2, 1969

IN THE PRIVY COUNCIL No.30 of 1967

ON APPEAL FROM THE COURT OF APPEAL FOR THE BAHAMA ISLANDS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
- 2 MAR 70
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

OCEAN ESTATES LIMITED (Plaintiffs) Appellants

- and -

NORMAN PINDER (Defendant) Respondents

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CASE FOR THE APPELLANTS

1. This is an appeal from a majority Judgment of the Court of Appeal for the Bahama Islands, dated the 20th June, 1967, setting aside, and allowing an appeal from, a Judgment of the Supreme Court for the Bahama Islands, holden at Nassau, dated the 1st November, 1966, whereby, in an action instituted by the Appellants, as owners of a tract of land situate in the Eastern District of New Providence, against the Respondent for damage caused by the Respondent's wrongful entry and trespass on the said land, it was held that the Appellants were entitled to recover from the Respondent damages to the extent of £100/- and to a perpetual injunction restraining him and his agents and servants, from continuing the trespass and from entering upon the said land.

pp.52-85

pp.43-48

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2. The main point for determination on his appeal is whether or not the Appellants (claiming to be owners of the said land with a documentary title and/or a possessory title) have a better right to possession of the said land than the Respondent who claims to be in possession of the same by virtue of a possessory title alone which, he alleges, he has acquired.

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The Respondent, on his own admission, was a trespasser when he first entered the land.

In the Appellants' respectful submission, in the circumstances of this case as stated briefly below, it is plain that he is still a trespasser thereon.

3. The facts, briefly stated, are as follows:-

The Appellants (hereinafter also referred to as "the Plaintiffs") instituted this action against the Respondent (hereinafter also called "the Defendant") in the Supreme Court for the Bahama Islands, stating their case briefly in their Statement of Claim, dated the 20th December, 1963, as follows:- 10

pp.2-4

"1. The Plaintiff was and is owner of all that tract of land situate in the Eastern District of the Island of New Providence and bounded on the North by the Yamacraw Road, on the East by Sans Souci and land granted to Henry M. Dyer, on the South by a road reservation bordering the sea, and on the West by the Fox Hill South Side Road. 20

"2. The Defendant has wrongfully entered upon the Plaintiff's said tract of land and has cut down trees and shrubs growing thereon without the consent or authority of the Plaintiff.

"3. The Defendant threatens and intends to continue and repeat the said acts of trespass complained about. 30

"And the Plaintiff claims

(a) Damages.

(b) An injunction restraining the Defendant from entering upon the said tract of land or otherwise trespassing thereon.

(c) Costs.

(d) Further or other relief".

4. By his Defence, dated the 25th March, 1964, and Further and Better Particulars, dated the 8th March, 1966, the Defendant said that he "is in possession of the premises by himself" and that "he has been in full free and undisturbed possession of the land the subject matter of this action by farming thereon continuously from about the year 1938 up to the present time." p.4

10 5. In support of their respective cases both sides produced evidence at the trial. The Plaintiffs produced documentary proof of their title and supported it by oral evidence. The Defendant relied only on oral evidence.

The procedure followed at the trial was thus described by the learned Trial Judge in his Judgment, hereinafter referred to in detail:-

> "The Plaintiffs called evidence to establish their documentary title to the land and their right to possession. Defendant then called evidence to support his averment that he had dispossessed the true owners and the Plaintiffs called evidence in rebuttal. At the close of Plaintiffs' evidence in rebuttal learned Counsel for Defendant sought leave to call further evidence intended to contradict statements made by Plaintiffs' witnesses relating to the extent to which Howard Nelson Chipman (Senior) [President and virtual owner of the Chipper Orange Co. Ltd., one of the Plaintiffs' predecessors in title] "planted trees and gathered fruits from the land after 1936. Learned Counsel for Defendant submitted he had been taken by surprise and misled as Counsel for Plaintiffs had not cross-examined any of the witnesses for the Defendant on this point. I refused the application. The extent of the interest of Howard Nelson Chipman (Senior) in the land had been disclosed in the statutory declaration made in 1948 (Ex. OE.10) which was put in evidence at an early stage in the trial and to which learned

p.44 l.17
p.44 l.39

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Counsel for Defendant made objection".

6. Thd documentary evidence of the Plaintiffs' title to the land in dispute included, <u>inter alia</u>, the following:-

pp.93-95
p.93 l.32

(A) A Crown Grant (Ex. O.E.1), dated the 4th December, 1890, to Thomas Dodd Milburne, of a tract of Crown land comprising about 47 acres exclusive of swamp and useless land, with specified boundaries, and a diagram annexed. 10

pp.95-98
p. 96 l.47 to p.97 l.1

(B) A Conveyance (Ex. O.E.2), dated the 28th August, 1919, executed by the executors and trustees of the Will of Thomas Dodd Milburne, deceased, in favour of Minnie Beatrice Albury, of 239 acres, "comprising a tract originally granted to Lewis Kerr and part of a tract originally granted to Henry M. Dyer and now called 'Pen' ", with boundaries shape and dimensions delineated and set out in a plan annexed to an indenture made between James Thomas Claridge and others and Thomas Dodd Milburne, dated the 17th February, 1890, registered in the Registry of Records, Book N. 9, pages 132-141. 20

pp.99-101

(C) Release of claim to dower (Ex. O.E.3), dated the 2nd June, 1920, in the said 239 acres of the Pen tract executed by Jean Crawford Milburne in favour of Minnie Beatrice Albury. 30

pp.102-104

(D) A Conveyance (Ex. O.E.4), dated the 14th January, 1922, executed by Minnie Beatrice Albury in favour of Edmund Dorsett Knowles of the said 239 acres, "comprising a tract originally granted to Lewis Kerr and part of a tract originally granted to Henry M. Dyer and now called 'the Pen' ".

pp.104-106

(E) A Conveyance (Ex. O.E.5), dated the 6th February, 1922, executed by Edmund Dorsett Knowles in favour of Elsie May Key of the said 239 acres, as described in (B) and (D) above. 40

(F) Release of claim to dower (Ex. O.E.6), dated the 7th February, 1922, in the said 239 acres, as described in (B) (D) and (E) above, executed by Rosalie Blanche Knowles (wife of Edmund Dorsett Knowles) in favour of Elsie May Key. — pp.106-108

7. The documentary evidence in support of the Plaintiffs' title continued as follows:-

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(G) A Conveyance (Ex. O.E.7), dated the 1st May, 1937, whereby the said Elsie M. Key conveyed 100 acres of the said land "commonly known as a portion of the Pen Tract" to the Chipper Orange Co. Ltd. (of which Howard Nelson Chipman, Senior, was President and virtual owner) in fee simple. — pp.109-110; p.110 1.13-21

(H) A Conveyance (Ex. O.E.8), dated the 24th June, 1946, whereby the said Chipper Orange Co. Ltd. conveyed to the British

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Bahamian Land Co. Ltd. in fee simple in possession free from incumbrances, 80 acres, described as part of a tract of land commonly known as "the Pen Tract" situate in the Eastern District of the Island of New Providence comprising about 100 acres. The plan attached to this Conveyance shows the tract in question to be 144 acres in extent. — pp.111-113; p.112

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(I) A Conveyance (Ex. O.E.9), of the same date and in similar terms as Ex. O.E.8, whereby the Chipper Orange Co. Ltd. conveyed to the British Bahamian Land Co. Ltd., 64 acres of the said "Pen Tract", the two deeds, Exs. O.E.8 and O.E.9 thus covering an area of 144 acres which, earlier, in Ex. O.E.7, had been wrongly described as being 100 acres in extent. As in Ex. O.E. 8 Supra, the plan attached to this Conveyance shows the

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tract in question to be 100 acres in extent. — pp.115-117; p.116

(J) A Conveyance and confirmation (Ex.O.E.11), dated the 12th February, 1949, executed by the said Elsie May Key in favour of — pp.120-123

the British Bahamian Land Co. Ltd. - granting and confirming to the latter all her right, title, etc. in the additional 64 acres of the land she had conveyed by Ex. O.E.7 to the Chipper Orange Co. Ltd. which, in extent, had been described as being only 100 acres, but which subsequently on a survey was found to be 144 acres in extent, all of which were included in this Conveyance. (pp.121-122) 10

pp.123-127 (K) A Conveyance (Ex. O.E.12), dated the 14th February, 1949, whereby the British Bahamian Land Co. Ltd. conveyed, inter alia, the land in dispute (totalling approximately 144 acres) to A.J.R. Whiteway, the said land being described in terms similar to those used in Exs. O.E.8 and O.E.9 (H) and (I)(supra).

pp.127-130 (L) Finally, a Conveyance (Ex. O.E.13), dated the 30th March, 1950, whereby the whole of the land conveyed by (K)(supra), was conveyed by the said A.J.R. Whiteway to the Plaintiffs. 20

8. The documentary evidence produced by the Plaintiffs included also a notarial declaration (Ex. O.E.10) made by the said Howard Nelson Chipper (Senior), on the 28th February, 1948. (pp.119-120) In this declaration the declarant (President and virtual owner of the Chipper Orange Co., a predecessor-in-title of the Plaintiffs) stated, inter alia, that, as Real Estate Agent and Manager for the said Elsie May Key (to whom, by Ex. O.E.5, the land in dispute had been conveyed by Edmund Dorsett Knowles on the 6th February, 1922) he had managed the land from the year 1922 until it was conveyed to the Chipper Orange Co. Ltd in 1937 (Ex. O.E.7) (p.119 l.25- p.120 l.12) subsequent to which he had managed and developed a portion of the land for the said Company (of which he was President and virtual owner). He declared, also, that the said Elsie May Key, the Chipper Orange Co. Ltd. and the British Bahamian Land Co. Ltd. (to whom, by Exs. O.E.8 and O.E.9 dated the 24th June, 1946, the land had been conveyed by the Chipper (pp.111-118)

Orange Co. Ltd.) had all exercised full rights of ownership over the land without interference on the part of any person or persons, and that, to his personal knowledge, they had enjoyed undisturbed uninterrupted and undisputed possession of the said land, had used it as their undisputed property and were recognised as its sole owners.

9. Of the oral evidence in support of the Defendant's case - he had of course no documentary evidence - it is sufficient here to refer only to the relevant portion of the Defendant's own testimony which was as follows:-

> "I first cut down this land in 1927 and 1928 and then I went back to the U.S.A. I cut all of it in those two years. I came back from the U.S.A. in 1932. I farmed on the land in 1938. The land was all grown up - all high land. I had about 18 acres under cultivitation... In 1939 I farmed 20 acres - tomatoes. There was plenty of land. I cut down 20 new acres each year. I never had the whole of the land cut down at one time. Then I grew up to 1959 for the Canadian market .... I grew okras .... about 1942 to 1956. I still grow okras for the local market in Nassau. (p.10 l.16-32)
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> "The whole of the land, including the swamp and the beach was about 165 acres. (p.10 l.32-34)
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> "I planted quite a few trees on the land .... I planted trees every year - one or two. I started about 18 or 20 years ago including several lime and lemon trees. I planted fruit trees in the early forties .... There were some walls there in 1938 in bad condition. I had them mended .... I have farmed every year since 1938, about every day .... Anybody going that way would see the land was occupied. I saw Howard Chipman twice. I don't know Elsie May Key. I've heard of her. I didn't know (p.10 l.34-42; p.11 l.12-20)

she was the owner of this land. I was not disturbed by anybody. Mr. Fountain showed up in 1963 and said he was representing Ocean Estates [Plaintiffs] ....

p.11 1.21-38

"I met a few fruit trees when I first went in and I cleaned round the trees. I put trees there in 1927 - 1928 .... I planted fruit trees to within 1,500 feet of South Beach Road .... I took care of the beach. I stopped people going on the beach .... It was round about 1944 when I first saw people going on the beach ....

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p.11 1.47-
p.12 1.5

"I don't know who owned the land that I now claim. Only myself and my labourers worked on this land .... I have stayed on the land since 1938 up to now, 1966. I had no other living except farming this land."

10. In cross-examination, the Defendant said:-

p.13 1.37-38

"I did not know who owned the land when I went on it in 1938.

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"I do not know who owns it now.

p.13 1.39-
p.14 1.6

"I went in as a trespasser ....

"I would have paid rent on the land in dispute if anyone had come along. Nobody showed up.

"I didn't try very hard to find the owner. If somebody had come along I would either have taken a lease or got off the land.

"After I had been on the land for seven years I started claiming the land. I had farms through the land all the time".

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11. Oral evidence, in support of the Plaintiffs' case and in rebuttal of the Defendant's evidence, was to the following effect:-

p.27 1.20-
p.28 1.2

William Telford Lowes (P.W.2), Planning Consultant and Plaintiffs' technical

adviser, said that he had walked on the land on about 8 or 10 occasions in the last two years (i.e. 1964-1966) and when doing so had not seen anyone thereon "except on one occasion when we instructed workmen to clear the boundaries of the site" - which was done.

Ray James Holman Nathaniels (P.W.3), Architect, employed by the Plaintiffs in the development of the land in dispute, said that he had visited the land on several occasions in 1957 and that it was only on one occasion when, accompanied by another person, he had seen a man in a clearing; and that, on that occasion he had moved freely on the land and had not been turned off. He said that he had seen "what could have been melons growing" but did not recollect seeing any fruit trees. p.28 l.5-25

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Ethelyn Taylor (P.W.4), a married woman, said that Howard Nelson Chipman, Senior, (President and virtual owner of the Chipper Orange Co. Ltd., a predecessor-in-title of the Plaintiff) was the father of her five children; that he had "a big tract of land near the prison at Fox Hall across the road from the prison" on which he grew various fruits and which he had farmed all his life; that she had never seen the Defendant on the land up to the day in 1951 when the said Chipman had died; and that she had herself planted many trees on the land. pp.28,29 p.28 l.37-39 p.29 l.9, 11,23-24

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12. Also in support of the Plaintiffs' case was the testimony of Frederick Carl Claridge (P.W.5), Road Contractor and Farmer, who said, in examination-in-chief:-

"I know Mr. Chipman Senior planted some orange trees there .... I knew him well .... I think Mr. Chipman was there when the prison was built. I think it was 1939 - 1940 or 1941-1942. Norman Pinder" [Defendant] "farmed there 16 or 17 years ago" [i.e. about 1949 or 1950] .... "that was just before Chipman died" p.29 l.35-45 p.30 l.3-9

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[Chipman died in 1951]. "Before Plaintiff (sic. Defendant?) used to grow tomatoes on the eastern end of Nassau on the Winton Estates about 2 miles along Yamacraw Road. That was 2 years anyway before he cut this piece and he used to farm on the western side of South Beach Road too."

In cross-examination, the witness said:-

p.30 l.20-28

"When Chipman first cut the land it was pretty high bush. I don't think Defendant was farming the land at the same time that Mr. Chipman was gathering the fruit. Mr. Chipman stopped bothering with the farm a couple of years before he died. I would say Defendant cut this piece of land on the east side of South Beach Road a couple of years before Mr. Chipman died. 10

p.30 l.28-33

"The trees along the wall on the Yamacraw Road were put there by Mr. Chipman. I saw him planting fruit trees there, and the trees went back 200 feet. All the trees were the same age along there. 20

p.30 l.33-34

"I saw him planting trees about 25-26 years ago" [i.e. about 1941/2] ....

p.30 l.35-38

"I have known Ocean Estates" [Plaintiffs] " for about 3 years. I am building the road for them now at Gleniston Gardens ....

p.30 l.45-47

"I don't think the fruit trees were planted longer than 26 or 27 years ago - a couple of thousand trees he must have planted there 30

p.32 l.18-22

"It would be about 30 to 35 years since he (Chipman) planted the fruit trees there. Chipman was there long after the prison was built. I know I saw him there planting the trees. I saw him several times on the side of the road."

13. In further support of the Plaintiffs' case, <u>Howard Nelson Chipman</u> (Junior), P.W.6, 42 years of age, the eldest living son of the said 40

Howard Nelson Chipman (President and virtual owner of the Chipper Orange Co. Ltd., a predecessor-in-title of the Plaintiffs) said:-

"My first acquaintance with the property was when I went up there with my father and mother in the middle thirties - when I was about 10-12 and in the forties. — p.32 l.47- p.33 l.10

"My father" /who died in 1951/ "taught me on that land how to bud and plant trees. He had tangerine, orange, shaddock, grapefruit, limes - most of the citrus fruit.

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"I was about 16 or 17 when I planted and budded trees roughly between 1936 and 1942 ....

"My father had caretakers on the land. I have seen Norman Pinder" /Defendant/. "He was not a caretaker and he could not have been farming when my father was farming there. He" /i.e. witness's father/ "used to do a lot of budding - growing fruit was his hobby. He had no tenants .... — p.33 l.15-21

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"I volunteered myself to give evidence in this case." — p.33 l.44

14. By his Judgment, dated the 1st November, 1966, in favour of the Plaintiffs, the learned Supreme Court Judge (James Smith J.) before whom the suit was tried, held as is stated in paragraph 1 hereof. — pp.43-48

The learned Trial Judge said that the issue between the parties was -

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"whether or not the Defendant, by his use of the land has dispossessed the Plaintiffs or the true owners through whom they claim title." — p.44 l.13-16

Examining closely the Plaintiffs' documents in support of their title, he said:-

"The documentary title of the Plaintiffs — p.46 l.8-17

shows that in 1946, at the time of the Conveyances Exs. O.E.8 and O.E.9" [conveyances of the land in dispute by the Chipper Orange Co. Ltd. to the British Bahamian Land Co. Ltd.] "the predecessors-in-title of the Plaintiffs had, by their documentary title, a right to possession of the land as against the Defendant who was at that time a trespasser on the land. The onus of proof then shifted to the Defendant to show that he had dispossessed the Plaintiffs and barred their title by operation of the Limitation Acts." 10

15. The learned Trial Judge then examined all the evidence before him in relation to the Defendant's claim that he had dispossessed the Plaintiffs. He found that "both Defendant and Chipman (Senior)" [President and virtual owner of the Chipper Orange Co., one of the Plaintiffs' predecessors-in-title] "were on the land at the same time, one farming tomatoes, the other planting fruit trees and gathering fruit in season." He continued:-

p.47 l.28-32

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p.47 l.32-37

"Thus, in the period 1941-1946 the Defendant did not have exclusive occupation of the land and in those years the growing of vegetable crops by the Defendant was not inconsistent with the use of the land by the true owner for growing fruit trees."

p.48 l.7

Examining the oral evidence of the Defendant and that of his witnesses, the learned Trial Judge thought it probable that cultivation by the Defendant had started in 1940. He continued:-

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p.48 l.9-12

"Accepting that date it seems to me that Defendant's possession was not adverse to the Chipper Orange Co. whose President, H.N. Chipman (Senior), grew fruit trees on the land up to 1946.

"Defendant, on his own story, was still a trespasser when Plaintiffs bought the land in 1950. They bought the land for the purpose of development and in the meantime made no use of it. Thus Defendant's farming was not inconsistent with the purpose for which Plaintiffs held

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the land."

16. The learned Trial Judge of the Supreme Court drew particular attention to the circumstance that "on his own admission in evidence Defendant did not enter on the land with the intent to oust the true owner." Setting out the Defendant's testimony which had caused him to make this observation (as to this testimony, see paragraph 10 hereof) he said:- p.48 l.19-21

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"I take this as an admission by the Defendant that it was not until he had been on the land for seven years that he formed the intent to oust the true owner. That being so time would not have started to run against the true owner in 1938 or 1940, when the Defendant said he first grew tomatoes on the land, but in 1945 or 1947, i.e. seven years later when he said 'he started to claim the land'. p.48 l.29-40

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"I find for the reasons given that Defendant by his trespass had not dispossessed the true owner at the date this action was commenced, namely, 20th December, 1963, and Plaintiffs' claim succeeds."

17. Against the said Judgment of the Supreme Court, the Defendant appealed to the Court of Appeal for the Bahama Islands upon the grounds set out in his Notice of Appeal dated the 10th December, 1966. pp.49-51

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18. By a majority Judgment of the Court of Appeal (Sinclair P. and Hallinan J.A., Bourke J.A. dissenting) the appeal was allowed and the Judgment of the Supreme Court set aside, with costs throughout. pp.52-85

19. In his Judgment, allowing the appeal, Sinclair P. on the subject of the Plaintiffs' documentary title, said:- pp.52-56

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"The first question which arises is whether the learned Judge was correct in holding that the Respondents had p.53 l.38-p.54 l.3

established a good documentary title to the land in question. On behalf of the Appellant it is contended that the Respondents did not establish a good root of title of the necessary age, namely, thirty years, in accordance with the provisions of Section 3(4) of the Conveyancing and Law of Property Act (now Cap. 115). That sub-section reads:-

> '(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a Certificate of title granted by the Court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter.'" 10

p.59 l.10-14

Examining the documentary evidence in support of the Plaintiffs' title, the learned President expressed the view that the Plaintiffs had not sufficiently established a good documentary title i.e. one which could be forced on an unwilling purchaser. In his opinion (which, it is respectfully submitted, was not in accordance with law) the Plaintiffs' title was defective because they had not been able to show a good root of title which was at least thirty years old and because the land in dispute could not be sufficiently identified from descriptions contained in some of the earlier documents. 20 30

p.57 l.36-37

p.58 l.22-25

p.59 l.16-23

20. The learned President said, however, that "since this was an action for trespass it was not necessary for the Respondents [present Appellants] to establish that they had a good documentary title which would have given them legal possession; it was sufficient if they established that they had a better right to possession than the Appellant" [present Respondent] "had". He proceeded therefore to examine that aspect of the case. 40

During the course of his examination he referred to the oral evidence which both sides

had adduced and to the said notarial declaration (Ex. O.E.10) made by Howard Nelson Chipman on the 28th February, 1948 (see paragraph 8 hereof) in which the declarant had named three of the Plaintiffs' predecessors-in-title, who up to 1948, had, according to the declarant, exercised full and unrestricted rights of ownership over the land in dispute. This declaration, notwithstanding the objection as to
10 its admissibility, was admitted in evidence by the Court below as being within Section 42 (7) of the Evidence Act (Cap. 42) which, as an exception to the non-admissibility of hearsay evidence, permits the admission in evidence of a statement made by a person since deceased if made in the ordinary course of business, in discharge of a duty incumbent upon such person for the purpose of recording or reporting something which it was the duty of the person to
20 perform, at or near the time when the matter stated occurred and of his own knowledge. (It is conveniently stated here that Section 42 (1) of the same Act enacts that hearsay evidence may be admitted "where the statement is a necessary part of any fact or transaction which is being investigat ed by the Court" - where, in other words, the statement is part of the <u>res gestae</u>.)

In the learned President's view the
30 declaration was inadmissible in evidence as it was not made in the ordinary course of business or in the discharge of a duty incumbent upon the declarant. He was satisfied however that although the Trial Judge had admitted the declaration erroneously he had not been influenced by its contents in arriving at his conclusions.

p.62 l.6-15

21. As to priority of possession, the learned President was in agreement with the view of
40 the Court below that during the period 1941 to 1946 the relevant oral evidence pointed to both the said H.N. Chipman (President of the Chipper Orange Co. a predecessor-in-title of the Plaintiffs) and the Defendant being on the land in dispute at the same time, the former planting fruit trees and gathering fruit and

p.63 l.30-39

p.63 l.39-45

and the latter growing tomatoes and other vegetables. In the learned President's view - which, it is respectfully submitted, was not in accordance with any reasonable assessment of the evidence, there was not sufficient evidence at the trial to justify a finding that the possession of the Plaintiffs' predecessors-in-title and that of the Plaintiffs was prior to that of the Defendant.

p.63 l.46-p.64 l.11

22. As to the alternative argument advanced on behalf of the Plaintiffs - to the effect that they (10) and their predecessors-in-title could, at least, be regarded as having entered into possession of part of the land under colour of title and, having so entered, they should be regarded as if they were in constructive possession of the whole - an argument supported by authorities followed in the Bahamas of which the principal is Wood v. LeBlanc (1904) 34 Can.S.C.r. 627 - the learned President said that the principles laid down in the said Canadian decision (which he accepted) (20) did not apply to the present case. It was his view (based, it is respectfully submitted, on an erroneous assessment of the evidence) that the evidence did not establish that the possession of the Plaintiffs and their predecessors-in-title was either continuous or exclusive.

p.65 l.41-p.66 l.1

p.66 l.22-33

23. The learned President said that the learned Trial Judge of the Supreme Court had entered Judgment for the Plaintiffs upon, *inter alia*, the following grounds: (a) the growing of (30) vegetable crops by the Defendant between 1941 and 1946 was not inconsistent with the use of the land by the true owners for growing fruit trees; (b) the Defendant, on his own admission, did not have any *animus possidendi* for the first seven years of his occupation; and (c) the Defendant's farming since 1950 was not inconsistent with the purpose for which the Plaintiffs had acquired the land on that date, viz. development. (40)

p.66 l.33-38

The learned President rejected these conclusions of the Court below upon the ground that the Plaintiffs and their predecessors-in-title could not, because of defects in their documentary title, be regarded as the true

owners of the land.

24. In a separate Judgment, also allowing the appeal, Hallinan J.A. said that - "much the most important ground of appeal is that which submits that the Respondents did not sufficiently prove their documentary title." Following an examination of some of the Plaintiffs' title deeds he said, as to some of them, that they did not "sufficiently describe the property to identify it". He continued as follows:-

pp.67-76
p.67 1.35-37
p.69 1.21-24

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> "The Conveyancing and Law of Property Act (C.115) Section 3 (4) provides that the length of title to which a purchaser is entitled is thirty years. In this suit, begun in 1963, the deed of 1937 is not a good root of title. Counsel for the Respondents has referred us to Section 3 (3) of C.115 - recitals, statements and descriptions of facts, matters, and parties, contained in deeds 20 years old at the date of the contract of sale are prima facie evidence of such facts, matters and descriptions. This provision is similar to that contained in the Vendor and Purchaser Act, 1874, Section 2, and the Law of Property Act, Section 45 (6) of the United Kingdom. The deed of 1937 is more than twenty years old and Counsel relies on a recital that the Vendor is seised in fee simple of the land described in that deed. The better opinion appears to be that a vendor cannot rely on the provisions of Section 3 (3) of C.115 to cure a defect in a root of title 30 or more years old: the authority for this is In Re Wallace and Grouts Contract /1906/ 2 Ch.D. 199 at p.210".

p.69 1.25-46

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It is respectfully submitted that in the circumstances of this case the said deed of 1937 (Ex. O.E.7) (whereby the land in dispute was conveyed by Elsie May Key to the Chipper Orange Co. Ltd. see paragraph 7 hereof) was sufficiently good as a root of title, that the

recitals therein were within the provisions of Section 3 (3) of the Conveyancing and Law of Property Act (c.115), and that the learned Appellate Court Judge was in error when he applied to this case the law which is applicable only to contracts of the sale and purchase of land.

25. On the subject of a "good documentary title", the learned Appellate Court Judge (Hallinan J.A.) said:- 10

p.70 l.23-33

> "In my view the Respondents have failed to prove a good documentary title to the land in dispute, for a good documentary title can only mean one which can be forced on an unwilling purchaser under a contract of sale. Anything less than this is a defective title and this can only avail a claimant in the special circumstances discussed later in this judgment. It is sufficient now to say these special 20 circumstances are not present in this case."

It is respectfully submitted that in this case it was not necessary for the Plaintiffs to do other than show vis a vis the Defendant a sufficient title - documentary or possessory - which would, under the relevant law, entitle them to maintain this action which, it should be noted, was for trespass and not for the enforcement of a contract for the sale of land; and that under 30 the relevant law it was not necessary for the Plaintiffs to establish a documentary title such as could be forced on an unwilling purchaser under a contract of sale.

p.71 l.16-34

26. On the "issue as to possession" the learned Appellate Court Judge (Hallinan J.A.) held that the said notarial declaration made by Howard Nelson Chipman which supported strongly the Plaintiffs' case on the said issue (see paragraph 8 hereof) was inadmissible in evidence 40 and that the Defendant's oral evidence as to acts of possession and user was stronger than that adduced on behalf of the Plaintiffs. He was in disagreement with the view of the Court below

p.72 l.11-13

p.72 l.29-43

that the Defendant could not have acquired a possessory title.

27. As to "constructive possession", the learned Appellate Court Judge (Hallinan J.A.), having referred to certain authorities, drew the conclusion therefrom (erroneous, it is respectfully submitted) that, in the circumstances of this case, there could be no presumption that the Respondents (present Appellants) were in
10 constructive possession of the land in dispute as they did not claim possession against a grantor or his assigns and no breach of contract or of good faith was in question. p.74 l.23-29

As to the Canadian authority, Wood v. LeBlanc (1904) 34 Can. S.C.627 which, as already stated, has been followed in the Bahamas, the learned Judge said that the principles there laid down are not applicable in the present case; for, in his view, the
20 Defendant here was in actual possession of parts of the land not occupied by Howard Nelson Chipman (President and virtual owner of the Chipper Orange Co. Ltd. one of the Plaintiffs' predecessors-in-title). p.74 l.30- p.75 l.19

As to the view of the Court below that the Defendant's possession cannot be said to have been adverse prior to his decision to claim possession of the land to the exclusion of the true owners - he had testified that
30 "After I had been on the land for seven years I started claiming the land" - the learned Appellate Court Judge, founding himself, it is respectfully submitted, on an insufficient appreciation of the law relating to adverse possession and of the evidence in the case, said:-

"If the Respondent's (Plaintiffs') predecessors had no documentary title they were not the true owners and the Appellant's
40 (Defendant's) possession of part of the land would prevent any presumption of constructive possession of that part arising in the Respondent's favour. Later in the 1950's when the Appellant farmed the land, I do not p.75 l.24-31

p.76 l.5-8

think the Respondents were in possession of any part .... In my view the Respondents moreover ceased to be in possession even of a part of the land after Mr. Chipman's death."

In conclusion the learned Appellate Court Judge, referring to the observation of the learned Trial Judge that the Plaintiffs had bought the land for the purpose of development and had made no use of it in the meantime, said, (contrary, it is respectfully submitted, to reason):- 10

p.76 l.13-16

"This might not matter if they had a good documentary title but it is fatal to their case if they are seeking to establish a possessory title."

pp.77-85

28. Bourke J.A. dissented from the Judgments of Sinclair P. and Hallinan J.A.

Reviewing the findings of the Court below, with which he was in general agreement, he said:-

p.81 l.10-19

"The Court below came to the conclusion that the Respondent's paper title was sufficient to establish it as the true owner and that its predecessors-in-title, the Chipper Orange Co. Ltd., had gone into possession through its agent, the President of the Company, Howard Chipman (Senior). 20

"The Appellant's acts of cultivation upon the land as an admitted trespasser upon the land were found to constitute neither exclusive possession nor adverse possession." 30

The learned Appellate Court Judge then referred to the evidence in the Court below on the nature and extent of the alleged occupation of part of the land by the Defendant and observed that the estimate of the Trial Judge that, on the evidence before him as to the Defendant's alleged occupation, "any single area of land cleared would be cultivated three times in a period of 27 years" had not been challenged. 40

p.81 l.26-29

29. As to the evidence of the Defendant himself that it was only after he had been on the land for seven years that he "started claiming" the land, the learned Appellate Court Judge (Bourke J.A.), agreed with the view of the Court below that by his evidence the Defendant had admitted that it was not until he had been on the land for seven years that he formed the intent to oust the true owner and that therefore time would not have begun to run in his favour until the seven years had lapsed. On this subject, he said:-

p.81 l.30-42

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> "I must say that I find the greatest difficulty in accepting the argument that the Trial Judge read more into this evidence than the Appellant really meant. It is submitted that the Appellant was saying no more than to indicate that after the lapse of seven years he considered that he had a right to remain upon the land and not be excluded; that he was merely in error as to his appreciation of the law and that this could not count against him. But it seems to me that the Appellant was making his intention plain. If a person had come along with rights of possession over the land who declined to surrender such rights to the extent of granting a letting, the Appellant would have left the land - or rather the portion of it (20 acres or so) which he was then cultivating. He did not, on his own showing, intend to infringe the rights of another. He was merely using the land, that is, the particular piece of it upon which he was growing vegetables at any one time during the seven years at the end of which he formed the intention of asserting a right to the possession of the ground to the exclusion of the person entitled."

p.81 l.43-
p.82 l.20

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30. Further, on the subject of "constructive possession", the learned Appellate Court Judge (Bourke J.A.) said:-

p.82 l.21-32

"There is no presumption in favour of a wrongdoer that possession of part imports possession of the whole- the doctrine of constructive possession can have no application in the case of a trespasser. And, I am not convinced by the submission that, having regard to the nature of the land, the Appellant's "/present Respondent's/" acts of user from time to time over different areas with intervals of years, are correctly to be taken as amounting to a possession of the whole. Moreover, in the earlier years there was the concurrent possession of parts of the land by Howard Chipman Senior. 10

p.82 l.33-38

"It is my view that there is no ground for disturbing the findings that there was no exclusive occupation and no adverse possession of the land by the Appellant when fruit trees were grown upon it for the Chipper Orange Co. or later when it was acquired for the purpose of development." 20

p.82 l.39-43

31. In the view of the learned Appellate Court Judge (Bourke J.A.) the Plaintiffs were entitled to succeed on the strength of their own title and not merely because of the weakness of the Defendant's title. He was in agreement with the view of the Court below that the Plaintiffs had, on the documentary evidence, shown themselves to be the true owners of the land in 30 dispute.

p.82 l.43-p.83 l.3

He pointed out that "no authority had been referred to for the proposition - that as between the parties the Respondents "/i.e. present Appellants/" had to show an absolute or perfect title or even a marketable title in the sense envisaged by Section 3(4) of the Conveyancing and Law of Property Act" /"A Purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years ...." see paragraph 19 hereof/. 40 Continuing, he said;

p.83 l.3-12

"It is a question surely of the relativity of titles (see Megarry and Wade on the Law of Property, 3rd Ed.pp.1135,1136). The Respondents "/present Appellants/ "have shown transactions concerning the land

"in dispute going back at any rate to the conveyance of 1937", /see paragraph 7 (G) hereof/, "and the reference to the Pen Tract land, to say nothing of the recital, may suffice to suggest the likelihood of the chain of dealings reaching the conveyance of 1922" /see paragraph 6 (D) and (E) hereof/.

p.83 l.12-23

10 "If there is an infirmity of documentary title I think that at the lowest it can be said that there is a colourable title in the sense that it was regarded as coming within the scope of the principle acted upon in the Canadian case of Wood v. LeBlanc" /(1904) 34 Can. S.C. 627/. "In that case it was held, according to the headnote, that the possession of a part of land claimed under colour of title is constructive

20 possession of the whole which may ripen into an indefeasible title if open, exclusive and continuous for the whole statutory period."

32. On the subject of a possessory title which each side claimed, the learned Appellate Court Judge (Bourke J.A.) expressed his views thus:-

p.83 l.25-37

"The Chipper Orange Co., acting through its President and virtual owner Howard Chipman (Senior) was in open

30 possession in 1940 of part of the land in which he grew fruit trees and continued to reap crops from them until 1946 when there was the conveyance to the British Bahamian Land Co. (Ex.O.E.8). There was no actual adverse possession by anyone else. As is said in Mcgarry and Wade (op. cit. p.1135) - where it is a matter of relativity of titles, in the last resort all depends upon possession."

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33. Comparing the nature of the Defendant's occupation of part of the land with the possession of the Plaintiffs and their predecessors-in-title, the learned Appellate Court Judge (Bourke J.A.) said:-

p.83 l.37-
p.84 l.17

"The Appellant, though he made use of the soil of part of the land upon entry did not have the animus possidendi - an intention to exclude any person with a better right to possession. Possession involves the continuous exercise of a claim to the exclusive use. I do not think that this subjective element can be left out of account when one comes to consider the true nature of his occupancy and user of the soil. In my judgment moreover there is no solid ground for criticism of the finding that the Appellant was not in exclusive or continuous occupation of the land or in actual adverse possession. Howard Chipman, on the other hand, did go into full and real possession of part of the land and he did so, if not under an absolutely good or even a marketable title, at least under a colour of right. Applying the principle to which I have just referred, it seems to me that Mr. Liddell's alternative argument" [for the Plaintiffs] "(for he maintained throughout that there was a good and sound title to establish a right as the true owner) based on Wood v. LeBlanc [(1904) 34 Can. S.C.R.627] "should anyway prevail and that the Appellant's [sic. Respondent's?] predecessor-in-title must be deemed to have been in constructive possession of the whole land in dispute when Howard Chipman entered in 1940 and took actual possession of part. There was thus prior possession of the property in favour of the Respondent" [present Appellant].

p.84 l.17-
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"The Respondent having therefore the better title, and the Appellant" [present Respondent] "having failed to establish that his opponent is barred from obtaining the remedy through extinction of the claim, is entitled to succeed in trespass."

p.84 l.47-
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Finally, the learned Appellate Court Judge said that he could discover no good reason why the propositions of law laid down in Wood v. LeBlanc should not be applied by the Court in the Bahama Islands - and that "Counsel for each side are

agreed that the case has been acted upon in decisions of the Supreme Court of the Colony". Concluding, on the application of that decision, he said: "Whether the principle is correctly to be held as applicable in the circumstances of the present case is another matter, as to which I have rendered my opinion in the affirmative sense."

p.84 l.27-29

p.85 l.1-4

34. Against the majority Judgment of the Court of Appeal for the Bahama Islands this appeal is now preferred the Appellants having been granted leave to Appeal by Orders of the said Court of Appeal, dated the 21st June, 1967 and the 27th October, 1967.

pp.86-87

pp.91-92

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The Appellants respectfully submit that the appeal should be allowed and that the majority Judgment of the Court of Appeal should be set aside and the Judgment of the Supreme Court, dated the 18th November, 1966, be restored, with costs throughout, for the following among other

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R E A S O N S

1. Because this was an action for damages for trespass and on any true assessment of all the evidence produced at the trial - oral and documentary - and application thereto of the relevant law it is clear that the Appellants are entitled to the remedies they sought.

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2. Because both ownership and possession of the lands in dispute were at all material times shown to have been in the Appellants or their predecessors in title.

3. Because the Appellants and their predecessors-in-title had a colourable title to the said land good and sufficient to defeat the possessory title claimed by the Respondent.

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4. Because the Appellants and their predecessors-in-title were in possession of the said lands under a colourable title thereto which possession was good and sufficient

to defeat the possessory title claimed by the Respondents.

5. Because the Appellants' predecessors-in-title were (a) by the oral evidence (b) by the recital in the conveyance of the 1st May 1937 and (c) by the notarial certificate of the 28th February, 1948, shown to have been in prior and exclusive possession of the said lands.

6. Because the Appellants were by the oral evidence shown to have continued in such possession at all material times. 10

7. Because the Respondent was not (by the evidence led by him or otherwise) shown to have been at any or for any sufficient material time in exclusive or adverse possession of the said lands or any particular portion thereof.

8. Because the learned Appellate Court Judges who formed the majority (Sinclair P., and Hallinan J.A.) were in error (a) in applying to the issues raised in this case the law relating to contracts for the sale of land; (b) in failing to give proper legal effect to the Appellants documentary title to the said lands; (c) in treating evidence of possession by the Respondents from time to time of different parcels of the said lands as evidence of possession of the whole; and (d) in rejecting the evidence contained in (i) the recital in the conveyance of the 1st May, 1937, and (ii) the notarial certificate of the 28th February, 1948. 20 30

9. Because, for reasons stated therein, the Judgments of Bourke J.A. of the Appellate Court and James Smith J. of the Supreme Court (the trial judge) are substantially correct.

E.F.N. Gratiaen 40

Malcolm Butt

R.K. Handoo

No.30 of 1967

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL FOR THE BAHAMA ISLANDS

B E T W E E N :

OCEAN ESTATES LIMITED
Appellants

\- and -

NORMAN PINDER
Respondent

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