R. C. CARTWRIGHT (PLAINTIFF)........APPELLANT;

1940
* March 18, 19.
* June 29.

AND

H. L. CARTWRIGHT, VERA A. CARTWRIGHT AND A. D. CARTWRIGHT (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Action for reconveyance of land—Claim by defendant in respect of improvements made thereon—Right to relief—Parties—Joinder of defendant's wife as party defendant.

Under an arrangement between the executors of a deceased's will and C., the executors delivered a deed of conveyance (absolute in form but not intended to operate as an absolute conveyance) of certain land of deceased's estate to C., who, pursuant to the arrangement, mortgaged the land and turned over the proceeds to the executors for use in the administration of the estate. C. was given an option to purchase, but if he did not exercise it within the time fixed he was to reconvey the land to the executors. C. did not exercise the option as such; but, *bona fide* believing, though erroneously (as found at trial and by this Court), that the result of certain later negotiations was (or, *per* Davis J., was so close to as to make practically certain) a sale to him of the land, made considerable improvements thereon. He resisted the present action for a reconveyance, and alternatively claimed in respect of the improvements.

Held: (1) C. must reconvey the land and account as to rents, profits, etc.

(2) C. should be paid from the estate such amount as the land had been enhanced in value by said improvements.

(3) The action as against C.'s wife, who, on the claim for reconveyance, had been made a defendant, should be dismissed.

Per Crocket and Kerwin JJ.: The facts that C. had had the legal title in himself (though subsequently transferred to the mortgagee), and *bona fide* believed that he had become the purchaser, under which belief he made the improvements, brings him within s. 36 of *The Conveyancing and Law of Property Act*, R.S.O., 1937, c. 152.

Per Davis J.: Good faith (found to exist in this case) is at the basis and of the essence of a claim for compensation in respect of improvements such as those made by C. Plaintiff's action was plainly a claim for an equitable right in the land (the legal estate had been conveyed to C. for the purpose of putting on the mortgage and had then passed to and remained in the mortgagee, and it was the beneficial ownership that plaintiff sought to be established), and the relief given to C. in respect of the improvements was one which a court of equity had the power to give under all the facts and circumstances of the case. C.'s wife could have no right to dower in the land, which was held by C. in trust for deceased's estate (the only basis upon which a reconveyance to the estate was sought), and therefore (on the plaintiff's own claim) was not a necessary party.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which allowed the appeals of the defendants H. L. Cartwright and Vera A. Cartwright from the judgment of Makins J. at trial.

The plaintiff and the defendant A. D. Cartwright are the executors of the will of Frances Jane Cartwright, deceased. The plaintiff sued for an order that the defendants H. L. Cartwright and Vera A. Cartwright (wife of the defendant H. L. Cartwright) do reconvey certain land to said executors in accordance with a certain agreement of February 16, 1932 (between the executors and H. L. Cartwright), and for an accounting from the defendant H. L. Cartwright of all moneys, rents or profits received by him from or in connection with said land. The defendant H. L. Cartwright pleaded that an option of purchase contained in said agreement had been exercised by him and that a subsequent agreement, in June, 1935, had been made providing for payment of the balance due by him on the purchase price, and alternatively that in or about May, 1935, an agreement had been made for sale to him of the land; that, relying on the agreement made in 1935, he, with the knowledge of plaintiff and his co-executor, had spent large sums of money in improving the property. He asked that the action be dismissed, and alternatively claimed a lien upon the land for the improved value thereof. He counterclaimed for a declaration that the agreement of 1935 is in full force and effect and for specific performance thereof. The defendant Vera A. Cartwright pleaded that at the time when she was married to the defendant H. L. Cartwright the said land was subject to a mortgage and that she had never been in possession of the land, and asked that the action as against her be dismissed.

The material facts of the case (as found by this Court) are sufficiently stated in the reasons for judgment in this Court now reported.

The trial judge, Makins J., found that there was no binding agreement made in 1935 as alleged by the defendant H. L. Cartwright and that he did not exercise the option for purchase given him in said agreement of 1932, and gave judgment for plaintiff, ordering the defendants H. L. Cartwright and Vera A. Cartwright to reconvey the land to the executors, subject to a certain mortgage for

$2,000 (the facts in connection with which are stated in the reasons for judgment in this Court now reported), and directed a reference to take an account and report on all moneys, rents or profits received by the defendant H. L. Cartwright from said land, and ordered that he pay to the executors such amount as should be found due to the estate upon the taking of the account. But he found also that the defendant H. L. Cartwright had acted in good faith in making the improvements, believing that he had or would have an agreement for sale of the land to him; and the trial judge directed a reference to ascertain by what amount, if any, the land had been enhanced in value by the said improvements, and made an order for payment to said defendant of such amount.

The defendants H. L. Cartwright and Vera A. Cartwright appealed to the Court of Appeal for Ontario, and the plaintiff cross-appealed against the order in respect of the improvements. The Court of Appeal found and declared that on or about June 1, 1935, an agreement was made whereby the defendant H. L. Cartwright became the purchaser of the land from the executors; and allowed said defendants' appeals and dismissed the action; and dismissed plaintiff's cross-appeal.

The plaintiff appealed to the Supreme Court of Canada. The defendant H. L. Cartwright cross-appealed for a declaration that a certain alleged agreement made on or about July 18, 1935, was a valid and subsisting agreement.

R. L. Kellock K.C. for the appellant.

H. L. Cartwright for himself and Vera A. Cartwright, respondents.

THE CHIEF JUSTICE—I concur in the conclusions agreed upon by my brothers Davis and Kerwin as follows:—

The appeal is allowed and the judgment at the trial restored with a variation by striking out the words "and Vera A. Cartwright" in the paragraph numbered 1 thereof and by adding a new paragraph numbered 12 thereto:

"This Court doth further order and adjudge that the action as against Vera A. Cartwright be dismissed with costs."

The cross-appeal is dismissed without costs. The appellant R. C. Cartwright will have as against the respondent H. L. Cartwright his costs

of the appeal to this Court and of the appeal to the Court of Appeal but is to pay the respondent H. L. Cartwright the costs of the cross-appeal to the Court of Appeal.

There will be no costs to or against A. D. Cartwright in this Court or in the Court of Appeal. Vera A. Cartwright is entitled to her costs in the Court of Appeal and in this Court. The motion of the respondent H. L. Cartwright for leave to adduce further evidence is dismissed without costs.

RINFRET J.—The appeal should be allowed and the judgment at the trial restored with costs throughout.

The judgment of Crocket and Kerwin JJ. was delivered by

KERWIN J.—It was quite frankly stated in argument before us on behalf of H. L. Cartwright that he had considered he was dealing not with two trustees but with two executors, one of whom would be able to bind the estate, and that on that basis he thought he had made a definite agreement with A. D. Cartwright on the occasion of his telephone conversation with the latter on or about June 1st, 1935. That would dispose of any suggestion that he had determined to exercise the option but, even without that statement at bar, I find it impossible to agree with the Court of Appeal that H. L. Cartwright became the purchaser of the land at the option price.

The trial judge found that H. L. Cartwright had acted *bona fide*. With that I agree, and in my opinion H. L. Cartwright thought he had a concluded bargain with the estate through A. D. Cartwright, and upon that supposition proceeded to make the improvements. Having had the legal title in himself (although subsequently transferred to the first mortgagee), and *bona fide* believing that he had become the purchaser, brings him, in my opinion, within section 36 of *The Conveyancing and Law of Property Act*, R.S.O., 1937, chapter 152. The improvements were made under the belief that the land was his,—subject only, of course, to the payment of the purchase price. A person who mistakenly believes that he has concluded an agreement to purchase the land and who acts *bona fide* is "under the belief that the land is his own." In *Montreuil* v. *Ontario Asphalt Co.* (1), the Company was

(1) (1922) 63 Can. S.C.R. 401.

in possession under a lease and had not exercised an option to purchase, and the case is quite distinguishable from the present.

Vera A. Cartwright was not a necessary party and the action against her should be dismissed with costs. With this variation, the judgment at the trial should be restored.

The appellant R. C. Cartwright should have as against the respondent H. L. Cartwright his costs of the appeals to this Court and the Court of Appeal but should pay H. L. Cartwright the costs of the cross-appeal to the Court of Appeal. The cross-appeal to this Court should be dismissed without costs. There should be no costs to or against A. D. Cartwright in this Court or in the Court of Appeal. Vera A. Cartwright is entitled to her costs in the Court of Appeal and in this Court. The motion for leave to adduce further evidence should be dismissed without costs.

DAVIS J.—It is unfortunate that this family litigation should have gone without an amicable settlement. The judgment of the Court of Appeal might well have been accepted by the parties as a fair and reasonable disposition of the matter. But the parties chose to continue their litigation. The appellant (plaintiff) appealed from the judgment to this Court and the respondent H. L. Cartwright (one of the defendants and a plaintiff by counterclaim) gave notice of cross-appeal. The parties insist upon their strict rights and this Court must therefore now endeavour to determine what those rights are.

The litigation arises out of a dispute as to the beneficial ownership of a residential property near the city of Kingston in the province of Ontario which comprises some sixty acres of land and is known as "Cartwright's Point" or "The Maples." The property was owned at the time of her death in 1920 by the widow of the late Sir Richard Cartwright. By her will she named two of her sons, R. C. Cartwright, the appellant (plaintiff), and A. D. Cartwright, one of the respondents (defendants), to be the executors and trustees, and to them probate was granted. Lady Cartwright by her will devised all her real and personal estate unto her executors and trustees upon trust to sell (subject to certain provisions with which we are not now concerned) with power to postpone sale for as long as they might think fit.

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Under date of November 30, 1931, the trustees delivered a deed of conveyance of the said property, absolute in form, to the respondent H. L. Cartwright for a consideration expressed on the face of the deed to be $10,000. The said H. L. Cartwright is a grandson of the testatrix and is a solicitor practising in Kingston. His uncle R. C. Cartwright, the appellant, lived in Toronto and his uncle A. D. Cartwright, respondent, lived in Ottawa. It is admitted by all parties that the document was not intended to operate as an absolute conveyance. The executors required money at that time for the continued administration of the estate (twelve years having passed since the death of the testatrix) and, there being no power in the will to borrow, the executors and the grandson H. L. Cartwright adopted the scheme of putting the property into the name of H. L. Cartwright personally so that he might raise money upon it for the purposes of the estate. This improper conduct on the part of the executors was the first step towards the unfortunate position of affairs which now exists. By a collateral agreement in writing dated February 16, 1932, between the executors and H. L. Cartwright it was agreed that H. L. Cartwright would put a mortgage on the property for $2,000 and turn the proceeds over to the executors for use in the administration of the estate. This he did. Subsequent to and in pursuance of this agreement, H. L. Cartwright managed the property and was in receipt of the rents and profits. The agreement further provided that H. L. Cartwright should have an option to purchase the property from the estate at any time during the term of the mortgage at the price of $10,000 "by paying" the difference between the then amount of the outstanding mortgage and the purchase price. But if the option was not exercised within the term of the said mortgage, H. L. Cartwright agreed

to thereupon reconvey the said property to the said [trustees] on their request in writing so to do and the said property shall thereupon be revested in the said [trustees].

The term of the $2,000 mortgage having expired on February 1, 1937, and the respondent H. L. Cartwright having paid nothing to the estate and having refused to comply with a written demand from the trustees to reconvey the property in accordance with the agreement of February 16, 1932, this action was commenced by one of

the executors and trustees, R. C. Cartwright, against the said H. L. Cartwright and his wife Vera Cartwright to compel the reconveyance of the lands and premises in question to the estate, free and clear from any encumbrance other than the $2,000 first mortgage above referred to. The other executor and trustee, A. D. Cartwright, though he had joined in a written demand for a reconveyance, did not join in the action and was consequently made a party defendant. Vera Cartwright (who is also a solicitor practising with her husband in Kingston) took the position that the action did not in any way lie against her because at the time she married H. L. Cartwright, February 2, 1935, the lands sought to be recovered were then subject to the $2,000 mortgage and remain so, and that she herself had never been in possession of the lands or of any part of them. Her position was that she had no interest in the property other than an inchoate right of dower, the property at all material times being subject to a mortgage. The other executor and trustee, A. D. Cartwright, as a defendant admitted in his pleading that there was an agreement of purchase and sale and that he on his part had always been ready and willing to carry out the same; although he submitted his rights to the Court he asked that the action be dismissed and that in any event no order as to costs should be made against him.

The action went to trial before Makins J. On the evidence it was plain that H. L. Cartwright never paid or tendered any money at any time; in fact he did not contend that he ever exercised the option as such. He testified that he never agreed to purchase the property on the terms of the option, i.e., $8,000 in cash. He did contend, however ,that some time in 1935 an agreement was made with the estate whereby he was to become the owner of the property in question. The date when the alleged agreement was made and its terms were left in the vaguest sort of expression. It is difficult to put one's finger on any particular date or on any particular term of the agreement set up by H. L. Cartwright.

Makins J. reached the conclusion that no enforceable agreement was ever made by the trustees, on the one hand, and H. L. Cartwright, on the other, for the purchase and sale of the property and the learned judge

ordered H. L. Cartwright and his wife Vera Cartwright to reconvey the property to the trustees and directed a reference to take an account of the dealings of H. L. Cartwright with the property.

Either believing that he had completed arrangements for the purchase of the property or, as more likely appears from the evidence, believing he was so close to the completion of the negotiations then pending as to justify him in proceeding with his plans to improve the property, H. L. Cartwright in June, 1935, had undertaken substantial renovations and improvements to the property which resulted in converting what was a summer house into an all-year-round residence at a cost which appears to have been about $6,000. At that time, on June 12, 1935, he put a second mortgage on the property for $6,000 to raise the money necessary to make the structural changes and improvements. By July 10, 1935, the building operations were substantially completed. Makins J. found that H. L. Cartwright had acted in good faith in expending the money on the property and allowed him on his alternative claim, by way of counterclaim, such sum, if any, as might be found on a reference to the Local Master to be the amount of the enhanced value of the property.

The parties then appealed and cross-appealed from that judgment to the Court of Appeal for Ontario. H. L. Cartwright appealed upon the ground that the order against him for a reconveyance of the property should not have been made and, alternatively, that the learned trial judge should have given him a lien on the property for the amount of its enhanced value. Vera Cartwright gave notice that upon the appeal she would contend, upon the ground that she had no interest in the property, that the judgment should be varied by dismissing the action as against her. The plaintiff, while supporting the trial judgment in so far as it ordered the reconveyance of the property, cross-appealed upon the ground that compensation should not have been granted to H. L. Cartwright in respect of the improvements made by him.

The Court of Appeal said that the proper conclusion of the whole matter was that "on or about June 1st, 1935," an agreement had been made between H. L. Cartwright and the trustees whereby H. L. Cartwright became the purchaser of the property at the price of $10,000, he

to assume the existing mortgage for $2,000 and to be credited with the amount owing thereunder on account of the purchase price. The Court therefore allowed the appeal and dismissed the action, but the Court made no order as to the costs of either the action or of the counterclaim or of the appeal or of the cross-appeal. I venture to think that it was thought that the judgment might be accepted by all parties as a convenient and satisfactory disposition of the matter. But from that judgment the parties appealed and cross-appealed to this Court.

Dealing with the issues strictly, as we are not only invited by the parties but bound to do, I cannot find any evidence of an enforceable agreement for the purchase and sale of the property. In fact I think it very plain on the evidence that there never was any such agreement, and that the trial judge was fully justified in ordering a reconveyance to the estate. It is impossible for me to accept the conclusion that an agreement was made between H. L. Cartwright and the trustees "on or about the first day of June, 1935," when as a matter of fact all the parties had met at Kingston in the office of Mr. Farrell, a solicitor, as late as the 18th day of July, 1935, in an effort to see if some sort of an agreement could not be arrived at and subsequently, on the 22nd of July, Mr. Farrell had drafted an agreement for submission to the parties, an agreement which no one, however, except A. D. Cartwright ever signed. Moreover, the proposed agreement so drafted provided that the estate should sell the property to H. L. Cartwright in consideration of a five-year third mortgage for $5,000—a transaction which the trustees of the property could have no power under the will to enter into. These facts are entirely inconsistent with an enforceable agreement having been made "on or about June 1st, 1935" or at any time. I cannot see any escape from the position that H. L. Cartwright is bound to reconvey.

The appellant contends further that, notwithstanding that H. L. Cartwright spent probably $6,000 on the property during June and July, 1935, he is not entitled to any compensation in respect of this expenditure. The trial judge, however, found as a fact that H. L. Cartwright had acted in good faith. Good faith is at the basis and of the essence of a claim for compensation in respect of

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such permanent and substantial improvements to property. With this finding of good faith we cannot interfere. The trial judge gave merely the amount, if any, of the enhanced value of the property; he did not declare a lien upon the property for the amount and this was one of the grounds of the respondent H. L. Cartwright's appeal to the Court of Appeal. The learned trial judge, no doubt, recognized the difficulty that might lie in his way if he declared a lien for the improvements under sec. 36 of *The Conveyancing and Law of Property Act,* R.S.O., 1937, ch. 152:

> 36. Where a person makes lasting improvements on land, under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court may direct.

Whatever may be the full scope of the words "under the belief that the land is his own" (the provision is a remedial one and should receive "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act." Sec. 10 of *The Interpretation Act*), the learned trial judge did not expressly put the compensation upon that ground or under that statute. It seems to me, although he does not say so, that he gave the relief which he thought ought to be given, under all the facts and circumstances, by a court of equity in a suit, such as this action, where a plaintiff claims to be entitled to any equitable estate or right. Sec. 15 (*c*) of *The Judicature Act,* R.S.O., 1937, ch. 100. This action was plainly a claim for an equitable right in the land and premises. The trustees had conveyed the legal estate to H. L. Cartwright in November, 1931, for the purpose of putting on the $2,000 mortgage. The legal estate passed from H. L. Cartwright to and remains in the first mortgagee. It was the beneficial ownership in the estate that the appellant (plaintiff) sought to be established in the action.

The trustees conveyed the property to the grandson H. L. Cartwright. They put him in possession. He was to have the collection of the rents and profits. He was

not asked to pay any rent and he was given the option to purchase. The trustees left the property entirely in his hands for several years. R. C. Cartwright, one of the trustees, lived in Toronto at this time and his brother, the other trustee, A. D. Cartwright, lived in Ottawa at this time. The former left everything in the hands of the latter. Neither of them appears to have taken any interest in the property. A. D. Cartwright undoubtedly was ready and willing at all times to see the property sold by the estate to H. L. Cartwright on almost any terms; he it was who signed the draft agreement of July 22, 1935, to sell the property to H. L. Cartwright for the consideration of a five-year third mortgage of $5,000. A. D. Cartwright undoubtedly created or encouraged the belief in H. L. Cartwright that the latter would be able to enjoy the benefit of the substantial expenditures on the property that he made. H. L. Cartwright fell into the error of regarding his two uncles in relation to the property, not as trustees but as merely executors of the will, and as a result of that error thought as a matter of law that the word or act of A. D. Cartwright was binding upon R. C. Cartwright. A court of equity was not, under all the facts and circumstances of the case, without power to deal with the whole matter just as the trial judge did.

While I think a cautious solicitor would, in an action of this sort, add as a party defendant the wife of the person in possession and asserting ownership of the property, it would be done at the risk of costs. The point is not that the husband did not have the legal estate in the property at the time of his marriage or at any subsequent time. H. L. Cartwright had been holding the property in trust for the estate; that was the only basis upon which a reconveyance to the estate was sought. His wife could have no right to dower in property held by her husband in trust for another, and was not therefore, on the plaintiff's own claim, a necessary party and the action should have been dismissed as against her.

I would therefore allow the appeal, set aside the judgment appealed from and restore the judgment at the trial except that the said judgment should be varied by striking out the words "and Vera A. Cartwright" in the

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paragraph numbered 1 thereof and by adding new paragraph 12 thereto:—

And this Court doth further order and adjudge that the action as against Vera A. Cartwright be dismissed with costs.

The cross-appeal should be dismissed without costs.

The appellant R. C. Cartwright should have, as against the respondent H. L. Cartwright, his costs of the appeal to this Court and of the appeal to the Court of Appeal, but should pay to the respondent H. L. Cartwright the costs of the cross-appeal to the Court of Appeal. There should be no costs to or against A. D. Cartwright in this Court or in the Court of Appeal. Vera A. Cartwright is entitled to her costs in the Court of Appeal and in this Court. The motion of the respondent H. L. Cartwright for leave to adduce further evidence should be dismissed without costs.

Appeal allowed with costs; judgment at trial restored with a variation.

Solicitors for the appellant: *Mason, Foulds, Davidson & Kellock.*

Solicitors for the respondents H. L. Cartwright and Vera A. Cartwright: *Cartwright & Cartwright.*

Solicitors for the respondent A. D. Cartwright: *Smith, Rae, Greer & Cartwright.*