Privy Council Appeal No. 40 of 1964

Paradise Beach and Transportation Company Limited and others – – – – – – – – *Appellants*

v.

Cyril Price-Robinson and others – – – – – *Respondents*

FROM

THE SUPREME COURT OF THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY 1968

Present at the Hearing:
LORD PEARCE
LORD UPJOHN
LORD PEARSON
[*Delivered by* LORD UPJOHN]

This is an appeal from the judgment delivered on 19th December 1963 of Scarr J. sitting in the Supreme Court of the Bahamas on the Equity Side whereby he dismissed the appellants' claim under the Quieting Titles Act 1959 to be entitled to seventeen twenty-first undivided shares in a strip of land known as Lot No. 8 running from sea to sea across Hog Island (recently renamed Paradise) and containing about 32 acres.

Until the island was developed recently the land in question was very poor, as the learned judge said in the course of his judgment " it was mostly coral rock with only pockets of soil and from the monetary point of view it was, prior to the last war, practically worthless ". Their Lordships have been informed that it is now very valuable.

The petitioners claim undivided shares in the land under the Will of one John Alexander Burrows (who will be referred to as the Testator) who died on 23rd October 1913 having by his last Will dated 22nd November 1912 devised some lands including Lot No. 8 to certain named children and grandchildren as tenants in common subject to a life interest in an undivided one-third part in favour of his widow who died in 1918 without ever having entered into possession so that her interest may for the purposes of this appeal be ignored.

The learned judge in his judgment traced the complicated devolution of the undivided shares claimed by the petitioners and held that their claim so far as the paper title was concerned was established subject only to the fact that 23/105 shares part of the 17/21 (or 85/105) shares of the petitioners had escheated to the Crown, as one of their predecessors (Clarence Azgin mentioned in the Testator's Will) had not only died intestate without issue but was illegitimate.

There has been no appeal from those findings nor has there been any dispute that the respondents who are the successors in title of Roseliza Price (who will be referred to as Roseliza) and her sister Victoria Hanna (who will be referred to as Victoria) both original takers under the Testator's Will were each entitled to 10/105 undivided shares in the land. The respondents however claim that Roseliza and Victoria and their successors have been in exclusive possession of the land since the death of the Testator or for more than 20 years before action brought and that the title of the

petitioners is barred by the relevant Statutes of Limitations. That is the sole question before their Lordships but it is divided into issues of fact and law; counsel for the second appellant in the main developed the challenge to the correctness of the findings of fact of the learned judge on the question of possession as well as his conclusions upon the relevant law while counsel for the remaining appellants developed his argument upon the footing that the judge erred only in law.

Their Lordships must logically deal with the issues of fact first.

It is common ground that during the lifetime of their father the Testator Roseliza and Victoria farmed the land but upon their father's behalf so that their possession was his possession but after his death they remained there carrying on the farming, not living there for until the early 1920s there was not even a house on the land which was then erected by Roseliza, but visiting and farming the land by day. So there is no doubt that they were in possession throughout but quite rightly, the learned judge before deciding whether this possession was exclusive, recognised that he must examine the evidence tendered on behalf of the petitioners supporting the view that some of their predecessors had in fact entered into possession. After careful examination of the facts he reached the clearest conclusion that apart from the possible exception of the Testator's eldest son Nehemiah until his death in 1917 and his (Nehemiah's) son, referred to in the judgment as cousin John (for John not only succeeded to his father's undivided share but as heir at law of certain other original takers to some other undivided shares as well), until the latter's death in 1939, none of them ever took possession of any part of the land.

The learned judge reviewed the evidence in relation to cousin John's share in great detail. He heard and saw the witnesses and had as he expressed it " no hesitation in rejecting the bulk of the evidence given on behalf of cousin John ". He dealt with the evidence that cousin John did visit the land on occasions and that he may have received occasional gifts of vegetables from his aunts Roseliza and Victoria but he reached the conclusion that " on the evidence these sporadic acts fall far short of possession even though one must take a most favourable view of a documentary owner ". It was argued that these findings were wrong, that all the petitioners entered into possession in or after 1913, alternatively that cousin John did or that two other of the original takers (Miriam Stuart and Veronica Murray) did so and the evidence was reviewed before their Lordships. It was said that having regard to the nature of the land, these visits and receipt of presents and so on established possession. Their Lordships are quite unable to accept this argument; the matter is one of fact and they can feel no doubt but that the learned judge reached the correct conclusion that none of the petitioners' predecessors including cousin John ever entered into possession of the land. The fact that the learned judge occasionally expressed the view in his judgment that cousin John was a possible exception from his general finding of non possession makes no inroads upon his clear conclusion as to cousin John's non entry into possession.

Having dealt with the evidence on behalf of the petitioners' predecessors the learned judge returned to a consideration of the nature of the possession of Roseliza and Victoria and after a detailed review of the evidence reached this conclusion

> " it is clear beyond any doubt that Roseliza and Victoria entered into exclusive possession of this land and the evidence substantiates such possession from 1913 until their deaths and since then by their successors in title."

Their Lordships see no reason to doubt the correctness of that finding and must turn to the argument addressed to them on that footing by counsel for the appellants.

The essence of the argument was that although the respondents and their predecessors had been in exclusive possession since 1913 yet for the purposes of the relevant Statutes of Limitation time has not yet started to run in favour of the respondents.

The relevant enactments are to be found in the Real Property No. 1 Act enacted in 1833 (which will be referred to as the 1833 Act) and the Real Property Limitation (1874) Act (which will be referred to as the 1874 Act) and are for all relevant purposes in the same terms as the Real Property Limitation Acts of 1833 and 1874 formerly applicable to this country.

The first relevant section was section 2 of the 1833 Act but that was repealed and re-enacted by section 1 of the 1874 Act and their Lordships propose to set out that section first in its logical place.

> " 1. After the commencement of this Act no person shall make an entry or distress or bring an action or suit, to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

The following sections are all in the 1833 Act:

> " 3. In the Construction of this Act the Right to make an Entry or Distress or bring an Action to recover any Land or Rent shall be deemed to have first accrued at such Time as hereinafter is mentioned; (that is to say), when the Person claiming such Land or Rent, or some Person through whom he claims, shall, in respect of the Estate or Interest claimed, have been in possession or in receipt of the Profits of such Land, or in receipt of such Rent, and shall while entitled thereto have been dispossessed, or have discontinued such Possession or Receipt, then such Right shall be deemed to have first accrued at the Time of such Dispossession or Discontinuance of Possession, or at the last Time at which any such Profits or Rent were or was so received; and when the Person claiming such Land or Rent shall claim the Estate or Interest of some deceased Person who shall have continued in such Possession or Receipt in respect of the same Estate or Interest until the Time of his Death, and shall have been the last Person entitled to such Estate or Interest who shall have been in such Possession or Receipt, then such Right shall be deemed to have first accrued at the Time of such Death; and when the Person claiming such Land or Rent shall claim in respect of an Estate or Interest in Possession granted, appointed, or otherwise assured by any Instrument (other than a Will) to him, or some Person through whom he claims, by a Person being in respect of the same Estate or Interest in the Possession or Receipt of the Profits of the Land, or in the Receipt of the Rent, and no Person entitled under such Instrument shall have been in such Possession or Receipt, then such Right shall be deemed to have first accrued at the Time at which the Person claiming as aforesaid, or the Person through whom he claims, became entitled to such Possession or Receipt by virtue of such Instrument; and when the Estate or Interest claimed shall have been an Estate or Interest in Reversion or Remainder, or other future Estate or Interest, and no Person shall have obtained the Possession or Receipt of the Profits of such Land or the Receipt of such Rent in respect of such Estate or Interest, then such Right shall be deemed to have first accrued at the Time at which such Estate or Interest became an Estate or Interest in Possession; and when the Person claiming such Land or Rent, or the Person through whom he claims, shall have become entitled by reason of any Forfeiture or Breach of Condition, then such Right shall be deemed to have first accrued when such Forfeiture was incurred or such Condition was broken.

> 12. When any One or more of several Persons entitled to any Land or Rent as Coparceners, Joint Tenants, or Tenants in Common, shall have been in possession or receipt of the Entirety, or more than his or their undivided Share of Shares of such Land or of the Profits thereof, or of such Rent, for his or their own Benefit, or for the Benefit of any Person or Persons other than the Person or Persons entitled to the other Share or Shares of the same Land or Rent, such Possession or Receipt shall not be deemed to have been the Possession or Receipt of or by such last-mentioned Person or Persons or any of them.
>
> 34. At the Determination of the Period limited by this Act to any Person for making an Entry or Distress, or bringing any Writ of Quare impedit or other Action or Suit, the Right and Title of such Person to the Land, Rent, or Advowson for the Recovery whereof such Entry, Distress, Action, or Suit respectively might have been made or brought within such Period shall be extinguished."

Before those enactments it was common ground that the relevant law was the same as in this country.

The reason for this substantial alteration to the previously existing law is well known.

Onto the Statute of James the common law engrafted the doctrine of " non adverse " possession that is to say that the title of the true owner was not endangered until there was a possession clearly inconsistent with its due recognition namely " adverse possession "; so that there had to be something in the nature of ouster. But in practice it was very difficult to discover what was sufficient to constitute adverse possession; thus the possession of one co-tenant was the possession of the rest though undisputed sole possession for a very long time might be evidence from which a jury could properly presume ouster. See *Doe d. Fishar v. Prosser* 1 Cowper p. 217. All this was swept away by the 1833 Act as was explained in an illuminating judgment of Denman C. J. in *Culley v. Doe d. Taylerson* 11 Ad. and E. 1003 at 1015 ff. After pointing out that at common law the possession of one tenant in common was possession of all and that there must be an ouster he continued

> " The effect of this section [No. 2] is to put an end to all questions and discussions whether the possession of the lands be adverse or not and if one party has been in the actual possession for twenty years whether adversely or not the claimant whose original right of entry accrued above twenty years before bringing the ejectment is barred by this section."

He then went on to point out that this section standing alone would not have affected the possession of co-tenants for at common law the possession of one was possession of the other and the position would have remained to be determined by the rules of the common law.

He then quoted section 12 and held that the effect of the section was to make the possession of co-tenants separate possessions from the time when they first became tenants in common and that time ran for the purposes of section 2 from that time.

In the earlier case of *Nepean v. Doe d. Knight* 2 M. and W. 894 at 911 Denman C. J. had said

> " We are all clearly of opinion that the second and third sections of that act . . . have done away with the doctrine of non-adverse possession, and . . . the question is whether twenty years have elapsed *since the right accrued* whatever be the nature of the possession."

And then the learned editor of Darby and Bosanquet on Limitation of Actions 2nd edition p. 377 when discussing this case adds

> " so that without an actual ouster the one tenant in common could bring his ejectment and the other could defend his possession under the statute."

All this is well settled law and there are a number of authorities to the like effect see for example *Ex p. Hasell* 3 Y and C (Ex.) 617 *Doe d. Jones v. Williams* (5 Ad. and E. 291).

Counsel for the appellant however has argued that though this may represent the law where a third party (an intruder) is in possession that does not apply where no one is in wrongful possession. He points out truly that Roseliza and Victoria were rightfully in possession of the whole land and were committing no wrong by farming all of it. See *Henderson v. Eason* 17 Q.B. Cases 701 *Jacobs v. Seward* 5 E. and Ir. App. 464.

So he submits that time has not yet started to run because the petitioners could not sue them as no wrong has been committed by those in possession; put in another way it was argued that time cannot run in favour of the co-tenants in possession until they commit a wrong.

Furthermore it was argued that while a right to enter arose in 1913 that was not a right " to make an entry " for the purposes of section 1 of the 1874 Act for such a right did not arise until an intruder was in possession or until there was some wrongful act by the co-tenants in possession.

These arguments necessarily led to the submission that where a co-tenant was lawfully in possession of the whole there must be some wrongful act shewing a possession inconsistent with the co-tenants' right to re-enter; something which counsel could not attempt to define but which was short of adverse possession under the pre 1833 law.

Their Lordships have no hesitation in rejecting this argument; to adopt it would defeat the whole object of the 1833 Act. It seems to their Lordships clear from the language of the Act and the Authorities already referred to that subject to the qualification mentioned below where the right of entry has accrued more than 20 years before action brought the co-tenants are barred and their title is extinguished whatever the nature of the co-tenants' possession. That right of entry (ignoring immaterial facts as to the widow and Nehemiah) accrued in 1913.

Counsel for the respondents was inclined to agree with the view that in contrast to the right of entry the time for bringing an action or suit had not yet started to run. Their Lordships cannot agree; it seems to them clear that for the purposes of section 1 of the 1874 Act the right to make an entry and the right to bring an action both accrued at the same time in 1913.

The qualification mentioned above arises upon section 12 of the 1833 Act. The " separate possessions " (to adopt the phrase of Denman C. J.) obviously only start when the occupation is " for his or their own benefit ". That is the crucial question as Lord Greene M.R. pointed out in *Re Landi* 1939 Ch. 828 at 834.

That is primarily a question of fact though the law may sometimes imply that one co-tenant is in possession for another co-tenant *e.g.*, a father for his infant but not adult son see *Re Hobbs* 36 Ch. D. 553, otherwise it is a question of proving some agency or trusteeship or acknowledgment of title on the part of those in possession. These matters were canvassed by counsel for the second appellants but there were no facts upon which he could base any useful argument.

The learned judge reviewed the facts fully and reached the conclusion that the possession of both Roseliza and Victoria was for their own use and benefit and their Lordships agree with that conclusion.

There was some argument before their Lordships as to whether the commencement of the time for making an entry or bringing an action was to be determined by reference to section 1 of the 1874 Act or section 3 of the 1833 Act. It is however clearly settled and was not in dispute before their Lordships that section 3 does not limit the generality of section 1 but is only explanatory of that section and to settle cases where under section 1 there might be a doubt when time started to run see *James v. Salter* 3 Bing. N.C. 544 *Governors of Magdalen Hospital v. Knotts* 8 Ch. D. 709 at 727 *Pugh v. Heath* 7 A.C. 235 at 238. In *James v. Salter* (supra) it was assumed that a devisee could not take under any branch of the 3rd section and that section one of the 1874 Act applied. The opinions of text writers including (Lord St. Leonards) have doubted the correctness of this assumption see Darby and Bosanquet supra at p. 306/8 but as whichever section is applicable, time started to run more than 20 years before action brought their Lordships do not think it necessary to express any opinion upon this question.

As the learned judge held it is clear that the petitioners' claim is barred by the 1833 and 1874 Acts and their title is thereby extinguished by section 34 of the 1833 Act.

Their Lordships would like to express their thanks to Scarr J. for his most admirable judgment full and lucid in relation to the facts and clear and accurate as to the law.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

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In the Privy Council

PARADISE BEACH AND TRANSPORTATION COMPANY LIMITED AND OTHERS

v.

CYRIL PRICE-ROBINSON AND OTHERS

DELIVERED BY

LORD UPJOHN

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