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IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 1 of 1973

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BEFORE: The Hon. Mr. Justice Luckhoo, Ag.P.
The Hon. Mr. Justice Robinson, J.A. (Ag.)
The Hon. Mr. Justice Zacca, J.A. (Ag.)

BETWEEN JAMES MORRISON - DEFENDANT/APPELLANT
AND HUBERT LOGAN - PLAINTIFF/RESPONDENT
(Executor of the Estate of L.C. Reid, deceased)

E. deLisser for the appellant.

Miss D. McIntosh for the respondent.

Heard: May 2, 1974

LUCKHOO, J.A.:

On May 2, 1974 we allowed the appeal of the appellant Morrison, set aside the order of the learned Resident Magistrate and ordered that the respondent Logan's claim be dismissed with costs here and in the court below. We promised to put our reasons therefor in writing and this we now do.

The respondent in his capacity as executor of the estate of Luther Calvin Reid, deceased instituted a claim in trespass to land against the appellant in the Resident Magistrate's Court for the parish of Manchester alleging that on or about January 10, 1972, the appellant entered upon the land being part of the estate of the deceased Reid at Long Bay in the parish of Manchester and damaged trees growing upon the said land. The appellant's defence, in answer to the respondent's claim, was that his presence on the land was by

leave or licence of one Adlin Ellis a person entitled to possession and in possession of the said land, the said Adlin Ellis claiming to be entitled to possession of an undivided interest in the land, the subject matter of this claim, as administratrix of the estate of Alfred Morrison deceased, who died intestate on July 4, 1954, letters of administration of the deceased estate having been granted to her on April 7, 1967.

The evidence adduced at the hearing before the learned resident magistrate was to the following effect. The deceased Luther Calvin Reid died testate on or about April 1, 1969. By his Will bearing date April 25, 1967, under which he appointed the respondent his executor, he made a devise in the following terms -

"I give and bequeath all that property owned by me and my deceased brother James Reid and my sister Alice Goulbourne both of Marlie Hill in the parish of Manchester known as Long Bay, in the **said parish** of Manchester estimated at about one hundred acres less or more. I therefore directed (sic) that this said property be divided equally among the children of my deceased brother James Reid and my deceased sister Alice Goulbourne mention above and my children."

The boundaries of the property mentioned in the devise are set out thereafter in the devise. It would appear from the testimony of Rolston Reid, a son of James Reid one of the persons mentioned in the devise set out above that sometime prior to his death on April 27, 1947, Richard Reid, the father of Luther Calvin Reid occupied the land mentioned in the devise or a portion of it in common with Luther Calvin Reid. There was admitted in evidence by consent the statement of claim and terms of settlement in respect of proceedings No. 488 of 1931 brought in the Resident Magistrate's Court for the parish of Manchester between Andrew William Thomson and Robert Cyril McCormack the personal

representatives of the deceased Alexander Cochrane Lowe Martin as plaintiffs and Alfred Morrison as defendant for an order for partition of 40 acres or thereabouts of land at Long Bay in the parish of Manchester. It was not disputed in the appeal before us that this area formed part of the larger area of 100 acres or thereabouts mentioned in the Will of Luther Calvin Reid. The statement of claim in the proceedings before the learned resident magistrate in 1931 averred that in or about the year 1922 James Eyticus Reid, Alice Goulbourne, Luther Calvin Reid, Richard Reid and Daniel Reid were owners as tenants in common in fee simple in possession of "a run of land at Long Bay in the parish of Manchester containing by estimation 40 acres or thereabouts" and that in the aforesaid year they agreed to sell to Alexander Cochrane Lowe Martin the said run of land for £30 but that subsequently the said Richard Reid and Benjamin Reid sold their interest in the said land to the defendant Morrison. In support of this averment there was put in evidence in the instant proceedings a receipt bearing date November 22, 1922 under the purported signatures of Richard Reid and Benjamin Reid in the following terms -

"I Richard Reid and Benjamin Reid do received (sic) from Mr. Alfred Morrison of Resource and Mr. Robert Allen and Alexander Allen of Marley Hill the sum of four pounds £4.0.0. on deposit of our portion of land at Long Bay which is to be deivided among seven of us value thirty three pounds £33.0.0."

It was also averred in the partition proceedings that Daniel Reid died on November 26, 1922 and that on January 22, 1931, letters of administration of his estate were granted to James Reid and that Alexander C.L. Martin paid the purchase money for three-sixths share in the said land to James Reid. It was further averred in those proceedings that after Martin's death on April 9, 1924, the plaintiff, as the executor of his estate, paid the

purchase money for the remaining one sixths share in the land to James Reid as administrator of the estate of Daniel Reid, deceased, and that on March 3, 1931, James Reid, Alice Goulbourne and L.C. Reid executed to the plaintiff a conveyance of four-sixths share and interest in the said land. The position therefore was that the plaintiffs held an undivided four-sixths share in the land (40 acres or thereabouts) while the defendant Alfred Morrison held an undivided two-sixths share therein. Hence the prayer for an order for partition between the parties and a sale thereof. On October 9, 1931, terms of settlement were agreed between the parties and accepted by the learned resident magistrate Mr. C.H. York-Slader. By those terms of settlement the defendant Morrison was to have access to the whole of the 40 acres of land, the subject matter of the proceedings, and he gave certain undertakings as specified in the terms of settlement. Also included in the terms of settlement was a provision that on the defendant's death the then owner of "Canoe Valley" (land outside of the area of 40 acres the subject matter of the proceedings) was to have the right to purchase the defendant's interest in the said 40 acres for £15 or such other sum as may be fixed by valuers one to be appointed by each party to be paid by the personal representative of the said defendant. There is no evidence to suggest that on the defendant's death in 1954 the then owners of Canoe Valley, be they Luther Reid and others, exercised the right of purchase of the defendant's interest in the said 40 acres. Indeed, the fact that the defendant's interest in the said 40 acres was included in the inventory of his estate in 1967 is some evidence to the contrary.

The appellant James Morrison testified that his father Alfred Morrison occupied 40 acres of land during his lifetime and that he received permission from Adlin Ellis to

go onto that land and cut a line which he did. Adlin Ellis, sister and administratrix of the estate of Alfred Morrison, deceased, testified that Alfred Morrison acquired his share in the land by purchase from Richard Reid - she referred to him as Tuppy - and Benjamin Reid. The receipt in respect of this purchase has already been set out above though it is to be observed that it refers to an amount paid on deposit by Morrison and two others. Be that as it may it is to be observed that the partition proceedings in 1931 proceeded upon the averment by the plaintiffs that there was in fact a completed sale of an undivided two-sixths share in the 40 acres portion by Richard Reid and Benjamin Reid to Alfred Morrison. A possible explanation of this is that subsequent to November 22, 1922, Morrison acquired the interest of Robert Allen and Alexander Allen the balance of the purchase price being paid to Richard Reid and Benjamin Reid. Adlin Ellis spoke of Morrison having 12½ acres of land at Long Bay. This would be approximately one third (or two-sixths) of 40 acres if that area were regarded as divided. Adlin Ellis testified that upon her brother's death in 1954 she took charge of his interest in the land and subsequently obtained letters of administration of his estate.

On this evidence the learned Resident Magistrate in the instant case came to the conclusion that the receipt in respect of the agreement of sale by Richard Reid and Benjamin Reid to Alfred Morrison and two others served no more than to establish that Alfred Morrison was entitled "to one-third of two-sixths of an interest which did not give her (Adlin Ellis) legal possession or make her a co-tenant with Luther Calvin Reid, and not enough to maintain a jus tertii defence." She accordingly found the appellant to be a trespasser. She further concluded that the partition proceedings of 1931 established no more than that Alfred Morrison had an interest in the Canoe Valley Estate but did not clarify the nature of his interest and that she did not know if that interest was terminated or still in existence. In the face of her findings it is difficult to understand the conclusions she reached adverse to the appellant.

If the receipt showed Alfred Morrison to be entitled to an undivided interest in the land (100 acres or thereabouts) clearly in the absence of ouster (and this was not pleaded nor proved) the administratrix of his estate would be a co-tenant with Luther Calvin Reid and entitled to possession of such undivided interest as Alfred Morrison possessed at the time of his death. If the partition proceedings of 1931 showed that Alfred Morrison had an interest in 40 acres of land being a portion of an area of 100 acres of land originally in the ownership of the Reid family but later disposed of by them and that that interest was determinable after death upon the purchase of Morrison's interest, it falls to the respondent who has brought the claim in trespass to show that Morrison's interest in the land in some way came to an end. He who affirms must prove. In any event the learned Resident Magistrate, once having found the existence of such an interest and not being in a position to say one way or the other whether that interest still survives, could not find the case for the respondent proved.

For these reasons we allowed the appellant's appeal and entered judgment for the appellant dismissing the respondent's claim with costs here fixed at \$50 and costs in the court below to be agreed or taxed.