Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Day v. Day and others from New South Wales; delivered 20th July, 1871.

Present:

SIR JAMES W. COLVILE.
JUDGE OF THE HIGH COURT OF ADMIRALTY.
SIR JOSEPH NAPIER.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

THE Appeal in this case has been brought against an Order pronounced on the 1st September, 1869, in the Supreme Court of New South Wales, by which it was ordered that the verdict found for the Plaintiff herein be set aside and a new trial had between the parties. The action was one of ejectment, in which the Plaintiff sought to recover a plot or parcel of ground in the city of Sydney, which had formerly belonged to the late Thomas Day the elder. His residence, and the premises on which he carried on his business as a boat builder, were situate on this property. In the month of May 1842, he gave over the business and the property to his eldest son (the late Thomas Day the younger), then of age, and went to reside at a place called Pyrmont with his family. He had other property in addition to that which he gave over to his son. Thomas Day the younger, having thus been put in possession, as ostensible owner of this property, and manager of the business of boat builder, continued in the occupation from the month of May 1842 down to the time of his death in December 1864. He made his will and devised the property in dispute to his wife for life; she was the Plaintiff

in the ejectment. The Defendants claimed under the will of Thomas Day the elder, who, in 1867, procured attornments from the tenants on the property, to whom Thomas, the son, had let portions.

The trial of the ejectment took place before the Chief Justice Stephen and a jury in November 1868. Evidence was given to prove the circumstances under which Thomas Day the elder gave up the property in question to his son Thomas, and put him in possession in 1842; to show the character of his occupation, and what he did in building on the property and letting to tenants; and that these acts and dealings were known to Thomas Day the elder and had his sanction. He did not execute any deed of conveyance to his son, and consequently it was admitted on both sides that the estate of the latter at the commencement was, in law, a tenancy at will.

The occupation of Thomas Day (the son) having been shown to have continued without interruption for twenty-two years, after the commencement of the estate at will in May 1842, it was submitted at the trial on the part of the Defendants that as it appeared on the evidence that at various dates commencing in or about 1852, Thomas Day (the son) let portions of the property in dispute on yearly and weekly terms, and received rent for the same, and transferred or purported to transfer part of the land to his brother William, who let and received rent for the same, of which letting and transfer Thomas Day (the father) had notice, at the times at which they took place respectively; and as the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of Thomas Day the elder, in the occupation of Thomas Day the younger, or of tenants paying rent to him until his death in 1864—"these facts amounted to a determination of the original tenancy at will created in May 1842, and to the creation of a fresh tenancy, so that the Statute of Limitations began to run in favour of Thomas Day, the son, only from such determination." (See Respondents' case, 8th, 9th, 10th, and 11th pars.)

A nonsuit was called for, but this was refused by the Chief Justice, who, at the close of the evidence on both sides, submitted to the jury certain questions in writing, accompanied by an explanatory charge. These are stated in the Appendix, p. 7.

In answer to these questions the jury found that the authority given by the father to the son to occupy the property was not upon condition, but in perpetuity in his own right; that the acts of letting and transferring of portions of the property by the son were not in violation of the authority given by the father; that these acts were done with his knowledge and assent, and that no fresh authority was afterwards given.

The jury having returned these answers, were directed by the Chief Justice to find a verdict for the Plaintiff, which they found accordingly.

A rule *nisi* was obtained to have the verdict set aside and a new trial granted. This rule was afterwards made absolute, the Chief Justice dissenting. The majority of the Court held that the jury were misdirected as to the question whether the original tenancy at will was determined by the underletting. One of the two Judges who constituted the majority, thought that the jury were not sufficiently instructed, as to implying a new tenancy at will from the acts and conduct of the parties, without finding an actual agreement. The other Judge was of opinion that the verdict was against evidence. He does not state whether this applied to all the answers of the jury or to which in particular.

The material question in this Appeal, is whether the occupation of the late Thomas Day the younger, from May 1842 until December 1864, was such as to have conferred on him an indefeasible title to the property, so that it passed by his will to his widow and devisee. His occupation at the commencement was that of a tenant at will. His father must be taken to have been the legal owner and proprietor, subject to the tenancy at will. If before and at the time of the death of the son, the father's right of entry, or of bringing an action to recover this property, was barred, the son died seised, and the Plaintiff's title is good.

This depends on the construction and effect of the Statute of Limitations (3 and 4 Wm. IV, cap. 27).

The 2nd section of the Statute enacts that no person shall make an entry on any land or bring an action to recover it, except within twenty years next after the right to make that entry or to bring that action shall have first accrued to him.

A right of entry may be said to exist at all

times in him, under whom, and at whose will the occupier holds, for he may enter at any time, and determine his will.

But the 7th section enacts, that the right of the person entitled, subject to a tenancy at will, to make an entry or bring an action to recover the land shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

The reasonable construction of this provision is (according to Lord St. Leonards) that the right shall accrue ultimately at the end of a year, from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy.

In the present case, the right under the Statute must be deemed to have first accrued to Thomas Day the father, in May 1843, at which time the tenancy at will under which the occupation began, must, for the purposes of the bar of the Statute, be deemed to have determined. The condition of Thomas Day the son was, for these purposes, but that of a tenant at sufferance, from and after May 1843, unless and until a subsequent tenancy at will was created by a fresh agreement of the parties.

The Defendants submitted that there was a determination of the original tenancy within twenty years before the end of the period of limitation. The acts on which they relied in order to show that the original tenancy was so determined were consistent with the character of the occupation confided to Thomas the son, and were beneficial to the property. It seems difficult to conclude that acts, which were conformable (not contrary) to his father's will, which had his sanction, and so far were authorized, not wrongful, should have determined the tenancy at will. It might be more reasonable to regard them as acts of a like character, done by a mortgagor or *cestui que* trust in possession are regarded, that is to say, as impliedly authorized by the character in which, and the circumstances under which, he occupies at will.

It seems to their Lordships that as in this case the statute began to run from May 1843, the question of a subsequent determination of the

original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. In any other view, such a determination of the original tenancy after the end of the first year is *per se* irrelevant. When there is an alternative given by the statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which, if time had not been running, would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant, for *all* purposes, what he was already, from the end of the first year, for the purposes of the bar of the statute—a tenant at sufferance.

Their Lordships, therefore, are of opinion that the defence made at the trial, as stated in the 11th paragraph of the Respondents' case, cannot be maintained. It submits "that the statute began to run in favour of Thomas Day, Junior, only from such determination," *i. e.*, the alleged determination by the acts stated in the 8th, 9th, and 10th paragraphs. They are clearly of opinion that the statute began to run in favour of Thomas Day, the son, in May 1843, at the end of the first year of his tenancy, and that a subsequent determination of that tenancy could not of itself be sufficient to stop the running of the statutory bar.

When the Statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the Statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual occupation of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will.

It was contended that there was not only a determination of the original tenancy at will, but the creation of a fresh tenancy, inasmuch as after such alleged determination, "the portion of the land sought to be recovered continued to be, to the knowledge and with the sanction of Thomas Day, Senior, in the occupation of Thomas Day, Junior, or

of tenants paying rent to him until his death in December 1864."

The Chief Justice put the question in writing to the Jury whether, with the knowledge of the acts done by Thomas the son, a new authority to occupy was given by Thomas the father, and this was answered in the negative; and afterwards he put orally a question to the Jury whether a new tenancy at will was created by a new authority to occupy, then given, or fresh arrangement made between the parties? This was also answered in the negative by the jury.

Their Lordships cannot concur in the opinion of Mr. Justice Cheeke if he meant to say that both or either of these answers was contrary to the evidence; nor can they concur in the opinion of Mr. Justice Hargrave, that the jury may have been misled by not having been sufficiently instructed as to their power to imply a new tenancy at will, from the acts and conduct of the parties, without finding an actual agreement.

Assuming that there was a determination of the tenancy, and that the occupation of Thomas Day the son, continued without interruption, to the knowledge and with the sanction of Thomas Day the elder, this would constitute an occupation at sufferance to all intents, and so far as related to the purposes of the statutory bars no alteration would be made in the status of Thomas the son. The right of entry created by the seventh section of the Statute was not thereby waived, suspended, or extinguished; there was no revesting of possession; the running of the Statute was in nowise impeded. Doubtless, an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved, as ought to satisfy a Jury, that the parties actually made such an agreement; and in that event it is proper to be found by a Jury as a material fact in issue. No such evidence has been given in this case.

The express exception in favour of cases within the 14th Section of the Act, where there has been a written acknowledgment of the title, shows the pervading purpose of the Legislature in creating the bar under the previous sections. Besides, as stated by Sir W. Erle, C.J., in Locke *v.* Matthews, 13 C. B. (N. S.) 764, "if the owner enters effec-

tively and creates a new tenancy at will, he has twenty-one years from that period before he can forfeit his estate." The language and policy of the Statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will.

The question in effect is whether the prescribed period has elapsed since the right accrued to make an entry or bring an action to recover the property, where such entry or action might have, but has not, been made or brought within such period. It seems to their Lordships that in this case the prescribed period of limitation elapsed at the end of twenty-one years from the commencement of the tenancy at will; that whether this tenancy was determined by the acts of the parties is not material, inasmuch as there was not a fresh tenancy at will created within this period. They think that the findings of the jury were according to the evidence, and that there was not any misdirection on the part of the Chief Justice, by which the Jury could be supposed to have been misled. It is not necessary for their Lordships to review in detail, or further to express an opinion on the positions of law in the elaborate and able Judgment of the learned Chief Justice. It is enough to say that, in the opinion of their Lordships, there was not any misdirection upon any material point; that the findings of the Jury were warranted by the evidence, and that the verdict for the Plaintiff is a right verdict, and ought not to be set aside.

They will, therefore, humbly recommend Her Majesty that this Appeal be allowed; that the Order of the Supreme Court of New South Wales, by which the verdict was ordered to be set aside and a new trial had, be annulled; the rule *nisi* be discharged with costs; and the postea delivered to the Plaintiff to enter Judgment on the verdict.

The Appellants to have the costs of this Appeal.

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