# NEWMAN *v.* WALKER

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): February 13th, 1967
(Civil App. No. 26/66)

[1] **Contract—form—note or memorandum in writing—part performance—requisites of part performance:** For part performance of a parol agreement to enable proof of the agreement to be given notwithstanding the Statute of Frauds, 1677, (a) the act relied upon as part performance must be referable to an existing agreement and cannot be an act done before the agreement is made, and (b) the agreement must be such that were it in writing the court would decree specific performance (page 52, lines 22–32).

[2] **Land Law—conveyancing—written agreement or memorandum—part performance—requisites of part performance:** See [1] above.

The appellant brought an action in the Supreme Court claiming possession of land allegedly encroached upon by the respondent, mesne profits and damages.

The parties owned adjacent pieces of land. The respondent built a cesspit and a wall on the appellant's land. He then told the appellant he wanted to erect a boundary wall. When the parties visited the place with their surveyors, measurements disclosed the respondent's encroachment. The cesspit occupied rather more than half the area encroached upon. It was agreed orally that the respondent would pull down the wall and the appellant would sell him the part of the land encroached upon which was occupied by the cesspit, for Le190. The respondent did nothing for over nine months. The appellant wrote threatening legal action if he did not remove the wall and restore the whole of the land. In reply, the respondent denied that there had been an encroachment and said he had built on his own land.

The present proceedings followed. The defendant admitted the encroachment but pleaded an oral "family arrangement" whereby the appellant was to sell him the whole of the portion encroached on, for Le190, and counterclaimed for specific performance of this agreement. In reply the appellant denied the alleged agreement and pleaded the Statute of Frauds, 1677.

The Supreme Court found that the appellant must have been aware of the respondent's entry into possession of the portion of land encroached upon, and held that this entry was an act of part performance antecedent to the oral agreement that the appellant

would sell the land occupied by the cesspit to the respondent. It ordered that the respondent should pay Le220 as compensation for the entire encroachment and the appellant should convey the portion encroached upon to the respondent.

On appeal, the appellant contended that the trial court had erred in fact in finding that Le190 was to be paid as compensation for the whole encroachment, whereas it was the purchase price of part of the encroachment, and had erred in law in its exposition of the law of part performance. The latter contention was not disputed by the respondent.

Case referred to:

(1) *McManus* v. *Cooke* (1887), 35 Ch. D. 681; 56 L.T. 900, applied.

*R.E.A. Harding* for the appellant;
*McCormack* for the respondent.

SIR SAMUEL BANKOLE JONES, P.:

The plaintiff in the court below, here the appellant, was and is the owner of property situate at 79 Kissy Road, Freetown, which she bought on March 25th, 1948. She complained that the defendant, here the respondent, who bought another property after she did, and contiguous to hers, encroached on her eastern boundary to a depth of 4 ft. 6 ins. by 7 ft., measuring on the whole 31.5 sq. ft., on which he erected a cesspit and a concrete wall. She therefore claimed possession of this portion of land, mesne profits for its occupation and damages for trespass.

The respondent in his defence admitted the alleged encroachment as well as the erection of the cesspit and concrete wall, but pleaded that there was a "family arrangement" (not in writing) by which the appellant had agreed to sell to him the whole of the portion encroached upon for the sum of Le190, and that he had always been ready and willing to pay this amount. He counterclaimed for an order for the specific performance of this agreement. The appellant, in reply to the respondent's defence and counterclaim, pleaded the Statute of Frauds, 1677, as well as completely denying the alleged agreement.

The undisputed facts which emerged from the evidence are as follows: Some time in January 1965, the respondent called on the appellant and told her that he wanted to erect a boundary wall between their respective properties. A date was agreed upon to

visit the site, and both parties and their surveyors went on the land on January 14th, 1965. After measurements had been taken, it was discovered that the respondent had encroached upon the appellant's land and had in fact erected thereon a cesspit and a wall. The entire encroachment measured 4 ft. 6 ins. by 7 ft.—the cesspit was only 2 ft. 8 ins. from the boundary. It appears to have been agreed that, if the respondent pulled down the wall, the appellant was willing to sell to him only that portion of her land measuring 2 ft. 8 ins. upon which the cesspit stood, for the sum of Le190. This agreement was oral and made on the site. When the respondent had not fulfilled his own part of the agreement up to November 8th, 1965, the appellant's solicitor wrote to the respondent threatening legal action if he did not remove the offending wall and restore to the respondent the whole of the land upon which he had encroached, not later than November 12th, 1965, which meant in effect a withdrawal of her offer made on January 14th, 1965. The respondent's solicitor replied on November 10th, 1965, and astonishingly stated that his client was not guilty of any encroachment whatever: "My client denies the allegations contained in your said letter, and says that the portion of land upon which he has built his wall is his land, the boundaries of which are in accordance with those shown on the cadastral survey map of that area." The writ was issued on February 7th, 1966, and pleadings were subsequently filed. At the hearing, the respondent stated that he built the cesspit in 1948 and the wall in 1965, even before he went to see the appellant about the proposed erection of the wall. He went on to say as follows:

> "When I started to build the cesspit, I did not measure my boundary to ascertain that I was not encroaching. At the time I erected the cesspit I never had the permission of the plaintiff to go into her land. I am asking this court to allow me to retain the encroachment despite the fact that I have built on the plaintiff's land."

I find that not only despite these admissions, but even in spite of them, the learned judge in his judgment had this to say:

> "In the absence of any evidence to the contrary, I am bound to *assume* that the plaintiff must have been aware of the cesspit, portion of which was on her land and had been built since 1948. I consider the entry into possession was an act of part performance *antecedent* to the oral agreement which was effected in 1965." [Emphasis supplied.]

He then went on to make the following orders:

1. That the respondent pay to the appellant an amount of Le220 as compensation for the encroachment.

2. That the appellant deliver to the respondent a plan of the portion affected by the encroachment, duly prepared, the respondent to bear the cost of its preparation.

3. That the said portion of land be conveyed by the appellant to the respondent, the respondent to pay the cost of preparing the necessary documents.

4. That the respondent pay the costs of the action.

It is against this decision that the appellant has appealed to this court.

In my view, the learned judge wholly misunderstood the evidence regarding the oral agreement purported to have been made on January 14th, 1965. He wrongly assumed that the sum of Le190 was "compensation" (he should have said "purchase price") for the entire encroachment by the defendant on the portion of land measuring 31.5 sq. ft. It was not. It concerned only that portion referred to above, measuring 2 ft. 8 ins.

Mr. McCormack himself conceded that the learned judge's exposition of the law of part performance was wrong, and we entirely and respectfully agree with him. The doctrine of part performance of a parol agreement enables proof of it to be given notwithstanding the Statute of Frauds, the reason being that where one party has stood by and allowed the other to fulfil his part of the contract, it would be fraudulent to set up the statute: see *McManus* v. *Cooke* (1) (35 Ch. D. at 697; 56 L.T. at 906). First, there must exist a contract, and the act relied upon as part performance must be referable to that contract; and secondly, the contract must be such that, had it been in writing, the court would decree specific performance. This doctrine is never invoked for an act done before the contract itself is made. This would be, with respect, like putting the cart before the horse. And this, surprisingly, was exactly what the learned judge did. I need not say that an elementary principle of the law of contract was flagrantly violated. On this ground alone, and there are several others, the learned judge's judgment cannot be sustained. It is therefore ordered that the judgment of the court below and the several orders therein contained be set aside and that the appeal be allowed.

DOVE-EDWIN and MARCUS-JONES, JJ. A., concurred.

*Appeal allowed.*