insolvent, went to the land and represented to one Thompson, then in possession as tenant of Hargreaves, that the latter having become insolvent Thompson's chattels on the place would, or might, be seized, and that Thompson becoming alarmed removed his chattels and left the place, and that O'Neil moved into it claiming that the defendant White had an interest in the place and that he, O'Neil, was there for him.

The learned Chancellor was of opinion that under these circumstances the principle of *Doe Johnson* v. *Baytup* (1) applied, and that the obtaining possession in this manner was such a fraud as estopped the defendants from putting the plaintiff to proof of title. The appeal is against this judgment of the learned Chancellor and the decree made in pursuance thereof.

The case, in my opinion, should have been disposed of upon the issue as to the validity of the title upon which the plaintiff had by his bill rested his case, the evidence upon which was fully entered into by both parties; by the plaintiff in support of the validity, and by the defendants in support of the grounds urged by them to establish the invalidity of the tax title. The evidence offered by the defendant, in support of the contention that the taxes for the years, for the alleged arrears in respect of which the land was sold, were paid before the sale was, in my judgment, wholly insufficient to establish that any such payment had been made for all or for any of such years, or to cast a doubt on the validity of the sale upon the ground that it took place when there were no taxes in arrear to justify a sale. There would be no security whatever in any title acquired upon a sale for arrears of taxes if a title

(1) 3 A. & E. 188.

1885

WHITE v. NELLES.

Gwynne J.

held under a deed executed in 1861 followed by the payment of taxes ever since by the purchaser at the tax sale and those claiming under him, could be now avoided upon such evidence as that upon which the defendants relied. Whether there were any such errors or defects in the assessment roll or in the proceedings taken to effect the sale as would not now at this distance of time be relieved against under the provisions of the 156th section of chapter 180 of the Revised Statutes of Ontario, it is unnecessary to determine, for it is clear to my mind that as the defendants have failed to prove that the taxes had been paid before the sale, the Ontario Statute, 33 Vic., ch. 23, has removed all errors and defects, if any there were, which would have enabled the true owner at the time of the sale to have avoided it.

By the 1st and 2nd sections of that Act it is enacted that in all cases where lands which were liable to be assessed according to the true intent and meaning of the statutes in that behalf, have, or any part thereof has, been sold and conveyed under color of such statutes for taxes in arrear and the tax purchaser at any such sale had, prior to the first day of November, 1869, paid at least eight years taxes charged on the said lands, although he shall not have occupied the said land or any part thereof, provided that the owner has not occupied the said land or some part thereof for one year between the sale by the sheriff and the said first day of November, such sale shall be deemed valid, notwithstanding the taxes and the sheriff's fees and charges for which the lands were sold were not imposed and charged in due form as required or authorised by the said statutes or any of them or exceeded the amount lawfully chargeable, and notwithstanding any defect in the warrant to sell, or that such warrant was issued too soon, and notwithstanding any irregularity in the notices of sale or the advertising and publishing thereof

1885

WHITE v. NELLES.

Gwynne J.

or in, or as to, the time and place of any such sale, or as to any adjournment of sale, and notwithstanding that there was on any such lands any property that might have been distrained, and notwithstanding that the lands have been assessed against some person as resident or occupant when they should have been assessed as non-resident lands, or were assessed as non-resident lands when they should have been assessed against the owner or occupant, or both, and notwithstanding any informality or defect in the keeping of the accounts of the taxes charged against such lands, or with which they were chargeable, and notwithstanding any other omissions, insufficiency, defects or irregularities whatsoever, as regards the assessment or sale, or the preliminary or subsequent steps required to make such sale effectual in law; and the 14th section of the Act enacts—that the words "tax purchaser," shall apply to any person who purchased, theretofore, at any sale under color of any statute authorizing sales of land for taxes in arrears, and include and extend to all persons claiming through or under him. The case of the plaintiff, as representing Hargreaves, comes precisely within the provisions of this statute, and the plaintiff was entitled to recover in virtue of the title asserted by him in his bill.

It becomes unnecessary, under these circumstances, to express any opinion upon the question raised, and so strongly pressed by the learned counsel for the appellant, namely, whether or not the facts in evidence as to the mode in which O'Neil entered into possession of the land, bring the case within the principle upon which the learned Chancellor proceeded, or whether the principle itself is applicable in this case in view of the special title asserted by the plaintiff in his bill, as to the validity of which the parties had joined in issue, which they had gone down to try, and in view also of

the fact that the plaintiff did not assert any claim based upon the principle upon which the learned Chancellor proceeded, but had, on the contrary, averred in his bill that the defendant White, finding the land unoccupied, put the defendant O'Neil in possession. The plaintiff, therefore, under the provisions of the 87th section of ch. 40 of the Revised Statutes, was entitled to a judgment in his favor for the delivery up of the possession of the land by the defendants to him, and the decree to that effect must be sustained; but I cannot see upon what principle that judgment, which is simply in the nature of a judgment in an action of ejectment, should be supplemented with an order for a perpetual injunction restraining the defendants from the committal of further trespasses upon land, of which, by force of the judgment, they will no longer be in possession. The only purpose that I can see which can be sought to be obtained by such an order would be to give to the plaintiff, in addition to the ordinary remedies which the law affords to all owners of real property for the redress of wrongs committed upon their property by trespassers, such further remedy and protection in the enjoyment of their possession as the fear of incurring the fines and penalties attending the committal of contempt of court may afford, and this is a species of remedy the application of which is not, in my judgment, to be extended so as to become an incident attached to a recovery in an action of ejectment. The statute which authorized actions of ejectment to be tried in the Court of Chancery does not, in my opinion, sanction the introduction of this novelty, the decree, therefore, should, in my opinion, be varied by removal from it of the clause as to the injunction.

It may be very desirable and reasonable that a plaintiff, having established his title to real property, should

1885

WHITE v. NELLES.

Gwynne J.

in the same action wherein such title is established, to avoid a multiplicity of suits recover damages in the nature of mesne profits during the time he was wrongfully kept out of possession until judgment, and as part of such damages the value of such timber as may have been cut upon the premises and disposed of by the defendant during the time that he was so in possession until judgment. But the statute which authorizes actions of ejectment to be tried in the Court of Chancery makes no provision for the recovery of damages by way of mesne profits, or otherwise, in a different manner when the action is brought in the Court of Chancery from that in which they are recoverable when the action of ejectment was brought in a court of common law; in which case either party is entitled to insist that those damages should be assessed by a jury. There is no statute which, in my opinion, warrants the substitution by the Court of Chancery of the dilatory and expensive process of enquiries and the taking of accounts before a master in chancery, as to damages recoverable by way of mesne profits consequential upon a recovery in an action of ejectment for the simple, direct and much less expensive assessment of such damages by a jury when the case is tried before a jury, or by a judge when it is tried by a judge without a jury. The direction, therefore, for the taking of the account which is ordered by the judgment and decree of the learned Chancellor, and which necessitates the re-opening of a question which was thoroughly, and at considerable expense, entered into at the trial, and which, if mesne profits were recoverable in the action brought for trying the title, ought to have been determined by the learned judge himself upon the evidence taken by him, who when trying the case without a jury was substituted for a jury, seems to me not to be warranted by any statute. The learned counsel for the appellant did not,

however, as I understood him, object to the account ordered upon this ground: his objection was that as the learned Chancellor had not adjudicated either in favor of the plaintiff or of the defendants, upon the title to the fee in the land as asserted upon the record, but expressly abstained from doing so for the reason given by him, and as the timber belonged to him in whom the right to the fee in the land was, it was premature to order the defendant, whose title to the fee as asserted by him might be good, to account for the timber cut by him to a person, who upon the the title being tried might be found to have no title to the land. This objection appears to me to be well founded, and, in fact, to be unanswerable if the judgment of the learned Chancellor is to be maintained upon the ground upon which alone he proceeded, he having, for the reason given by him, expressly and purposely declined to determine the question of title to the fee simple in the land, which was the sole question upon which the parties had joined issue, which they had gone down to try, and upon which the right to an account in respect of timber cut depended.

In my opinion the decree and judgment of the Court of Chancery should be varied so as to change it into a simple judgment within the provisions of the 87th section of ch. 40 of the the Revised Statutes of Ontario, namely, that the plaintiff is entitled to the possession of the land for the recovery of the possession of which the action was brought, and that he do have execution therefor accordingly, without more, thus giving to the plaintiff the same judgment as he could have had if the action had been brought in a court of common law instead of in the Court of Chancery. The Ontario statute which has authorized title to real property to be tried and determined in a Court of Chancery equally as in a court of common law, never authorized, or, in

1885

WHITE v. NELLES.

Gwynne J.

my opinion, contemplated the application of different principles in trying the title, varying according to the court in which the action should be brought, or the pronouncing a judgment in the Court of Chancery of a more extensive character than could have been pronounced by a court of common law, if the action had been brought there, the judgment in both courts should be the same, namely, that the plaintiff should recover the possession of the land for which the action was brought and that he should have execution therefor.

Appeal dismissed with costs; counsel for respondent assenting, the order of the Court of Appeal was varied by extending the time given the appellant White for bringing an action to establish his title for three months from the pronouncing of the judgment of the Supreme Court.

Solicitor for appellant White: *H. T. W. Ellis.*

Solicitor for appellant O'Neil: *T. White.*

Solicitors for respondent: *Cronyn & Betts.*