

in the alternative, for a declaration that the defendant's title had been extinguished by virtue of the Limitations Act.

The defendant counterclaimed for possession of the land and compensation for use and occupation by the plaintiff.

The action and counterclaim were tried without a jury at London.

W. R. Meredith, for the plaintiff.

J. M. Donahue, for the defendant.

SUTHERLAND, J., in a written judgment, said that the conveyance was subject to a mortgage upon the land, which the defendant covenanted to pay and to indemnify the deceased against, and contained a further covenant by the defendant to provide his mother, the grantor, for the rest of her natural life, with a comfortable home on the land conveyed and suitable maintenance, including food, fuel, clothing, medicine, medical attendance, and nursing.

No evidence of duress or undue influence on the part of the defendant in procuring the deed was offered at the trial.

In view of the terms of the deed, the proper legal presumption was that the mother's possession, after it was executed, was pursuant to the deed. She continued to occupy the house and lot until her death on the 12th March, 1919. The mother's possession could not be deemed adverse to the defendant's title under the deed, and was not such as could ripen into a title by possession in her as against him.

While the defendant paid the taxes and the interest on the mortgage, and ultimately the principal, and while at times he supplied her with meat and vegetables, and while he allowed her to have the entire use of the house and premises as a home, which might be said to be referable to the covenant contained in the deed, and in part performance thereof, he did not otherwise or in any strict sense carry out the covenant to provide her with suitable maintenance. He asserted that she did not ask for it, and that he was in reality not expected to provide it while she was allowed to remain in possession and keep boarders.

It was argued that the deed was an improvident one. It was a deed of all her realty, and she was apparently possessed of very little else. The absence of a revocation clause might also, in some circumstances, have had a prejudicial effect. But the deed was made for good consideration—the protection of the grantor against the mortgage—and thus the preservation of the home; and the grantee had discharged this part of the obligation.

The mother not having seen fit to attack the deed in her lifetime, it was not, in the circumstances, now open to the plaintiff to do so: *Empey v. Fick* (1907), 15 O.L.R. 19, 22.