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August 16, 1966

IN THE PRIVY COUNCIL No. 40 of 1961.

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES

BETWEEN:

WEST BANK ESTATES LIMITED Appellants

- and -

JOHN VICTOR (since deceased)
SHAKESPEARE CORNELIUS ARTHUR
(substituted for JOHN VICTOR
deceased)
ZACHARIA LAYNE and
GIDEON LAYNE Respondents.

APPELLANT'S CASE.

RECORD

1. This is an appeal from the decision of the Federal Supreme Court of the West Indies in its appellate jurisdiction for British Guiana given on 25th February 1961. The order of the Federal Supreme Court was made in two actions between the same parties which were heard together and in which only one judgment was delivered. The first (hereinafter called the "Originating Summons Action") was brought by an ex parte originating summons (1959 No. 1130 Demerara) issued by the Respondents herein (hereinafter called "the Claimants") on 27th July 1959. This summons claimed registration in the name of the claimants of the title to the land described in the summons and briefly called Lot 33, part of Plantation Maria's Lodge. The second action (hereinafter called the "Writ Action") was brought by a writ of summons (1959 No. 1719 Demerara) issued on 30th October 1959 by the Claimants against the Appellant herein (hereinafter called "the Company"). In this action the Claimants claimed possession of what was alleged to be a portion of the said land, damages for trespassing on it

pp.174,175,176

pp.1,2

pp.7,8,9

RECORD

and an injunction to restrain further trespass.

2. To the greater part of the said land the Company has made and makes no claim. What is in dispute is an irregular quadrangle shaped like a long thin triangle with the top cut off, running from west to east. This is shown coloured pink on Plan R.A.W. 2 and is over a mile long. The pink land is hereinafter called the "disputed land". It lies between land to the north known as Plantation Reynestein (or Reinstein) which is vested in the Company and land to the south known as Lot No. 33 part of Plantation Maria's Lodge cum annexis which is claimed by the Claimants and is hereinafter called "Lot 33". The main question is whether or not the Claimants have acquired a title to the disputed land by adverse possession.

Exhibit in Pocket at end of Bound Case.

3. Both actions were heard together in the Supreme Court of British Guiana by Bollers J. Some ten days were taken in hearing oral evidence. In the Originating Summons Action the learned judge held that the disputed land was not part of Lot 33 and he accordingly granted the Claimants' application for registration of title to Lot 33 defined in such a way as to exclude the disputed land. He made no order as to costs. In the Writ Action the learned judge dismissed the Claimants' claim with costs. In the Writ Action there were no formal pleadings but affidavits supporting and opposing an application for an interim injunction were by consent ordered to be treated as pleadings.

pp. 24-82 inclusive

p. 136

p. 135

p. 24

4. In the Federal Supreme Court the claimants' appeals were allowed, and a cross appeal by the Company in the Originating Summons Action (as to the description of land to be registered) was also allowed. In the Originating Summons Action the order of Bollers J. was affirmed but the description of the land to be registered was varied by including the disputed land as part of Lot 33. No order as to costs was made. In the Writ Action the Court granted a declaration that Lot 33, including the disputed land, be registered and transport therefor be registered in the claimants' name, and ordered that the action be referred to the trial judge or any

p. 174

other judge of the Supreme Court of British Guiana to assess damages. The Claimants were awarded the costs of the Writ Action and of the appeal, with the costs of the assessment of damages to be in the discretion of the Supreme Court of British Guiana. On 2nd September, 1961, the Federal Supreme Court gave the Company final leave to appeal to Her Majesty in Council. pp.178,179

5. The Writ Action, which is the more important of the two proceedings, was concerned with acts done by the Company in the course of and for the purpose of clearing and cultivating an area of some 300 acres for the purpose of growing sugar cane. By a Transport dated 2nd June, 1927, and made between Barclays Bank (Dominion, Colonial and Overseas) Ltd. of the one part and the Company of the other part the land known as Plantation Reynestein was conveyed to the Company as Parcel No. 20 of the said Transport. In 1957 the Company began to bring parts of Plantation Reynestein into cultivation, starting at the northern end. By early April 1959 the Company's servants began to clear bush and scrub at the south of Plantation Reynestein near Lot 33. The Claimants claim to be the owners of Lot 33 by descent from one John Graham who acquired the same by a Transport made on 28th August 1875. The Claimants alleged that in the course of clearing the scrub and bush the Company's servants crossed the boundary between Plantation Reynestein and Lot 33.

pp.196-202 inclusive

p.200; line 36 et seq.

p.46; lines 2-4

p.46; line 20 et seq.

pp.180,181

6. The Company denied that its servants had ever trespassed beyond the boundary of Plantation Reynestein as defined in the Transport dated 2nd June, 1927. Both Bollers J. at first instance and Marnan J. who delivered the only judgment in the Federal Supreme Court (in which Hallinan C.J. and Lewis J. concurred) held that this contention was correct. Marnan J. held that the Claimants had entirely failed to show that the Transport to John Graham dated 28th August 1875 included the disputed land. He also held that the boundary referred to as the "hundred rood line" (as mentioned in the next paragraph hereof) up to which the Company had caused its servants to work, and which they had never crossed, was either on or within the true southern boundary of Plantation Reynestein as conveyed by the Transport dated 2nd June 1927.

pp.196-202

p.120; lines 17-20

p.152; lines 43-47

p.153; lines 5-13

7. The Claimants had, however, alleged (although the matter was never plainly raised on the pleadings) that they had in fact used and to some small extent cultivated land up to a dam, which was a physical feature on the ground and extended to about half the length of the disputed land, in the belief that the dam was the true northern boundary of the disputed land. The position of the dam is shown on Plan D by a red line running between two blue lines and by the word "dam" in two places. The "hundred rood line" was so-called because it represented a line from east to west drawn parallel to the northern boundary of Plantation Maria's Lodge and at a distance of 100 roods to the north of it. Plan D also shows this line. It is coloured red and bears the legend "N. 284° 09' 23" (True)". The origin of this line is the Transport of 8th March 1836 whereby the owner of Plantation Reynestein conveyed 100 roods of that Plantation to the then owner of Plantation Maria's Lodge, as appears by Parcel 20 in the Transport dated 2nd June 1927. The dam and the hundred rood line respectively form the northern and southern boundaries of the disputed land.

Exhibit in Pocket at end of Bound Case pp.224,225

8. The Claimants based their claim to title on section 3 of chapter 184 of the Ordnances of British Guiana. This provides that "title to land.....may be acquired by sole and undisturbed possession, user or enjoyment for thirty years, if such possession, user or enjoyment is established to the satisfaction of the Court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose". Their claim to be entitled to sue in trespass was based on section 5 of the same Ordinance. This bars an owner's right of action to recover possession of land after twelve years from the date on which the right of action accrued.

9. The evidence on behalf of the Claimants was given in general terms referring to Lot 33 and was to the effect that for upwards of 30 years they had cultivated small plots of land on Lot 33; but it was never specifically stated that they had cultivated parts of the disputed land. Their evidence was that in accordance with the primitive habits of farming employed by them, each plot was only cultivated for about one year and was then left for about eight years during which period bush again grew over the plot and gave it new

p.32; lines 29-35

fertility. However, evidence was also given that there were spice trees on the dam and cocoa trees in the trench south of the dam which trees the Claimants alleged they owned, and that the Company's servants broke down spice and coconut trees in the course of working on the disputed land. The Claimants also alleged that they had from time to time over a long, though indefinite, period of years cut timber, wood and grass of useful kinds which grew naturally in the swamps and that they had used or sold the produce they obtained in this way. The Claimants also alleged that they had been in the habit of fishing in various places in the swamp and that rice had been grown on part of Lot 33, either between 1920 and 1925 or more recently in the 1950's.

p.37; lines 36,37

p.32; lines 22,23

10. Bollers J. did not accept parts of the evidence given on behalf of the Claimants as to acts of possession done by them on the disputed land and found other parts of their evidence conflicting. He held, however, that taking the best possible view of the evidence such acts did not amount to any ousting of the true owner of the disputed land nor to any sufficient dominion to amount to possession or control of the disputed land by the Claimants. He found that there was no evidence as to the construction of the dam; its date of building was unknown, save that it was between 1854 and 1891, and the purpose for which and the persons by whom it was made also remained unknown. In all the circumstances the learned judge held that the Claimants had not dispossessed the true owner. They had never attempted to enclose or use the disputed area as a whole and could not point to any identified area which they had consistently occupied for upwards of 30 years, nor for upwards of 12 years nor indeed for any substantial period. Bollers J. went on to hold that since the Claimants could not show any paper title to the disputed land they could not be constructively in possession of it and accordingly he dismissed the action for trespass with costs. Bollers J. made an order on the Originating Summons defining Lot 33 in such a manner as to exclude the disputed land. However, the description approved by Bollers J. included (incorrectly as the Company contends) land at the western end of Lot 33 up to the backline of Plantation Maria's Lodge, whereas the correct backline of Lot 33 should be that of Plantation Reynestein.

p.130; lines 26-33

pp.129-133 inclusive

p.133; lines 16-32

p.134; lines 18-22

11. On appeal to the Federal Supreme Court

Marnan J. (with whom the other members of the court, Halliman C.J. and Lewis J. concurred) agreed with Bollers J. that the "hundred rood line" was correct according to the paper title and formed the minimum southern boundary to Plantation Reynestein, and also that the Claimants had not established any clear northern boundary to Lot 33. Marnan J. further held that the dam was of an origin too uncertain to be held to constitute the boundary as set out in any of the Transports. However the learned judge did hold that the dam was a "farmers' boundary", although he accepted that the Claimants had never cultivated, enclosed or made use of the whole of the land on the southern side of the dam. Marnan J. went on to hold that Bollers J. had correctly decided that the Claimants had to show 30 years' occupation in order to establish full title in themselves which would entitle them to registration as owners under the Originating Summons, and to show 12 years' occupation in order to give them a right to sue in trespass.

p.152; lines 46,47
p.153; lines 5-12
p.154 lines 21-23 and 37-39
p.154, line 49
p.155, lines 15-19

12. Marnan J. then turned to issues upon which he disagreed with the Trial Judge. He accepted that the Claimants had never enclosed or cultivated the whole of the disputed land and that in law a trespasser who in fact occupies one part of a defined parcel of land does not thereby establish possession of the whole of the parcel; but he went on to hold that "the principles relating to trespassers have no application to the present case". The learned judge relied on the fact that the Company, while not admitting, did not really challenge the claim of the Claimants to be owners of Lot 33. He held that the intention of the Claimants was to occupy land to which they thought they were legally entitled. The learned judge went on to hold that so far as the Claimants did occupy the disputed strip they did so in the bona fide belief that their rights extended up to the dam. The learned judge expressed himself as relying on a passage in the speech of Lord Watson in Lord Advocate -v- Wemyss /1900/ A.C. 48 at 68. He thus concluded that the position of the Claimants was different from that of a mere trespasser.

p.156; lines 40-46
p.157; lines 1-4
p.157; lines 5-7
p.157; lines 38-46
p.158; line 22
p.158; lines 44,45

13. Marnan J. went on to hold that the Company's predecessors in title had abandoned the land south of the dam by virtue of its existence as a visible obstacle and the evidence that neither

p.159; lines 38-47

party had ever asserted any claim of right to land on the other side of the dam. He also held that the true northern boundary of Lot 33 was never established at all, and that therefore the Claimants did not bear the onus of proving user sufficient to constitute dispossession, although he had accepted that the hundred rood line was the true southern boundary of Plantation Reynestein according to the Company's paper title. He thus concluded that all that the Claimants had to prove was that they had so occupied the land both north and south of the hundred rood line as to give rise to a prescriptive title under section 3 of Chapter 184 of the Ordinances. The learned judge then turned to deal with a point arising under Thomas -v- Thomas (1855) 2 K. & J. 79 which is not material to the further consideration of this matter.

p.160; lines 44-46

p.160; lines 36-39

p.152; lines 46,47

14. The learned judge then set out the acts of user and enjoyment relied upon by the Claimants. He criticised the findings of Bollers J. upon the evidence but did not expressly dissent from them. Marnan J. then correctly held that all the acts proved by the Claimants should be looked at as a whole and stated, relying upon Lord Blackburn's speech in Lord Advocate -v- Lord Blantyre (1879) 4 App. Cas. 770, that "the more ways in which a possessor treats land as his own the more clear the inference of adverse, that is to say exclusive and proprietory, possession". He therefore held that Bollers J. misdirected himself in four respects: (a) in treating the Claimants as trespassers in respect of the disputed strip; (b) by applying to evidence of user standards appropriate to proof of dispossession by user; (c) by misconstruing Section 3 of Chapter 184 of the Ordinances; and (d) by refusing to treat the Claimants acts of user as a whole.

pp.164,165,166

p.165; lines 29-31 and lines 40-43

p.168; lines 17-19

15. Marnan J. then held that the presence of the dam was evidence that the Claimants were in possession of the land to the south of it, although he had agreed that there was no evidence about the construction of the dam. He went on to hold that the Claimants' evidence that they used the whole of Lot 33 including the disputed strip was fortified by the fact that they found a "ready-made northern side-line on the land". The learned judge considered that the Claimants had discharged the onus that lay upon them under

p.169 lines 42-46

p.170; lines 38-42
p.171; lines 36-39

section 3. The Claimants were peasant farmers who could not be expected to bring the land into close cultivation. He held that by taking natural products from time to time from woodland or rough country the Claimants had made a user of the land up to the line of the southern edge of the dam which was normal for persons of their means and class and that they had thereby acquired a title to the disputed land under Section 3 of Chapter 184. As above mentioned no separate judgment was delivered by either Hallinan C.J. or Lewis J., who simply agreed with Marnan J.

16. The Company contends that Marnan J. erred in law in three major respects: first, in holding that although the Claimants (unlike the Company) had no paper title to the disputed land yet the Claimants were not trespassers when they entered upon it; second, in holding that the intention of the Claimants affected the quality of their acts of possession; and third, in applying standards of user varying with the means and class of the persons doing the acts. As to the first head the Claimants could not claim to occupy the disputed land as of right since they had no title to it; they never claimed to occupy as tenants or licensees; there is no other category of occupier into which the Claimants could fall save that of trespassers. As to the second head the intention of an occupier, however bona fide in the sense of not fraudulent or relying on force but in a genuine belief in entitlement, cannot affect the quality and effect of his acts. No man can be held to be in occupation of land which he does not enclose, cultivate or make regular use of merely because he intends in his own mind to occupy or acquire that land or believes (erroneously) that it is his.

17. As to the third head the Company contends that the estate or wealth of any person cannot affect the rights and liabilities arising out of his acts. Occupation of land remains occupation whether by the most noble and powerful subject in the realm or by the poorest and most humble of Her Majesty's subjects. There cannot be one test for a peasant farmer and another for a company commanding substantial assets.

18. The Company further contends that, as was in substance held by Bollers J., the Claimants

entirely failed to adduce any satisfactory evidence that they or their predecessors had ever had sufficient possession, user or enjoyment either of any identified part of the disputed land or of that land as a whole for any requisite period. At most, there was evidence that they did intermittent acts on unidentified and varying portions of Lot 33 (and so, perhaps, of the disputed land) for periods falling far short of any relevant statutory periods. Further, on the concurrent findings of both courts below these acts were done on land which in law was vested in the Company. They were done without lawful authority and were accordingly acts done by trespassers. The law should be slow to treat intermittent acts by trespassers on unidentified portions of a large area of land as amounting to possession of the whole area merely because the trespassers mistakenly believed the land to be theirs. The law should also be slow to accept the doctrine apparently laid down by the Federal Supreme Court that a landowner will be treated as having abandoned any part of his land which lies on the further side of a physical obstacle on his land such as the dam in this case merely because there is no evidence of his having crossed the obstacle "in the sense of asserting a claim of right on the other side". Such doctrines, the Company contends, are novel, and create perils for landowners without conferring any justifiable advantages on others.

19. The Company further contends that Marnan J. erred in law in his assertion that Bollers J. had applied the wrong principles of law in relation to section 3 of Chapter 134 of the Ordinances. First, the decision of Bollers J. was based upon his finding that the Claimants "have not shown by an unequivocal act or acts that they were asserting a right to the disputed area for the statutory period and have failed to prove open, actual, undisturbed occupation of a definite area adverse to the true owner". This finding correctly applies section 3 on its true construction. Secondly, in any event the word "sole" in the phrase "sole and undisturbed possession, user or enjoyment" in section 3, taken in its context, shows that there must be a discontinuance of the actual or constructive possession of the true owner, or a dispossession of him, coupled with the squatter taking a possession adverse to the true owner. Accordingly, in so far as Bollers J. relied upon the concepts of discontinuance, dispossession and adverse

possession, he did so correctly.

20. The Company therefore humbly submits that this Appeal should be allowed and that the judgment of the Federal Supreme Court should be reversed or varied by dismissing the Writ Action No. 1719 of 1959 and by remitting the Originating Summons No. 1130 of 1959 to any judge of the Supreme Court of British Guiana to make such declaration of the Claimants' title to Lot No. 33 part of Plantation Maria's Lodge cum annexis as may accord with the order of Her Majesty in Council and by substituting appropriate orders as to costs for the following among other

R E A S O N S

(1) BECAUSE the Claimants failed to establish any sufficient possession, user or enjoyment for 12 years or more (or, a fortiori 30 years or more) either of the disputed land as a whole or of any identified part of it.

(2) BECAUSE such acts of possession, user or enjoyment of the disputed land or any part of it as the Claimants established were too ill-defined, transitory and insignificant to amount to a sufficient possession, user or enjoyment of the disputed land or any part of it.

(3) BECAUSE no intention by the Claimants to possess, use or enjoy the disputed land or any part of it would suffice without a sufficient actual possession, user or enjoyment.

(4) BECAUSE no belief by the Claimants that the disputed land was theirs could make sufficient acts that otherwise would be insufficient.

(5) BECAUSE in doing any acts upon the disputed land the Claimants were trespassers throughout.

(6) BECAUSE the means or class of the Claimants are irrelevant in determining the sufficiency of any possession, user or enjoyment of the disputed land.

(7) BECAUSE the Company never abandoned the disputed land or any part of it.

(8) BECAUSE the decision of the Federal Supreme Court was contrary to the weight of the evidence and was based on incorrect inferences from the evidence.

(9) BECAUSE the decision of Bollers J. was right.

(10) BECAUSE the decision of the Federal Supreme Court was wrong.

R.E. MEGARRY.

JEREMIAH HARMAN.

No. 40 of 1961

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CASE FOR THE APPELLANTS

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