P.C.
GHS. G. 2

Judgment
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 a Company incorporated in England and carrying on business in this Colony at 22, Church Street, Georgetown (Defendants) Appellants

- and -

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

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the judgment of the Federal Supreme Court dated the 25th day of February 1961 and the order thereon entered on the 4th day of July 1961 whereby the Respondents-Plaintiffs appeal from the judgment and order of the Supreme Court of British Guiana dated the 4th day of April 1960 was allowed and the Appellant-Defendants cross appeal was dismissed. pp.145-173 pp.174-176 pp.96-136

2. This case arises out of a dispute as to the ownership and possession of a strip of land on the boundary between two estates known as Reynestein (the property of the Appellants) and Lot 33, Maria's Lodge (the property of the Respondents).

3. Prior to 1836 Lot 33 had formed part of the Reynestein Estate. In that year 'a piece of land of one hundred roods facade by seven hundred and fifty roods in depth .... commencing from the northern boundary or side line of Plantation Maria's Lodge and extending northward' was conveyed by the owners of Reynestein Estate to Maria's Lodge. Subsequently the land so conveyed was divided into Lots and in 1875 one Graham, the predecessor in title of

KLASS MARK ACCESSION NUMBER
R 87170
GNS 6.2

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
25 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

the Respondents, acquired Lot 33 which being the northern-most bordered on the Reynestein Estate. In 1927 the Appellants acquired the Reynestein Estate less the land alienated in 1836 which was described in the transport as "containing 100 roods by admeasurement commencing from Plantation Maria's Lodge and extending thence northwards". On the ground at a distance of a little more than 100 roods north of the northernmost boundary of the Old Maria's Lodge was a bank or dam with two flanking ditches roughly parallel to the boundary. The area in dispute is the portion between a line drawn 100 roods from the Old Maria's Lodge boundary and parallel to it and this dam.

4. In 1958 the Appellants for the first time crossed the dam and carried out operations south of it. Their entry was disputed by the Respondents, who on the 27th day of July 1959

pp. 1-2 issued an originating summons claiming registration of their Title to Lot 33 which was opposed by the

pp.7-9 Appellants, and on the 30th day of October 1959 issued a writ claiming 'as the legal and beneficial owners in occupation and possession for upwards of 30 years nec clam nec precario' of Lot 33.

(1) Possession of a portion of the land occupied by the Appellants as trespassers;

(2) $50,000 damages for trespass by entering cutting trees and digging trenches and canals upon that portion of the land; and

(3) an injunction restraining the Appellants from committing further trespass.

p. 7 5. An interim injunction was obtained and the
pp.9-11, affidavits sworn on this application were treated
14-22 as the pleadings in the case and both actions came on for hearing on the 21st day of December 1959. (On the 23rd day of December the injunction was discharged as it was disclosed that the Appellants had already completed all the clearance and digging

pp.24-7 they intended to do on the disputed strip). Both sides called evidence largely as to the various

pp.72-82 plans of the area and the existence of 'paals' from previous surveys. The learned Trial Judge called the Commissioner of Lands and Mines Department to produce all relevant plans. The entry by the

Appellants to the land in dispute was admitted.

6. The learned trial Judge (Bollers Ag. J.) held that on the documents and plans the boundary between the estates 'by transport' was the 100 rood line and not the dam and he then went on to consider whether the Respondents had established a prescriptive title to the disputed land. Section 3 of Cap. 184 of the Laws of British Guiana states:-

> "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".

The learned trial Judge held that the burden of proof on the Respondents was to show 'that they were in adverse possession of the disputed area of the land nec vi, nec clam, nec precario for a period 30 years ..... or whether they were in possession nec vi, nec clam, nec precario for a period of twelve years which would confer upon them negative rights and upon which they could properly found and maintain an action for trespass against the rightful owner of the land.' He further held that 'there must be a clear case of dispossession of the true owner by the party claiming to be in possession.' p.125 L. 33- p.126 L.3

7. The evidence on which the Respondents relied to show their possession was:

(1) Cultivation

(2) The cutting of timber, wood and grass.

(3) Fishing in ponds.

(4) The growing of rice.

(5) The presence of the dam along what they claimed to be the northern boundary of Lot 33.

The learned trial Judge as to the first four headings held that although there were such acts they were not definite enough as to a specific area or for sufficient length of time to establish adverse

possession. As to the dam he held:

p.132 L.36-
p.133 L.39

"I have already found from the evidence of Edghill, the Government Surveyor, that there is no certainty that this dam is a sideline dam. Mr. Burnham /Counsel for the Respondents/ relies strongly on the evidence in this case that a sideline dam is a dam which usually divides two estates, and which is formed by the neighbouring or adjoining owners of land digging trenches and throwing up dirt from each side to form a dam. In this case it is usual to find that the boundary between the two estates is a notional line running along the centre of the dam. Mr. Burnham also relies on the dictum of Comacho C.J. in Lall Bahadue Singh v. McPherson reported at page 87 in 1957 B.G.L.R. where he states that when the dam is complete it is owned in moieties by the adjoining land owners who constructed it. This dam is not shown in Fraser's plan of 1854, but is shown on Fowler's plan of 1891. Some time between those years this dam must have been constructed. In 1836 when the 100 roods of Reynestein was conveyed to the proprietors of Maria's Lodge, lot 33 became part of Plantation Maria's Lodge cum annexis. It could then be reasonably argued that it was a dam dividing the two estates of Reynestein and Maria's Lodge.

There is no evidence, however, as to how this dam was constructed, who built it and for what reason it was built, and in my opinion it would be wrong and unsafe for me to find that it was in fact a sideline dam. It may very well be that the Plaintiffs always regarded this dam as the northern boundary of lot 33, and the evidence shows that the servant or agent of the Defendant Company, William Wilson, never cut wood to the south of that dam, and that Cockfield, one of the predecessors in occupation and/or title of the Defendant Company, never worked to the south of the dam, but there is no convincing evidence that it was a side-line dam dividing the two estates, and that the Plaintiffs and Defendant Company or their predecessors in title agreed that the dam should form the northern boundary of lot 33.

The presence of the dam, therefore, unlike

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
25 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

87170

a fence, is no evidence that the Plaintiffs reduced the land south of it into their possession, and as a result dispossessed the true owner of the land south of the dam, and that they erected the dam in order to exclude not only third parties but also the true owner."

8. Finally the learned trial Judge held 'I find that the Plaintiffs 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 definitive area adverse to the true owner,' and dismissed the action. p.135 LL.34-39

9. The Respondents appealed to the Federal Supreme Court of the West Indies on the following grounds:-

"(i) The decision is against the weight of evidence. p.141 L.40-p.147 L.24

(ii) The learned trial Judge erred in law and misdirected himself in holding that on the facts accepted by him the Plaintiffs had not been in occupation of the disputed area nec clam, nec vi, nec pracario.

(iii) The learned trial Judge erred in law and misdirected himself in holding that the admitted trespass committed by the Defendants was highly technical and in refusing to award damages therefor.

(iv) That the learned trial Judge erred in law in dismissing the action for trespass after acts of trespass were admitted by the Defendants, and were so found by him, however highly technical.

(v) The decision of the learned trial Judge was erroneous in point of law and was unreasonable having regard to the evidence when he awarded costs in favour of the Defendants on the claim for trespass and refused to award costs in favour of the Plaintiffs in the application for registration of title".

10. Marnan J. giving the judgment of the Court held as follows:-

p.152 L.33-
p.153 L.22

"The first was whether it was possible to determine the boundary between lot 33 and Reynestein according to transport. The second was whether the Appellants /Respondents herein/ could establish a prescriptive title to the land up to the line of the dam.

On the first question, the Appellants /Respondents herein/ contended for the line of the dam, while the Respondents /Appellants herein/ contended for the hundred rood line. As already pointed out, the Respondents /Appellants herein/ were in much the stronger position..... The learned judge held, as I think correctly; that the Respondents /Appellants herein/ successfully proved, by surveyor's evidence, that the hundred rood line was their minimum southern boundary, by virtue of their transport of 1927. The Respondents' /Appellants' herein/ attitude was that, having established their own southern boundary, they were not concerned with the precise location, by transport, of the northern side line of lot 33. Moreover, the Appellants /Respondents herein/ called no expert evidence to relate the position of their northern side line to their transport of 1875. Fraser's plan did not enable them to do so, and I think that the Judge was again right in holding that Fowler's plan, on which the Appellants /Respondents herein/ sought to rely, was evidence only of occupation, and not of boundaries.

I therefore hold that the judge decided correctly that the only boundary by transport which was established by the evidence was the Respondents' /Appellants' herein/ southern sideline, which depended on their transport of 1927. It by no means follows that that was the same boundary as agreed upon by the parties to the conveyence of 1836. Let it be said at once that there was not enough evidence to establish what that agreement was.

.....

I repeat, that there is not enough evidence to relate the dam to whatever was agreed as to the new boundary in 1836. But, conceding that the dam has no probative force in considering the question of the boundary by transport, I consider that its existence since, at least, 1891, must have had a most important bearing on what the occupiers of lot 33 believed it to represent, and on the likelihood of their having used as their own all the land up to the southern ditch. If the dam was not a lawyer's, or a surveyor's boundary, it was a farmer's boundary. It is not disputed that it was treated as such, so far as it ran, by the farmers living on either side of it for more than the first half of the present century. Nor is there any evidence that anyone ever crossed the line of the dam from either side, throughout the whole depth of the estate, until 1958, when the Respondents' /Appellants' herein/ agents were immediately challenged by the Apellants /Respondents herein/. p.154 L.37 - p.155 L.8

.....

The Respondents' /Appellants' herein/ substantial point was that even on the most favourable view of the Applicants' evidence, it failed to establish the type of occupation necessary for the acquirement of title by prescription, save in respect of the area of close cultivation. They contended firstly that such occupation must be so close and continuous as to operate in law as a dispossession of the true owners, and secondly that it must be hostile to the true owners. p.156 LL.8-17

.....

I therefore think that the position of the Appellants /Respondents herein/ is different from that of a mere trespasser, because it is plain upon the evidence that at all material times they not only believe, but had good reason to believe, that their legitimate boundaries in the north and in the west were the line of the dam, and the backline. I do not suggest that it follows they should be held to be in constructive possession of any land they did not in fact use or occupy. But there are two important matters which, in my p.158 L.44 - p.159 L.20

opinion do follow. The first is that their animus possidendi extended to a well defined area on the ground, and when one comes to consider whether de facto occupation and user is sufficient to establish a prescriptive claim, the intention with which the land was so occupied is a most important element (Littledale v. Liverpool College supra). The second is that the question of dispossession cannot be approached in the same way as if the Appellants /Respondents herein/ were to be regarded as deliberate trespassers.

.....

p.159 LL.36-47 Mr. Elliott submitted that there was no evidence of discontinuance of possession in the present case. But in my view the only reasonable inference to be drawn from the admitted alienation of 1836, coupled with the long existence of the dam as a visible obstacle, and the evidence that neither neighbour ever crossed it in the sense of asserting a claim of right on the otherside, is that at, or some time after the alienation of 1836, and certainly before 1891, the Respondents /Appellants herein/ predecessors in title abandoned the land south of the dam.

.....

p.163 L.17 - p.164 L.7 What, then, is the nature of the possession which the Appellants /Respondents herein/ had to prove in this case. I think the answer is to be found in the plain words of Section 3 of Cap. 184. The learned judge expressed the onus upon them in varying terms, other than those of Section 3, but I make no criticism in that respect. It was undisputed that the Appellants' /Respondents' herein/ possession, user or enjoyment was nec vi, nec clam, nec precario, and that it had continued in point of time, since 1875; and more particularly in the cultivated area since 1891. The evidence was that it was sole and undisturbed, and it was not suggested that it was taken or enjoyed by fraud, or by consent or agreement relating only to possession. In effect, the only issue between

the parties was whether that possession, user, and enjoyment, which was not challenged in respect of the area of close cultivation, was confined to that area, or whether it extended to the full depth of the estate.

.....

I therefore agree with Mr. Burnham's submission that the Appellants' /Respondents' herein/ conduct anduser must be regarded as a whole. Act cannot be isolated from act, nor year from year. If the test is whether the Appellants' /Respondents' herein/ conduct with regard to the land south of the dam should have made it plain to the owners of Reynestein that their title to that land was in jeopardy, all the use made of that land in the present century must be taken into account, although only the land comprised in the disputed strip, and the period since 1929 are strictly in question. If the test is whether the Appellants /Respondents herein/ have brought themselves within the terms of Section 3 of Cap. 184 the same considerations apply. I therefore come to the conclusion that the learned judge misdirected himself in dealing with the issue of the Appellants' /Respondents' herein/ possession and user of the land in the following respects. He treated the Appellants /Respondents herein/ as trespassers ab initio in respect of the disputed strip. He applied to the evidence of user the standards appropriate to proof of dispossession by user. He failed to give proper effect to the meaning of Section 3 of Cap. 184. And he declined to consider the Appellants' /Respondents herein/ acts of user as a whole, both as to time and to space. p.168 LL.17-43

.....

After careful consideration of the evidence in this case I have come to the conclusion that the Appellants /Respondents' herein/ did succeed in discharging the true onus that lay upon them. I shall not repeat the language of Section 3, or the respects to which it was unchallenged that the Appellants p.171 L.20-p.172 L.2

/Respondents herein/ had fulfilled its requirements. I do not presume to dissent from the learned Judge's findings as to reliability of the various witnesses. But on an analysis of the evidence I think that the greater part of the Appellants' /Respondents' herein/ evidence as to user stands uncontradicted. Woodlands and rough country can be useful to a farmer if they afford natural products which he wishes to take from time to time leaving it to nature to replenish her own supplies. I think that the Appellants /Respondents herein/ proved that they had made what was, for persons of their means and class, normal user of the land up to the line of the southern ditch, and I hold that they had, long before the commencement of either action, acquired a title to the land bounded on the north by that line, on the west by the back line; on the south by their boundary with lot 32, and on the east by the Demerara river, pursuant to Section 3 of Cap. 184. Since it was held, and indeed not disputed, that all the parties interested were before the Court, the Appellants /Respondents herein/ are entitled to a declaration to that effect pursuant to Section 4 (a) of Cap. 184."

11. The question of damages was remitted to the trial Judge.

pp.178-179 12. The Appellants were granted Final Leave to appeal to Her Majesty in Council by the Federal Supreme Court of the West Indies on the 2nd day of September 1961.

13. The Respondent John Victor having now died it was ordered by Order-in-Council dated the 27th day of April 1965 that Shakespeare Cornelius Arthur ought to be substituted in place of John Victor deceased as Respondent and the appeal to stand revived accordingly.

14. The Respondents humbly submit that this appeal should be dismissed, with costs for the following among other

R E A S O N S

(1) BECAUSE the Appellants had failed to establish that the disputed land fell within the boundaries of the Reynestein estate after 1836.

(2) BECAUSE the Respondents had established a prescriptive right to the disputed land.

(3) BECAUSE the Respondents had acquired title to the disputed land by virtue of Section 3 of Chapter 184 of the Laws of British Guiana.

10 (4) BECAUSE the Appellants right of action to recover possession of the disputed land from the Respondents was barred by Section 5 of Chapter 184 of the Laws of British Guiana.

E. F. N. GRATIAEN

THOMAS O. KELLOCK

No. 40 of 1961

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES

B E T W E E N:

WEST BANK ESTATES, LIMITED, a Company incorporated in England and carrying on business in this Colony at 22, Church Street, Georgetown (Defendants) Appellants

- and -

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

---

C A S E FOR THE RESPONDENTS

GARBER, VOWLES & CO.,
37, Bedford Square,
London, W.C.1.