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*Mar. 14,15.
*March 20.

SAMUEL MEISNER (DEFENDANT).....APPELLANT;

AND

JACOB MEISNER (PLAINTIFF). .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute of Frauds—Part performance—Evidence.

M. leased land to his two sons, S. and W., of which fifty acres was to be in the sole tenancy of W. In an action by M. against S. for waste by cutting wood on said fifty acres the defence set up was that by parol agreement in consideration of S. conveying one hundred acres of his land to W. he was to have a deed of the fifty acres, and having so conveyed to W. he had an equitable title to the latter. M. admitted the agreement but denied that the land to be conveyed to S. was the said fifty acres.

Held, per Nesbitt and Idington JJ. that the conveyance to W. was a part performance of the parol agreement and the statute of frauds was no answer to this defence.

The majority of the court held that as the possession of the fifty acres was referable to the lease as well as to the parol agreement, part performance was not proved, and affirmed the judgment appealed from in favour of the plaintiff (37 N. S. Rep. 23) on this and other grounds.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above head-note and in the judgments given on this appeal.

Borden K.C. for the appellant.

Newcombe K.C. for the respondent.

SEDGEWICK and GIROUARD JJ. were of opinion that the appeal should be dismissed for the reasons given by Mr. Justice Davies.

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*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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DAVIES J.—I am of opinion that this appeal should be dismissed. The questions involved are largely those of fact. The trial judge has found them in plaintiff's favour, and the Court of Appeal in Nova Scotia has confirmed his judgment. The evidence is very confused and in the important points almost directly conflicting. As the trial judge says:

> The whole difficulty between father and son has so obviously grown out of family feuds and constant litigation that little credit can be given to anything they say, and in the absence of written evidence no legal effect in my view could be given to the defence set up.

On such a finding by the trial judge as to the credibility of the parties and their evidence it would require a very strong case indeed to justify this court in reversing his conclusion, confirmed as it is by the Provincial Court of Appeal. Mr. Borden felt this difficulty but contended that the trial judge had misapprehended the evidence as to the defendant's possession of the seventy acre lot in dispute, and that his judgment was formed on that misapprehension. For my part I am quite unable to see that there was any such misapprehension. His conclusions were reached by rejecting the evidence of the defendant and accepting that of the plaintiff and his witnesses, and I incline to the opinion that he was right.

The facts, so far as I have been able to extract them, are that the father was at one time the owner of a considerable block of land and entered into a family agreement in writing with his two sons, Samuel, the defendant, and William, under which the lands were apportioned between them as tenants from year to year of their father, conditional on their providing for the maintenance and support of the old man and his wife.

Under this family arrangement the seventy acre lot became William's, as tenant.

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The defendant admitted cutting the trees complained of but contended that he had become the equitable owner of this seventy acre lot by virtue of a parol agreement made between himself and the plaintiff, his father, whereby, in consideration of his conveying 100 acres of land previously conveyed to him by the father to his brother William, the plaintiff agreed that he should have the use of the lot in question in all respects as owner, and that he would give him the title by will at his death. He contended that he had conveyed the 100 acres to William, had entered into possession of the seventy acres under the parol agreement with the father, and that there having been part performance of the agreement his equitable title was a good defence to the action.

The father on his part utterly denied the existence of any such agreement, but admitted that he was to give Samuel fifty acres of land somewhere if he would convey one half of his 300 acre lot to William which he denied was done. William, the brother, on the other hand says that Samuel, the defendant, went into possession of the seventy acre lot under an agreement of exchange with him whereby it was provided that Samuel was to convey to William "one half of the land he owned between the two rivers" estimated to contain about 300 acres, and William was to assign to Samuel his interest in the seventy acres. William says,

> he, Samuel, was to have the use of it the same as I had. He was to rent the same as I did. It was not the understanding that he was to have the use of it in father's lifetime and have it willed to him. He was to have the use of it. The time was up every year.

In order to successfully maintain his defence and defeat the operation of the Statute of Frauds it was essential that defendant should have proved part performance of the alleged verbal agreement by which

he was to become the owner of the seventy acres. Has he done so? The trial judge held he had not because his possession was as clearly referable to the lease of that seventy acres from the father to William, and of which leasehold interest Samuel had become the assignee (if William's version was accepted) as it was to the alleged verbal agreement between the father and Samuel.

The defendant could only succeed, and that was fully recognized by his counsel, by showing that the acts relied upon by him as part performance were unequivocally and in their own nature referable to some such agreement as that alleged by him. *Maddison* v. *Alderson* (1). In my opinion he has signally failed to do so. His possession of the seventy acre lot, to put it at the highest for him, is as clearly referable to the exchange of lands testified to by William and under which Samuel became the tenant of his father of this lot as it was to the alleged verbal agreement of which Samuel testified. I must say that I concur with the trial judge in thinking the former theory to be the correct one.

That being so there was no part performance of the alleged agreement even if one could accept the vague and unsatisfactory evidence of Samuel as to its existence.

The appeal should be dismissed with costs.

NESBITT J.—The plaintiff, Jacob Meisner, the father of William, Samuel and Stephen Meisner, was apparently the owner of a considerable tract of land.

In November, 1886, he conveyed a parcel of land to the defendant Samuel Meisner which I gather was then assumed to contain about 150 acres. In November, 1888, a lease was executed between the father and

(1) 8 App. Cas. 467.

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Samuel and William of the homestead together with stock and implements. This lease expressly excepted 50 acres of the homestead from the portion to be rented to Samuel, and expressly leased said 50 acres to William. In the view I take of the document I think this 50 acres about which the dispute has arisen is, for the purposes of this suit, to be treated as if it had been leased by a separate document to William. In October, 1893, Samuel conveyed to William 100 acres, part of the parcel conveyed in 1886 by the father to Samuel. The father now sues Samuel for cutting wood on the fifty acres or seventy acres which was exclusively leased to William in 1888. Samuel sets up as a defence that he is entitled to cut this timber on the ground that by a bargain between himself and his father he, at the request of the father, conveyed the 100 acres in 1893 to his brother William; that William *then* gave up possession of the fifty acres and Samuel went into possession of it and has cut wood from time to time; and that the father agreed that if he would give a deed to his brother of the 100 acres, he, the father, would give the defendant the exclusive use and enjoyment of the seventy acres as his own during the father's life time and give him a title of the seventy acres by his will.

The trial judge found against the claim of the son and such finding has been affirmed by the Supreme Court of Nova Scotia, and we are pressed with the argument that this court should not disturb a mere finding of fact in which both the courts below have concurred.

So long as an appeal lies to this court on questions of fact I think we cannot decline the duty of forming and expressing our own judgment, bearing in mind, however, the considerations so fully referred to by Lord Davey in *Montgomerie & Co. Limited*, v. *Wallace-*

James (1), at pages 82 and 83. I have the less hesitation in this case because it is apparent that the trial judge was influenced in his decision by the view which he held that he was not entitled to draw any inference from the fact of finding the defendant in possession of the seventy acres, because, he said,

his acts of possession, in the absence of corroborative evidence as to the agreement, must be referred to the lease under which he had the right to enter on this lot for ordinary purposes but not to cut timber on it.

This same error runs still more strongly through the judgment of the Court of Appeal which makes a full collection of cases to shew that no evidence to contradict or vary the terms of the lease could be given by the defendant, cases having no bearing unless the court assumed the defendant was entitled to possession by virtue of the lease. I have already pointed out that the lease expressly excludes this fifty acres from its provisions and expressly gives the exclusive possession to William Meisner. It is quite clear that if the evidence convinces us that the possession of Samuel Meisner at the date of the litigation is to be referred to a subsequent arrangement such as Samuel alleged, that then the father cannot succeed in this action of waste and the statute of frauds is no answer to the defendant. Samuel swears expressly to the bargain—I give a short extract of his evidence:

My father said if I would give Willie a deed of 100 acres between the two rivers that he would give me the seventy acre lot and at his death I was to have a title of it. It was to use it as my own. That was before I gave the deed. I gave the deed to Willie. There was no objection to it from my father or from Willie from that time until this trouble arose. Since I gave the deed to Willie I have cut logs on the seventy acre lot. I have cut pine, spruce, hemlock and hardwood. That is before this last time. My father knew I cut. The seventy acre lot was surveyed twice. It was surveyed just before I gave Willie the deed. Father and William got it surveyed. I did not get the deed from my father at once after I gave the deed because he said he would not put it out of his hands;

(1) [1904] A. C. 73.

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he would give me the land and after his death I would get the title of his will.

The father admits that he requested the defendant to give William a deed and admits that he was to give *a deed* of *some* land but denied that it was *the fifty acres*, and says that he has not yet made up his mind what land it will be; he says:

I cannot tell when the deed was given by Samuel to Willie, I did not read it, it was read to me.

The brother William says:

Samuel gave me a deed. I put it on record. I did not pay Samuel anything for it.

The brother, however, says that the defendant was to simply take his place as tenant in the fifty acres and he could be turned out at any time, his time was up every year. He also says, referring to the seventy acre lot,

yes, he was to have the use of it if he gave me one-half of what he had between the rivers, *I had the use of the seventy acre lot before that.*

This seems to make it plain that Samuel's possession is to be referred to the *bargain*, not to the *lease*. This is the fact on which both courts erred.

Stephen Meisner, another brother, called as a witness, swears:

Father complained to me that Samuel was stripping that land. I said, well, did not Samuel get that land from you? Does he not own it? Did he not give William the 100 acres of land between the two rivers for a place over on the side of the river? And he told me, yes, but Samuel did not give the 100 acres, only part of the 100 acres. * * * * He said when Samuel gave William the 100 acres he was giving him the seventy acre lot. He said Samuel gave William a deed of part of the 100 acres but not the whole.

Samuel Robar, a neighbour, states that the father told him substantially the same. Thomas Acker, another neighbour, states that three years before the trial he asked the father for liberty to cut hemlock trees upon the lot and in reply he said he could not as it belonged to Samuel.

It is true the father denies that he made these statements, but the story of the father that the defendant was to give the deed of 100 acres to his brother, and that he was to give a deed of some fifty acres not mentioned seems incredible, more particularly as the defendant, apparently immediately after the conveyance by him to William of the 100 acres, *for the first time* went into the exclusive possession of the fifty acres and apparently exercised the usual rights of ownership from time to time from 1893 down to 1902, without objection by the father. Nobody other than William Meisner made any suggestion of an execution of the deed of 100 acres for a mere yearly tenancy which William enjoyed of the fifty acres, which bargain, if made, would of course account for the possession of Samuel. Apart from the possession of the seventy acres I think the execution by Samuel of the conveyance to William of the 100 acres, which was executed on the faith of the father's promise, was an act of part performance taking the case out of the Statute of Frauds. *In the matter of Estate of Earl of Longford*; *In re Cook's Trustee's Estate* (1). See *Lincoln* v. *Wright* (2) as to the defence of Statute of Frauds. I do not intend to prejudice the position of any of the parties in any action of specific performance. Different considerations may arise there, as for instance the father's statement that Samuel had not conveyed all he agreed to which if found to be the fact might influence a court in its decree in such an action. I would allow this appeal with costs in all the courts.

IDINGTON J. concurred.

Appeal dismissed with costs.

Solicitors for the appellant: *Wade & Paton.*

Solicitors for the respondent: *McLean & Freeman.*

(1) L. R. Ir. 5 Eq. 99.

(2) 4 DeG. & J. 16.