# 10/14/80 STATE DELAWARE v. EMMONS B. PHILLIPS AND

1980 | Cited 0 times | Court of Chancery of Delaware | October 14, 1980

HARTNETT, Vice Chancellor

MEMORANDUM (Unreported) OPINION

After 13 years, this suit finally came to trial. It involves a dispute over the ownership of approximately 13 acres of land on the ocean in Sussex County.The disputed parcel is claimed by the State, as plaintiff, and by defendants Blaine Phillips and Janet Phillips, his wife. They were deeded the disputed parcel in 1960 and 1961 by the other defendants, Emmons Phillips and Mae Phillips, his wife, who are the parents of Blaine Phillips.

This is my decision in favor of the plaintiff after considering six days of trial testimony which ended on May 16, 1980, over 290 exhibits, the transcript of a three-day trial held in Superior Court in 1958 and the post-trial briefs of the parties.

As will be seen, the disputed parcel has never been patented or granted to private owners and therefore record title remains in the State. The evidence further shows that the disputed parcel was never described in any recorded deed to the Phillipses or anyone else prior to a 1959 deed whereby the Phillipses created a record title to the disputed parcel in themselves. The Phillipses at trial failed to sustain their burden of showing that they, or anyone else, acquired title to the disputed parcel by adverse possession or under the doctrine of presumed grant and they failed to establish facts which would estop the State from retaining title to the disputed parcel. From a preponderance of the evidence I find the facts to be:

I

Along the Atlantic Ocean there are several miles of "public lands", that is, lands which -- because they have never been granted to private owners -- are owned by the State. State v. Phillips, Del. Ch., 305 A.2d 644 (1973), aff'd., Phillips v. State ex rel. Dept. of Nat. Res. & Env. Con., Del. Supr., 330 A.2d 136 (1974).In the late 1920's, pursuant to an Act of the General Assembly, the Public Lands Commission of the State commissioned Thomas L. Pepper, a surveyor, to review the land titles between Cape Henlopen and the Maryland line along the Atlantic Ocean and to determine and to plot the lands still in the ownership of the State. In 1929 he completed his work and prepared a Survey of the Public Lands which was recorded in the Office of the Recorder of Deeds, in and for Sussex County. Unfortunately, the exact plot, as recorded, is no longer in the Recorder of Deeds' records, but a copy is in the possession of the Department of Transportation and was introduced as

evidence in this trial. It is referred to as the "Pepper Survey". (PX 3).

This Pepper Survey has become the seminal plot by which other surveys, public and private, have evolved. It was based on old deeds and ancient land patents of record in Georgetown, Delaware, Annapolis, Maryland and elsewhere.

The Pepper Survey, in the area of the disputed parcel, shows three Patents: Fowle's Delight Patent, which is south of the disputed parcel, and Comfort Pasture Patent and Salt Meadow Patent, which are to the west of the disputed parcel. At the end of this Opinion is a plat prepared by the Court which shows the location of the three patents and the disputed parcel. It is based on the Pepper Survey and the trial testimony. The boundaries of these three Patents -- as placed on the Pepper Survey -- show that the disputed parcel is not a part of these three Patents but other lands of Phillips -- not in dispute -- are. The disputed parcel is shown on the Pepper Survey as being part of Tract No. 4 of the public lands.

In 1931 concrete markers were placed to mark the boundaries as shown on the Pepper Survey. Many of these markers still exist and at least two -- and perhaps four -- are still located on the boundary lines of the disputed parcel.

Almost all of the many plots and surveys introduced as evidence in this trial are consistent with the Pepper Survey -- even the surveys prepared for the Phillipses by Ike Bennett in 1943 and by Wingate and Eschenbach in 1960. The evidence does not show that the Pepper Survey is inaccurate to any material extent. I therefore find it is accurate and correctly shows the Public Lands in State ownership and the boundaries of the old Patents in this area.

II

The metes and bounds of the ancient Salt Meadow Patent and Comfort's Pasture Patent, as plotted on the Pepper Survey, show that the eastern boundary of those Patents does not extend eastward to the Atlantic Ocean but extends eastward only to Public Lands which lie between the Ocean and those Patents. There is no dispute as to the bounds of the Fowle's Delight Patent which lies to the south of the disputed parcel. Notwithstanding the Pepper Survey, the Phillipses have claimed that the Comfort Pasture and Salt Meadow Patents bordered the Ocean and that the disputed parcel is therefore within those Patents.

That claim was laid to rest by the 1976 decision of Chancellor Quillen in this case which held that the easternmost boundary of these Patents did not necessarily bind with the Atlantic Ocean. State v. Phillips, Del. Ch., No. 276 S. (Jan. 2, 1976). No evidence adduced at the trial convinces me that the eastern boundaries of the Salt Meadow Patent and the Comfort's Pasture Tract Patent bind with the Atlantic Ocean and I therefore hold that they do not.

It is clear that the disputed parcel is not a part of any of the ancient Patents which have been discovered to be of record and record title to the disputed parcel is still, therefore, vested in the State -- as part of the Public Lands.

III

The Phillipses also urge that the 13-acre disputed parcel of land is part of a much larger tract of land, title to which has been claimed -- at one time or another -- by the Williams Family because of their alleged adverse possession of it. The large tract claimed by the Williamses was bounded, roughly, on the south by the lands of the old U.S. Coast Guard Station -- now State lands; on the north by Kinksbush Gut which is near "the Narrows" -- an area of Assawoman Bay; on the west by Assawoman Bay; and on the east by the Public Lands or the Atlantic Ocean. Excluded from the Williamses' claim is a parcel of land of Banks which lies on the east side of Assawoman Bay and is otherwise completely surrounded by the Williamses' claim. The Phillipses maintain that the Williamses' claim extended eastward to the Ocean while the State maintains that the Williamses' claim extended eastward only to the Public Lands which border the Ocean. It is clear that George E. Williams claimed most of this large tract in 1931 and 1932 when he created record chains of title by executing deeds, and it is conceded that there was no record title to the Williamses to any part of the large tract claimed by them prior to 1931. The Williams Family claims it occupied and used the large tract between 1900 and 1931 and 1932 and acquired title to it by adverse possession. The State does not claim any lands contained within the bounds of the ancient Patents and for the most part the Williamses' claim is within those bounds.

George E. Williams in 1931 and 1932 executed two deeds to Marvel Pepper which conveyed part of the tract the Williamses claimed by adverse possession (DX 5 and DX 4). In 1939 Marvel Pepper conveyed part of these lands to Edgar Arthur Simpler and Emmons B. Phillips by quit claim deed (DX 9). The Phillipses allege that the disputed 13-acre parcel was intended to be included within the lands described in the 1931 and 1932 deeds of Williams and the 1939 deed of Pepper. The 1939 deed of Pepper did not describe any of the lands conveyed by metes and bounds but only described the lands conveyed by reference to adjacent owners. The derivation in this 1939 deed, however, states that the lands conveyed were acquired by Marvel Pepper in the two deeds from George Williams in 1931 and 1932. The 1931 deed (DX 5; PX 35) described the lands by metes and bounds and by its terms did not include the disputed parcel, and the 1932 deed (DX 4; PX 35) described the lands as being all the lands included in a Patent called "Fowle's Delight" except for lands of Daisey (nee Banks). It is not contended that the disputed parcel is part of the Fowle's Delight Patent and it clearly is not.

The "adjacent owner" references to the State in the 1939 deed of Pepper to Phillips and Simpler are consistent with the claim of the State that the disputed parcel was always recognized as State or Public Lands and was not intended to be included in the lands conveyed by the 1939 deed. None of the deeds prior to 1959 describe the lands conveyed therein as being bounded on the east by the Atlantic Ocean.

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I find that the 1931 and 1932 deeds of George E. Williams to Marvel Pepper and the 1939 Marvel Pepper deed to Simpler and Phillips did not include the disputed parcel as part of the lands conveyed therein. This is clear from the deeds themselves; (quoted infra), the bounds of the Patents, and the testimony in a 1958 trial by Thomas Pepper (DX 34) who prepared the 1931 and 1932 deeds for George E. Williams. It is also not inconsistent with the testimony of most of the members of the Williams' Family who testified as to an ancient writing allegedly written by George Williams (DX 11) and as to other facts.

The first recorded deed in which the disputed tract is described is a quit claim deed which Emmons B. Phillips et al executed in 1959 to a straw party (DX 38) and which created a record title to the disputed parcel. Eva Williams -- the widow of George E. Williams -- and the residuary legatee under his Will (Will Book AN, No. 39, Page 48), joined in this quit claim deed. This deed is also the first deed of record to state that the lands claimed by the Williamses or the Phillipses were bounded by the Ocean. Subsequently in 1960 and 1961 defendants Emmons B. Phillips and wife conveyed the disputed parcel to their son and daughter-in-law, also defendants in this litigation.

Because the 1939 Pepper deed to the Phillipses did not include the disputed parcel within the lands conveyed, the Phillipses have no privity of title with the title of the Williamses or the Peppers. The failure to include the disputed parcel within the lands conveyed by the deeds of Williams and Pepper also strongly indicates that neither Williams or Pepper claimed title to the disputed parcel.

IV

To understand my holding that there is no record title to the disputed parcel prior to the 1959 deed which the Phillipses executed to create record title in themselves, it may be helpful to review the actual language in the deeds relied upon by the parties. In 1931 and 1932 George and Eva Williams created a record chain of title to the lands claimed by them by executing two deeds to Marvel Pepper which described the lands conveyed as follows:

1. 1931 DEED (DX 5; PX 35):

All, that certain tract, piece or parcel of land situate, lying and being in Baltimore Hundred, Sussex County, Delaware, and lying on the east side of Assawaman Bay adjoining lands of Warren Lynch, Raymond Banks and lands of the State of Delaware, more particularly described as follows, to-wit: - Beginning at a post at Assawaman Bay, thence due East 4 perches, North 39 degrees East 23 perches, North 81 degrees East 38 perches, South 10-1/2 degrees East 103 perches, South 3-1/2 degrees West 62 perches, South 22 degrees East 24 perches, South 56 degrees West 13 perches, South 18 degrees West 14 perches, South 11 degrees East 36 perches, South 64 degrees West 3 perches, North 84-1/4 degrees West such a distance as will reach Assawaman Bay, thence along and with the several meanderings of said Bay including several small islands lying near the shore home to the place of beginning, containing 85 acres of land and marsh be the same more or less. Proper variations to be allowed on

all lines.

As shown by the testimony of Thomas Pepper who prepared the deed (DX 34, p. 404), this deed was intended to convey only Comfort's Pasture which does not include the disputed parcel. The description therein is based upon the Pepper Survey and is consistent therewith, It -- by its metes and bounds -- excludes the disputed parcel. The existence of the State's claim that the disputed parcel is part of the Public Lands is necessarily acknowledged by a reference to the State as an adjacent owner.

2. 1932 DEED (DX 4; PX 35):

All that certain tract, piece or parcel of Marsh and Beach land situate, lying and being in Baltimore Hundred, Sussex County, Delaware, adjoining lands of Raymond Banks, lands of The State of Delaware, and lying on the East side of Assawaman Bay, being all the lands included in a Patent called "Fowles Delight" except that part which was claimed by Thomas Daisey and plotted in Orphans Record No. 49, Page 522, etc., reference to said Patent and Orphans Court Record being had will more fully and at large appear.

This deed by its express terms conveyed only the lands contained in the Fowle's Delight Patent. It is undisputed that the disputed parcel is not part of the Fowle's Delight Patent which lies to the south of the disputed parcel. It also refers to adjacent State lands.

On June 21, 1939, Marvel Pepper conveyed part of the lands conveyed in the 1931 and 1932 deeds to him to Emmons Phillips and Edgar Arthur Simpler (Phillips's brother-in-law) (DX 9; PX 37). The description of the lands conveyed states:

All, the right, title and interest of said parties of the first part of, in and to ALL Those certain tracts, pieces or parcels of marsh and beach land situate, lying and being in Baltimore Hundred, Sussex County, Delaware, adjoining lands of Raymond Banks, lands of the State of Delaware and lands of Gilbert Wilkes and lying on the East side of Assawaman Bay, be the contents what they may. Being a part of the same lands conveyed to Marvel C. Pepper, one of the above named grantors, by George E. Williams and Eva M. Williams, his wife, by two Deeds, one bearing date August 22, 1930 (sic), and now of record in the Recorder's Office of the State of Delaware, in and for Sussex County, in Deed Book No. 284, Page 231, and the other Deed bearing date August 3, 1932, recorded in Deed Book No. 285, Page 336, &c., reference to which will more fully appear.

This description states that it is part of the lands conveyed by the 1931 and 1932 deeds set forth above. It therefore only conveys what was conveyed in those two deeds.

In the Sussex County Deed Records immediately following this 1939 deed to Simpler and Phillips from Marvel Pepper on the same page there is a recorded copy of a plot which purportedly shows the

lands conveyed in the deed (PX 19). It is a copy of a portion of the Thomas Pepper 1929 Public Lands Survey, updated, and clearly shows that the disputed parcel was not to be included in the conveyance to Simpler and Phillips from Pepper. The original deed introduced in evidence in this trial, however, contains no plot annexed to it at the present time nor is there a reference in the language of the deed to any plot. (DX 9).

In 1943 Phillips and Simpler divided the lands they had acquired from Pepper in 1939. (DX 12, PX 20, PX 38). In their deeds dividing the lands they used metes and bounds descriptions prepared for them by Ike Bennett, a surveyor. The Bennett Survey followed the 1929 Pepper Survey and recognizes the Pepper Survey markers (PX 38, PX 21, PX 20). The deed to Phillips from Simpler (DX 12) conveys:

ALL, that certain piece, parcel or tracts of land lying and being situated in Baltimore Hundred, Sussex County and State of Delaware and lying on both sides of slag road leading from Fenwick Island to Bethany Beach bounded and described as follows.

To Wit: -- Beginning for tract number One at a cement bounder settled on the east side of the aforesaid slag road right of way and in line of State of Delaware lands thence with said right of way N. 5-1/2 degrees E. 692 Ft. to a stake and corner for lands deeded this day to Don, Arthur, and Maxine Simpler thence with said land S. 74 degrees 52' E. 328 ft. to a stake in line for State lands. thence with said State lands and high beach S. 1-1/4 degrees W. 707 ft. to a cement bounder & corner for State lands thence with same N. 75 degrees 24' W. 386 ft. home place of beginning, containing Five and Seventy-three one hundredths acres (5 73/100) more or less.

TRACT #2

Situated on both sides of aforesaid road beginning at a cement bounder corner for lands of Raymond Banks and State lands thence running with said Banks land N. 77 degrees 10' W. 574 ft. to a cement bounder at the edge of Assawamma Bay thence across out in a northerly direction to a cement bounder and land of land of Thomas Pepper thence with same N. 88 degrees E. 439.7 ft. to a cement bounder and corner for said Pepper thence S. 15 degrees E. 198 ft. to a cement bounder and corner for State lands thence with same S. 46-3/4 degrees W. 119 ft. home place of beginning. Containing Three and forty five one hundredths acres (3 45/100) more or less.

TRACT #3

Situated on West side of aforesaid road Beginning at a cement bounder on the west edge of aforesaid right of way and line of lands for Raymond Banks thence with said right-of-way. S. 40 degrees E. 1201 ft. to a cement bounder N. 8 degrees E. or S. 8 W and land deeded this day to Don, Arthur & Maxine Simpler thence with same N. 80 degrees 7' W. 951 ft. to a cement bounder at the water edge of Assawamma Bay thence with same in a northerly direction to a cement bounder and corner for lands of Raymond Banks thence with said Banks land S. 80 degrees 7' E. 1303.5 ft. to a cement bounder and

iron axle thence N. 14 degrees 55' E. 628 ft. home place of beginning. Containing sixteen and fifty five one hundredths (16 55/100) acres more or less.

Said described lots being a part of the same lands that Marvel C. Pepper and Hattie S., his wife deeded by deed to Edgar Arthur Simpler and Emmons B. Phillips the twenty-first day of June A.D. 1939. Recorded at Georgetown in Deed Book E. 11 Vol. 317 Page 594.

The metes and bounds descriptions in the deeds between Emmons Phillips and Edgar Arthur Simpler excludes the disputed parcel.

All the recorded deeds therefore clearly show, despite Phillips's claim to the contrary, that the disputed parcel was never included in any recorded deed prior to the quit claim straw deed in 1959 in which the Phillipses created a record title to the disputed parcel in themselves.

At the time Phillips and Simpler purchased the lands from the Peppers in 1939 they were given, by the seller, a letter from an attorney which clearly showed that the title to the lands being conveyed was predicated on a claim of adverse possession by the Williamses (DX 8).

When the Phillipses placed 3 cottages on part of their lands in 1947 (not the lands now in dispute) they were placed (except for perches) within the bounds of the Fowle's Delight Patent and west of the eastern boundary of that Patent as shown on the Pepper Survey. When the Phillipses placed their "Pine Patch" cottage immediately adjacent to the disputed parcel in 1949 they placed it within the bounds of the Comfort Pasture Patent as shown on the Pepper Survey and not on the disputed parcel. The State makes no claim to any lands contained within the Fowle's Delight or Comfort Pasture Patents.

V

The disputed parcel as claimed by the Phillipses is now bounded on the east by the Atlantic Ocean; on the west by the public highway leading from Fenwick Island to Bethany Beach (Delaware Route 1, formerly Route 14); on the north by lands of Wilkes (formerly of Thomas Pepper) or public lands; on the south partly by public lands and partly by the Fowle's Delight Patent as deeded to Phillips and Simpler in 1939 by Marvel Pepper. The Phillips claim it lies entirely within the large tract claimed by the Williamses.

As previously discussed, there is no record of any conveyance of this disputed parcel from the sovereign to private owners by patent or other grant. Nor is there any record of any conveyance of it prior to 1959 when the Phillipses created a record title in themselves.

Prior holdings in this Court have established that if lands in this State have never been patented or granted to private owners, their title remains with the State, Phillips v. State ex rel. Dept. of Nat. Res.

& Env. Con., (1974), supra, unless the private owner can show he has acquired title by adverse possession or by the doctrine of presumed grant. State v. Phillips, Del. Ch., 400 A.2d 299 (1979).

Prior to 1843, title by adverse possession could not be acquired against the State. In 1843 and 1852 the General Assembly enacted legislation which permitted title to public lands to be acquired against the State by continued uninterrupted and peaceable possession for a period of 20 years -- except as to salt marshes, beach or shore. State v. Phillips, Del. Ch., 400 A.2d 299 (1979).

This Court held in this 1979 decision that the disputed parcel (except the land between high and low water mark -- immediately adjacent to the Ocean) is not beach or shore within the meaning of the statute. The State now concedes that the disputed parcel is not salt marsh. In 1953 the General Assembly repealed the statute permitting the acquisition of title by adverse possession running against the State. 49 Del. L., Ch. 386 (July 15, 1953); State v. Phillips (1979) supra. Therefore, the burden of persuasion in this case fell upon the Phillipses to show that they or persons in privity with them acquired title to the 13-acre disputed parcel by 20 years adverse possession between 1843 and 1953 or that they acquired title under the doctrine of presumed grant prior to 1967 when this suit was commenced.

Phillips's task is made difficult by a number of factors: (1) adverse possession was permitted to run against the State only between 1843 and 1953; (2) the disputed parcel and the surrounding areas are sand; (3) the disputed parcel and the surrounding area, for the most part, have always been vacant; (4) the record chain of title to the larger tract which abuts the disputed parcel on two sides is traceable only back to 1931 and the record chain of title to the disputed parcel commenced in 1959 when the Phillipses created the chain in themselves by a straw deed; and (5) the descriptions in the recorded deeds in the chain of title up to 1959 excluded the disputed parcel.

VI

In this trial the Phillipses attempted to show that the Williams Family -- who claimed lands in the area as long ago as 1900, and who were the grantors in the 1931 and 1932 deeds which first established a record chain of title to lands in this area -- claimed the disputed parcel as part of their claimed land holdings and intended to include the disputed tract in their 1931 and 1932 deeds to Pepper and that Pepper intended to include the disputed parcel in his 1939 deed to Phillips and Simpler. As previously indicated they were unable to show that these deeds included the disputed parcel.

The Phillipses also tried valiantly to show that they occupied the disputed parcel openly and notoriously since 1939; that the Peppers likewise occupied the disputed parcel from 1931 to 1939 and that the Williams Family so occupied it from 1900 to 1931. This they, unfortunately, also failed to do.

The evidence shows that as long ago as the 1920's the Williams Family erected or used various duck

blinds, wooden tents, shacks and duck pens on part of the large tract claimed by them, but all of these structures were located on the bay side of the tract on lands which were within the bounds of the ancient land Patents and none of these structures were located on the disputed parcel which is sandy beach on the east side of the large tract. From prior to 1931 and even thereafter, the Williamses and their invitees hunted, gunned, fished, trapped, oystered and swam on part of the lands they claimed but the activities which might have been conducted on the disputed parcel were of a recreational nature such as swimming, gathering shells, fishing, picnicking, collecting wild berries and driftwood and rabbit and bird hunting. All of these latter activities have also been engaged in by the public on the public lands for many years.

Sometime before 1931 the Williamses used a water well and water storage barrel which were located near the disputed parcel either at the present location of the "Pine Patch cottage" or on lands to the north of the disputed parcel, both of which locations are within the ancient Patents. The Phillipses have not shown by a preponderance of the evidence that these facilities were located on the disputed parcel.

Arthur E. Baull testified he hauled sand from the area near or on the disputed parcel after 1935 and prior to 1939 but he also testified, in effect, that he did not haul any sand from lands of Pepper. Since the Phillips claim the disputed parcel was within the lands conveyed in the 1939 Pepper deed to them, Mr. Baull could not have removed the sand from the disputed parcel. There also was no formal public road to the area until 1939. I, therefore, conclude that the Phillipses did not show by a preponderance of the evidence that sand was removed from the disputed parcel prior to 1939. Other than these uses, Phillips introduced no evidence to show that anyone occupied or used the disputed parcel prior to 1939.

The Phillipses did show various uses by them of the disputed parcel from 1939 to 1959 -- such as hunting, picnicking, swimming, sunbathing, kite flying, ball playing, fishing and shell, driftwood and wild berry gathering -- which activities were also engaged in by the general public on the state public lands. They also planted indigenous shrubs and grasses. From 1939 to 1951 they sold sand which was removed by others by hand digging, but it is inconclusive whether the sand removal was from the disputed parcel. After 1959 the Phillipses continued their prior activities (except sand removal) and planted non-indigenous plants and trees which, however, resembled the natural growths. They also placed monuments and fences on the disputed parcel. In 1962 the vegetation, monuments and fences were destroyed by a storm. Beginning in 1959 they expressed their claim of ownership of the disputed parcel to various employees of the State Highway Department.

The State never formally notified the Phillipses of the State's claim to the disputed parcel until after 1959 but as early as 1955 the Phillipses knew of a new State survey being underway. In February of 1962 the State placed signs on the disputed parcel showing State ownership and the State filed this suit in February of 1967.

The Phillipses have paid the taxes as assessed to them by Sussex County since 1939. Taxes were assessed against the disputed parcel commencing in 1960, after the 1959 deed was recorded whereby the Phillipses created a record in themselves, and until 1968.

There was some inconclusive and even inaccurate evidence that the reputation in the community was that the Williams Family owned land in the area -- even after 1932 when they conveyed the lands they claimed in this area to Pepper.

A handwritten memorandum written prior to 1949 by George E. Williams -- introduced as evidence by the Phillipses -- is more consistent with the State's position that George E. Williams did not claim the disputed 13-acre parcel than with the position of the Phillipses that he did claim it.

A 1960 survey prepared by Wingate & Eschenbach for the Phillipses follows the lines of the Pepper Survey except that Wingate & Eschenbach moved the eastern boundary of the disputed parcel eastward to the Ocean. The 1960 Wingate & Eschenbach Survey (DX 70) shows three existing markers on the disputed parcel boundary lines, which markers were from the Pepper Survey. No evidence was adduced to show any justification for Wingate & Eschenbach showing the eastern boundary of the disputed parcel to be the Ocean. The Wingate & Eschenbach Survey shows that the eastern boundary line of other lands of Phillips -- the title of which is not disputed by the State -- is the eastern line of the Fowle's Delight Patent -- which eastern line binds with the public lands and does not bind with the Ocean. This eastern Fowle's Delight Patent boundary line is as shown on the Pepper Survey.

Edgar Arthur Simpler, a co-grantee with Emmons Phillips in the 1939 deed from Pepper, testified in a 1958 trial (DX 34) that the tract claimed by George Williams was irregular in shape with a crooked boundary line which had been marked by flags in the 1930's. This testimony is in conflict with the assertion that the Williamses claimed all the land between the Ocean and the Bay from Kinksbush Gut to the U.S. Coast Guard Station.

VII

From the facts adduced at trial, it is clear that the Phillipses did not establish by a preponderance of the evidence that they, or their predecessors in title, occupied the disputed parcel by continued, uninterrupted and peaceable possession of the disputed parcel for the twenty years required to establish title by adverse possession against the State. State v. Phillips, Del. Ch., 400 A.2d 299, 303 (1979). In order to establish title by adverse possession it must be shown that the possession relied upon was open, notorious, hostile and exclusive for at least a twenty-year period. State v. Phillips, Del. Ch., 400 A.2d 299, 304 (1979); David v. Steller, Del. Supr., 269 A.2d 203 (1970); Suplee v. Eckert, Del. Ch., 160 A.2d 590 (1960).

For the claim to be open and notorious it must be so public that the owner has notice of the possession; for a claim to be hostile it must be against a calim of ownership by all others; for

possession to be exclusive it must be exclusive of the record owner and the public. Steller v. David, Del. Super., 257 A.2d 391 (1969), rev'd on other grounds, David v. Steller, supra. The adverse possession must be of a character sufficient to give the record owner notice that an adverse claim is being asserted.Lewes Trust Co. v. Grindle, Del. Supr., 170 A.2d 280 (1961), Suplee v. Eckert, supra; Marvel v. Barley Mill Road Homes, Del. Ch., 104 A.2d 908 (1954), 2 AM.JUR.2d, Adverse Possession § 48, p. 138 (1962).

Here the evidence shows that the activities supporting the claimed adverse possession of the disputed parcel by the Williamses, by the Peppers, and by the Phillipses -- at least prior to 1953 when the General Assembly repealed the statute permitting adverse possession to run against the State -- were the same activities that any member of the public would likely engage in on the public lands. These activities therefore could not put the State on notice that a private owner was claiming title to part of the public lands.

The State claims that a stricter standard of proof is required to establish adverse possession against the State than against private owners, but it is not necessary to decide this since the Phillipses have not met the burden required in private cases. See United States v. Fullard-Leo, 331 U.S. 256 (1947), Morgan v. Moseley, Ky. App., 266 S.W. 876 (1924).

XIII

The Phillipses also have not, by the preponderance of the evidence, established title to themselves based on the doctrine of presumed grant. That doctrine has long been recognized in Delaware. State v. Phillips, Del. Ch., 400 A.2d 299 (1979); Tubbs v. Lynch, Del. Super., 4 Del. 521 (1847); Wall's Lessee v. McGee, Del. Super., 4 Del. 108 (1844). However, it is clear that in Delaware, at least, the length of possession necessary to establish title by presumed grant is longer than the time period required to establish title by adverse possession. The minimum time in Delaware for title to be acquired by presumed grant is well over 30 years. Tubbs v. Lynch, supra; Wall's Lessee v. McGee, supra. A shorter period of time was not indicated in my 1979 decision in this case. My citing at 400 A.2d at 299 of United States v. Fullard-Leo, 331 U.S. 256 (1947) for the proposition that the doctrine of presumed grant is a general rule of American law does not overrule the clear holding of Delaware Courts that well over 30 years possession is necessary to invoke the doctrine.

Even if the Phillipses' activities on the disputed parcel commencing in 1959 were sufficient to notify the State of their claim -- which they were not -- these activities did not continue for even 20 years prior to 1967 when this suit was commenced -- certainly not for over 30 years. There has been no showing of adverse use for over 30 years by any claimant or any comination of claimants.

The doctrine of presumed grant is not strictly speaking based solely on possession, in any case. It is predicated on evidence being adduced which would show that a conveyance might have been executed. State v. Phillips, Del. Ch., 400 A.2d 299 at 305 (1979). It is only a presumption subject to

rebuttal. 2A C.J.S., Adverse Possession § 326, p. 117 (1972). The evidence adduced at trial was sufficient to rebut any presumption of a grant of the disputed parcel by the State to Williams, Pepper or Phillips.

IX

The Phillipses also urge that even if they cannot establish their title to the disputed parcel by adverse possession or reliance on the doctrine of presumed grant, they can nevertheless prevail because the State is barred by equitable estoppel or laches from claiming title to the disputed parcel.

If an owner of land stands by and permits another to make improvements to the land in the good-faith belief that he has a right to do so, and the owner neither objects nor interposes to prevent the work, but rather silently permits the improver to proceed, he will be estopped to deny the improver's title or to assert his own or he will be liable for the value of the improvements. 31 C.J.S., Estoppel § 94, p. 505 (1964); 27 AM.JUR., Improvements § 1-35, p. 259-285 (1940); McGinnis v. Department of Finance, Del. Ch., 377 A.2d 16 (1977); Timmons v. Cambell, Del. Ch., 111 A.2d 220 (1955); 3 Pomeroy, Equity Jurisprudence § 804 (5th ed. 1941).

It is essential that for the doctrine of equitable estoppel to be applied, the party claiming the benefit of the estoppel must be misled to his injury and change his position for the worse. He must believe and rely on the representations of the party sought to be estopped. National Fire Ins. Co. v. Eastern Shore Lab., Inc., Del. Super., 301 A.2d 526 (1973); Wilson v. American Insurance Company, Del. Super., 209 A.2d 902 (1965).

Laches is an inexcusable delay, without necessary reference to duration, in an assertion of a right. Skouras v. Admiralty Enterprises, Inc., Del. Ch., 386 A.2d 674 (1978). Unless mounting to a statutory period of limitations, mere delay is not sufficient to constitute laches, if the delay has not worked to the disadvantage of another. Shanik v. White Sewing Machine Corp., Del. Supr., 19 A.2d 831 (1941). Prejudice or injury to the party raising laches is an essential element. So long as the position of the parties is not changed and there is no prejudice from delay, the doctrine of laches is inapplicable. See 2 Pomeroy, Equity Jurisprudence § 419 (5th ed. 1941).

The doctrine of laches and equitable estoppel are closely related, laches being an application of the general principles of estoppel. Frank v. Wilson & Co., Del. Ch., 9 A.2d 82 (1939). A common element of each theory is prejudice, that one party relies on the representations of the other to his detriment.

Although the contrary is apparently the majority view, in Delaware laches and equitable estoppel can be asserted against the State in certain circumstances, albeit, with less rigidity than against a private party.Singewald v. Girden, Del. Ch., 127 A.2d 607 (1956); but see 30A C.J.S., Equity § 114, p. 34 (1965).

The only significant acts of the Phillipses on the 13-acre disputed parcel which could possibly be

considered to be a substantial change of position was their additions to their Pine Patch Cottage. In 1949 the Pine Patch Cottage was moved onto lands entirely within the bounds of the Comfort's Pasture Patent which the State concedes is owned by the Phillips. At that time, therefore, it was not located on any part of the 13-acre disputed parcel. Subsequently the Phillipses added to the Pine Patch Cottage and these additions encroached less than four feet upon the 13-acre disputed parcel. These encroachments were so slight and so difficult to see from the public highway, however, that they could not have put the State on notice of any adverse claim by the Phillipses, therefore, the State could not have been put in the stance of having stood by and voluntarily permitted the Phillipses to proceed with the improvements to their detriment. The other physical additions placed by the Phillipses on the disputed parcel consisted of strands of barbed wire and small trees furnished by the State, all of which were placed after 1960 and destroyed by the storm of 1962. These were not of a substantial character or cost, nor did they exist for a substantial period of time, nor were they made under such circumstances as would call for notice or protest from the State. 31 C.J.S., Estoppel § 94, p. 506 (1964). In fact, the Phillipses knew or should have known of the State's claim of title to the disputed parcel at this time. There is therefore no factual basis on which to assert a claim of estoppel or laches.

X

The holdings and decree of specific performance in a prior case in this Court (Emmons B. Phillips et ux v. Max Berg et al, C.A. No. 423, Sussex County, 1972, DX 197) are neither res judicata nor stare decis to the issues in this case nor are they persuasive. That action was an amicable action between parties with the same interest, that is, the quieting of title to the lands then in question. The lands in question in that case were all part of Fowle's Delight Patent and there was no allegation that they were public lands. The factual and legal issues in that case and the present case were not the same and that opinion announced no new doctrine of law. It could not, therefore, be stare decis to the issues in this case. The parties in the 1972 case and those in this case and the land in issue were also different and therefore the 1972 judgment is not res judicata to the issues here. State v. Phillips (1979) supra. Maldonado v. Flynn, Del. Ch., 417 A.2d 378, 381 (1980).

The Superior Court's opinion and decrees in Wienski v. Wilkes (C.A. 131 and 133, 1956-1958, DX 39) are also not determinative of the issues in this case nor res judicata nor stare decis because that case also involved lands which had been patented or granted to private owners and were not alleged to be part of the parcel disputed in this case. The issue there was which private owners owned lands conceded to be in private ownership, thus there was no question that the lands still belonged to the State -- as is the case here.

In that trial, it should be noted, however, Eva Williams testified, in effect, that the Williams's occupancy was limited to the acres conveyed by she and her husband to the Peppers by the 1931 and 1932 deeds. As previously noted, those deeds did not convey the disputed parcel.

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XI

This Court is aware of the holding in Green v. Cowgill, Del. Ch., 61 A.2d 210 (1948) and Marvel v. Barley Mill Road Homes, Inc., Del. Ch., 104 A.2d 908 (1954). The teaching of those cases is that the Court of Chancery does not try title to land and that claims of adverse possession are best triable at law. The instant case, however, commenced in 1967 and it has been the subject of three opinions in this Court, of which two are reported. It has also been thrice appealed to the Delaware Supreme Court and the docket here consists of 348 entries. None of the parties suggested that the case be tried in the Superior Court. For these reasons, and the Court's familiarity with the issues and the record, I did not raise sua sponte the question of whether trial should take place in this Court or the Superior Court. Originally the issues presented in this case were clearly triable here, therefore, this Court had discretion to proceed to resolve the entire controversy. Getty Ref. & Marketing Co. v. Park Oil, Inc., Del. Ch., 385 A.2d 147 (1978). Because of the unusual nature of this case, however, it should not be considered a precedent that this Court will determine adverse possession claims in other cases whether requested to do so or not.

For the reasons discussed, judgment must be entered in favor of plaintiff and against defendants. Plaintiff should submit a proposed final order. []