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HAJI ARTIN TERZIAN v. MAROULLA CHR. MICHAELIDES.

[GRIFFITH WILLIAMS AND MELISSAS, JJ.]

(March 2 and 5, 1948)

HAJI ARTIN TERZIAN, *Appellant*,

v.

MAROULLA CHR. MICHAELIDES, *Respondent*.

(*Civil Appeal No.* 3810.)

Immovable property—Registration—Double registration—Ownership—Prescriptive adverse possession—Title perfected by lapse of prescriptive period—Bona fide purchaser—Ancient lights—Right—Remedy—Injunction or damages—Oppresiveness.

In 1925 respondent's father became owner by purchase of a house and yard adjoining his wife's house, and in the same year he gave as a gift to his wife, the then owner of the respondent's house, a small space from his plot 6 ft. × 6 ft., on which a W.C. was constructed for the wife's house. On the 31st July, 1939, the wife transferred her house to their daughter, the respondent, and by the declaration of sale, admittedly in the handwriting of the father who was a Land Registry official of long standing, the mother asked for the transfer to the respondent of this W.C. along with other additions to the house. In effect the title deed issued to respondent in pursuance of this declaration, and after a local enquiry, specifically mentioned the W.C. in question.

It was necessary to exclude this space from the father's registration, for which the father's consent would be required, but inadvertently this was not done. On the evidence it was clear that the father acquiesced in the inclusion of this space in the respondent's title deed. In 1943 the father transferred his own house, as it was originally registered in his name, to another daughter who sold and transferred it in the following year to the appellant who, in February, 1945, contended that he was the owner of the space in question. The respondent then brought an action claiming ownership by registration or prescriptive adverse possession, and the Court had to determine which of the two registrations should prevail in respect of the space in dispute.

Held: (i) that the appellant's predecessor in title, namely respondent's father, remained inadvertently formally registered for the space in dispute, and appellant who inspected the premises before his purchase cannot be considered a bona fide purchaser without notice. The transfer to respondent was effective to include this space, but even if doubts were to persist as to this result, the respondent's title was perfected by the lapse of the prescriptive period of 15 years.

(ii) that the right to free access of daylight is acquired through defined windows or apertures and the obstructor cannot claim that it would be equally convenient for the owner of the right to open another window.

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(iii) that the remedy by injunction is not oppressive where the owner of the servient site is not prevented by the easement from making use of his site to its best advantage.

Judgment of the District Court affirmed.

Appeal by defendant from the judgment of the District Court of Limassol (Action No. 228/15) in favour of the plaintiff.

Z. Rossides for the appellant.

J. Potamitis for the respondent.

The facts of the case are fully set out in the judgment of the Court which was delivered by :

GRIFFITH WILLIAMS, J. : The action out of which this appeal arises was instituted by respondent claiming ownership by registration or prescriptive adverse possession of a small space 6′×6′ which was attached to her house by enclosing walls, and formed the W.C. of her first floor. She further claimed relief from obstruction by defendant of the access of daylight to one of her ground floor rooms by the roofing in of a corner of his yard between walls to form a kitchen. In the alternative plaintiff claimed damages. The trial Court found for the respondent on both claims.

In regard to the first claim the defence was that this space occupied by the W.C. is included in defendant's registration No. 32717 of 3.1.1944.

This structure was surrounded on three sides by appellant's yard. Some time in February, 1945, its walls collapsed, and appellant objected to their reconstruction on the contention that he is the owner of the space.

The registration of respondent No. 30509 of 21.8.1939 includes an upstairs W.C. whose pipes led down into this enclosed space, and on the evidence before the trial Court it is equally certain that appellant's registration includes the same space. The appellant's counsel contended that appellant's registration alone includes this space.

The sequence of events which brought about this state of things was this : In 1925 respondent's father became by purchase owner of the house and yard adjacent to respondent's plot 168 now registered in appellant's name. In the same year after his purchase he gave this disputed space to his wife, the then owner of the respondent's house, plot 170, as a gift, and this W.C. was constructed as already described part and parcel of the wife's house for the upper storey. On 31.7.39 the wife transferred this house to their

daughter, the respondent, and by the declaration of sale, admittedly in the father's handwriting who is a land registry official of long standing, the mother, transferor, asked for the transfer of this W.C. along with other additions to the house to the respondent. In effect the respondent's title deed issued to her in pursuance of this declaration and after a local enquiry specifically mentions this W.C.

To straighten out matters and avoid conflict between the new registration in respondent's name and the father's it was necessary to exclude this space from the father's registration for which the father's consent would be required, but this inadvertently was not done and the present difficulty arose.

On the evidence of the father, and from the fact that he filled in the declaration of sale form on behalf of his wife, it was made perfectly clear that he, the father, acquiesced in the inclusion of this space in the respondent's title deed. The father in 1943 transferred his own house as it was originally registered in his name to his other daughter Olga, and she sold and transferred it in the following year to the appellant.

It is in evidence that appellant inspected these premises on several occasions before his purchase, and he did not go into the witness box to contradict this evidence, so that there can be no substance in the contention that he is a bona fide purchaser without notice. But we still have to determine the question which of the two registrations should *prevail in respect of this disputed space.*

We can best approach the subject by asking whether the father before he parted with his house could successfully maintain a claim against respondent for the removal of the W.C. from his yard and for recovery of this space. We *think not. He would have been faced with the conclusive* defence that he gave it as a gift to his wife and perfected that gift by acquiescing in its registration in the respondent's name. It was argued by appellant's counsel that by the express terms of the declaration of sale only such additions as were within the boundaries of plot 170 were intended to pass to respondent. The simple answer to this argument is that this W.C., the only one for the respondent's first floor, is expressly mentioned in the declaration of sale and must have been intended to pass to her. If the father were to raise his claim after 1940 he would have been faced with the additional defence of prescriptive possession which is the other ground on which respondent claims.

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The trial Judge made no finding on this aspect of the case but the appeal being by way of rehearing we can draw our own conclusions from the evidence. We have already alluded to the fact that this space was permanently attached to respondent's house from 1925 until the collapse in 1945 of the enclosing walls. The appellant tried to prove that the cesspit of this W.C. was in use by the occupants of the wife's and husband's houses in common. Of his two witnesses on this point the mason Thrasyvoulos Vasiliou is uncertain whether the cesspit of this W.C. was left exclusively for the upstairs premises of respondent 20, 15 or 10 years ago, and his other witness, Maria Christou, an old tenant of appellant's premises, is equally uncertain whether she ceased to be their tenant 16 or 23 years prior to the trial. This faint attempt to prove common possession, therefore, fails.

On this head of claim the evidence, in our opinion, is conclusive in favour of respondent both as to exclusive possession and as to adverse possession. We do not overlook the fact that the husband, the donor, was residing with his wife in her house until his transfer to Kyrenia in 1936. This circumstance does not change the adverse character of the wife's possession during her ownership of the house. The wife as owner was in possession of the whole house including this W.C. space which was, as we said, permanently attached to her house as best they could make it, and the owner's intention on her part could not but extend over this space. The husband's intent on the other hand to part with the ownership of this space in favour of the wife is clear from the fact of his having made a gift of it to his wife.

This exclusive and adverse possession of the wife was continued down to and beyond the completion of the prescriptive period by her daughter, the respondent. So that the respondent's claim based on prescriptive possession is unanswerable.

The result is that in our opinion the appellant's predecessor in title, namely respondent's father, remained inadvertently formally registered for this space, and appellant cannot be considered a bona fide purchaser without notice. The transfer to respondent in the circumstances enumerated was effective to include this space, but even if doubts were to persist as to this result, the respondent's title was perfected by the lapse of the appropriate prescriptive period of 15 years.

In regard to the claim for ancient lights, it was conceded by appellant's counsel that respondent is entitled to free access of daylight, but not through a particular window, and argued that it would be equally convenient for respondent to open another window and that the injunction given against appellant to demolish the obstruction is oppressive to him. We do not agree with his first contention. This right is acquired through defined windows or apertures. In regard to his second contention the remedy prescribed by law for interference with this right is either injunction or damages where the injury is small, capable of estimation in money, adequately compensated by a money payment, and the injunction would be oppressive to the defendant. All these requirements must co-exist to justify the substitution of damages for an injunction. In the present case there is no evidence that the appellant is prevented by this easement from making use of his site to its best advantage. He caused this obstruction by transferring his kitchen from the one side of his premises to the other. We do not therefore consider the injunction oppressive to the appellant.

The appeal, therefore, fails, and we affirm the judgment of the District Court on both claims of respondent but we further order that the appellant's registration be amended to exclude the space in dispute in the action from his registration.

Appeal dismissed with costs.