

Revised

IN THE COURT OF APPEAL
R.M. CIVIL APPEAL NO. 42 and 42A/64

Before: The Hon. Mr. Justice Duffus - President
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Waddington.

April 1st, 2nd May 1965

E. D. PHILLIPS PLAINTIFF/APPELLANT

v

MYRTLE BISNOTT DEFENDANT/RESPONDENT

Mr. David Coore, Q.C., for the Plaintiff/Appellant
Norman Hill, for the Defendant/Respondent.

JUDGMENT

WADDINGTON, J.A.

This is an appeal by the plaintiff from the judgment of the Resident Magistrate for the parish of Portland whereby he entered judgment for the defendant on a claim by the plaintiff against the defendant to recover damages for trespass, and judgment for the defendant on a counter claim by the defendant against the plaintiff for £15 for damages for trespass. The defendant had also counter claimed for a declaration that she was the sole, absolute and lawful owner of the land, the subject of the alleged trespass, but this the Resident Magistrate refused on the ground that he had no jurisdiction to grant such a declaration. The defendant also appealed from the refusal of the learned Resident Magistrate to grant the declaration sought, but during the hearing of the arguments learned counsel for the defendant conceded that the learned Resident Magistrate in fact had no jurisdiction to grant such a declaration.

The case for the plaintiff was, that he acquired the land in question in the year 1954 from one Julia Keech, who subsequently died on May 14, 1962, and the land formed part of a larger area which originally belonged to three brothers of Julia Keech, One brother, who lived in America /died

died, leaving his one third share to Julia Keech. Another of the brothers, William Keech, gave his one third share to Julia Keech by a deed of gift dated May 25, 1953. The third brother, Wesley Keech, died in 1941, leaving his one third share by his will to his daughter, Norma Keech, who is also the daughter of the defendant. The legal position as regards the land after May 25, 1953, was therefore, that Julia Keech was the owner of a two thirds undivided share and Norma Keech was the owner of a one third undivided share.

The plaintiff got to know Julia Keech from 1925, and started to give her financial assistance from 1938, when she became destitute and appealed to him for help. The plaintiff said that he gave her financial assistance on the basis that at some future date he would be acquiring a portion of her land. In 1953, an oral agreement was made between the plaintiff and Julia Keech that for the sum of £500, representing advances made by the plaintiff from time to time to Julia Keech, Julia Keech would pass over to the plaintiff her two thirds interest in the land. Before this agreement was implemented, the defendant, on behalf of her daughter Norma Keech, requested a division of the land between Julia Keech and Norma Keech, and as a result of this, on March 19, 1954, the land was surveyed and a line laid down dividing Julia Keech's two thirds portion from Norma Keech's one third portion. It was agreed between the parties that a dividing fence should be constructed, but this was never done. Immediately after the survey, the plaintiff assumed possession of Julia Keech's land, started paying taxes thereon, reaping the fruits thereof and subsequently erected a building thereon to the value of over £1000. On June 25, 1958, Julia Keech executed a conveyance of the land to the plaintiff in fee simple, subject to reservation of a life interest to herself. At the same time, Julia Keech made a will in which she appointed the plaintiff's wife sole executrix, and devised all her estate, real and personal, to the plaintiff's wife. Julia Keech continued to live on the land until her death on May 14, 1962.

On July 24, 1962, the defendant entered the premises and broke a padlock which the plaintiff had placed on a door, and told the plaintiff that she had come to take possession of the place. It was in respect of

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this alleged trespass by the defendant that the plaintiff brought his action.

In her defence, the defendant denied the trespass complained of by the plaintiff and said that the land, the subject of the proceedings, was her sole property. She said that after the survey in 1954 (to which I have already referred) and up to 1958, she used to cook, wash, clean and sweep for Julia Keech, and as a result of talks which she had with Julia Keech in 1958, it was arranged that she would pay Julia Keech £30 and Julia Keech would pass over the place to her, but would continue to live on the premises, and the defendant would continue to look after her. As a result of this arrangement, on May 12, 1958, Julia Keech executed a conveyance of the land to the defendant in fee simple subject to a covenant by the defendant to maintain, keep and care Julia Keech for the rest of her life and to permit her to continue to occupy the land and reside in the house thereon and to pay her funeral and testamentary expenses on her death. At the same time, Julia Keech made a will in which she appointed the defendant sole executrix, and devised all her assets, real and personal, to the defendant. The defendant admitted that on or about July 24, 1962, she entered the premises and committed the acts of which the plaintiff complained. She asserted however, that she did this in exercise of her rights as owner of the property.

The learned Resident Magistrate found, inter alia :-

- (1) that the plaintiff was in possession of the land and exercised acts of possession over it from sometime in 1954, and until Julia Keech's death, to the knowledge of the defendant and without being molested by the defendant;
- (2) that the defendant never disclosed to the plaintiff nor to anyone that Julia Keech had made a formal conveyance of the land to her on May 12, 1958, until after Julia Keech's death;
- (3) that between the period May 14, 1962, and July 24, 1962, the defendant openly exercised acts of possession over the land by entering upon it and reaping fruits from the land, to the knowledge of the plaintiff, and this presumably caused him to put the padlock on the room there.

The learned Resident Magistrate held as follows :-

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- (i) that by the conveyance dated May 12, 1958, the deceased, Julia Keech, conveyed all her interest in the land to the defendant who then became the sole, lawful absolute owner;
- (ii) that on June 25, 1958, when the deceased Julia Keech purported to convey the land to the plaintiff she had already lawfully divested herself of her interest in the land and had nothing to convey;
- (iii) that there being no memorandum in writing signed by Julia Keech - the party to be charged as required by the Statute of Frauds - no valid nor enforceable contract was entered into by the plaintiff and Julia Keech between 1953 and May 12, 1958, and therefore the plaintiff could have no equitable interest in the land;
- (iv) that as on July 24, 1962, both parties were claiming and exercising possession of the land, the right to possession of the land was then vested in the defendant who then held the legal title to the land;
- (v) that the plaintiff was therefore the trespasser on the land.

It is difficult to understand the learned Resident Magistrate's holding that the plaintiff was a trespasser, in view of his finding that the plaintiff was in possession of the land and was exercising acts of possession over it from some time in 1954, until Julia Keech's death, to the knowledge of the defendant and without being molested by the defendant. He attempts to justify this holding however, by his finding that the defendant, between May 14, 1962 and July 24, 1962, openly exercised acts of possession over the land to the knowledge of the plaintiff, and that that, coupled with her conveyance of May 12, 1958, vested in her the right to possession of the land and thus made the plaintiff a trespasser. If the defendant's conveyance gave her the right to possession, the fact was that the plaintiff was in de facto lawful possession since 1954, and could not, in the circumstances, be said to be a trespasser. If the defendant subsequently acquired the right to possession by virtue of her conveyance of May 12, 1958, then her remedy would be an action of ejectment against the plaintiff, but certainly not an action in trespass. In any event, it seems to me that the possession of the plaintiff was not merely that of a person

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in possession without any right or title. He was in possession originally, in pursuance of a verbal agreement with Julia Keech, which verbal agreement was evidenced by the subsequent conveyance of June 25, 1958, by Julia Keech to the plaintiff. Even although this verbal agreement would be unenforceable, as not complying with the formalities required by the Statute of Frauds, the entry into possession by the plaintiff under the agreement coupled with his building on the land, would, in my view, be sufficient acts of part performance to take the case out of the statute, and the effect of this would be, that the equitable interest in the land would pass from Julia Keech to the plaintiff from 1953. The position in law would therefore be, that on May 12, 1958, when Julia Keech purported to convey the land to the defendant, she was then only entitled to the bare legal estate, subject to the equitable interest of the plaintiff, and, as it is abundantly clear on the evidence (although there was no finding on this point by the learned Resident Magistrate) that the defendant had notice of the plaintiff's interest in the land, the conveyance to the defendant would be subject to the equitable interest of the plaintiff. All, therefore, that the defendant would hold under her conveyance, would be the bare legal estate in the land, which she would hold in trust for the plaintiff who was entitled in equity to the beneficial interest therein. In these circumstances, therefore, the defendant would not be entitled to possession of the land as against the plaintiff, and her entry thereon on July 24, 1962, would constitute a trespass against the plaintiff's possession. In my view, the learned Resident Magistrate erred in the conclusions which he reached as set out in paragraphs (iii), (iv) and (v) above. On the facts as found by the learned Resident Magistrate, and on a proper application of the law, the defendant was, in my view, the trespasser. For these reasons, I would allow the plaintiff's appeal by setting aside the judgment entered in the court below and order that judgment be entered instead for the plaintiff on

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the claim and counter claim, for £15 with costs. The plaintiff should also have the costs of the appeal, fixed at £12.

Judge of Appeal

I agree

President

I agree

Judge of Appeal