Privy Council Appeal No. 27 of 1985

Dawn Pickering nee Penn as Attorney for Emmelyn Penn, Executrix of the Estate of William McFarlane Penn, deceased — *Appellant*

v.

Ivor Stevens, Executor of the Estate of Ethelinda Leonora Stevens, deceased and Others — *Respondents*

FROM

THE COURT OF APPEAL OF THE VIRGIN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Mackay of Clashfern**]*

This is an appeal from a judgment of the Court of Appeal of the Virgin Islands delivered on 8th October 1984, dismissing in part an appeal from the Land Adjudication Officer (E.L. St. Bernard Esq.) dated 5th December 1981, whereby the claim brought by the appellant for a one-half share of two parcels of land, known respectively as Beels and Dixons, on the island of Great Camanoe was dismissed and the entirety of the land was awarded to the respondents in proceedings commenced under the Land Adjudication Ordinance 1970.

The issue in the appeal is whether on the evidence adduced before the Land Adjudication Officer the one undivided half share of the parcels to which the appellant was entitled as co-owner with the respondents had been lost to the respondents by acquisitive prescription under the law of the Virgin Islands. The competing claims were brought by both claimants before the Land Adjudication Officer in their capacities as legal personal representatives of

William McFarlane Penn on the one hand and Ella Urania Penn on the other.

The parcel Beels was held by William Benjamin Penn under a deed of gift in 1847. William Benjamin Penn died in 1896 leaving a will by which he devised his interests in Beels to his son Ludolph Geraldine Penn and to his daughter Ella Urania Penn in equal shares and appointed Ella Urania Penn to be his executrix. Ludolph Geraldine Penn died intestate prior to 1906 leaving William McFarlane Penn as his eldest son and heir. Ella Urania Penn died in 1938 leaving Ethelinda Leonora Stevens, her niece, as her sole executrix and beneficiary. Ethelinda Leonora died testate in Nevis at the age of 93 in the year 1973.

The parcel Dixons was purchased by and conveyed to Ludolph Geraldine Penn in 1871. He sold 30 acres of it to Ella Urania Penn and the same acreage to Conrad Wylie, his brother, who predeceased him and who predeceased William Benjamin Penn, his father. In the result William Benjamin Penn succeeded to the estate of Conrad Wylie. The Land Adjudication Officer found that Ella Urania Penn was entitled to one-third of Dixons in her own right and to one-half of the one-third granted to Conrad Wylie. William McFarlane Penn became entitled to the remaining undivided half interest in Dixons as eldest son and heir of the intestate Ludolph Geraldine Penn.

In the proceedings before the Land Adjudication Officer the appellant claimed an undivided half interest by documentary title in Beels and Dixons as legal personal representative of William McFarlane Penn. The respondents claimed the entire interest for the successors of Ella Urania Penn on the basis that Ella Urania Penn and her executrix Ethelinda Leonora Stevens had acquired the entire interest by documentary title and by possession.

The Land Adjudication Ordinance 1970 of the Virgin Islands (No. 5 of 1970) is an ordinance to provide for the adjudication of rights and interests in land and for purposes connected therewith and incidental thereto. With regard to disputes it is provided in section 15(1):-

"15(1) If in any case -

(a) there is a dispute as to any boundary whether indicated to the Demarcation Officer or demarcated or re-adjusted by him, which the Demarcation Officer is unable to resolve; or

(b) there are two or more claimants to any interest in land and the Recording Officer is unable to effect agreement between them,

the Demarcation Officer or the Recording Officer as the case may be shall refer the matter to the Adjudication Officer.

(2) The Adjudication Officer shall adjudicate upon and determine any dispute referred to him under subsection (1), having due regard to any law which may be applicable, and shall make and sign a brief record of the proceedings."

As a result of amendments by Ordinance No. 13 of 1971 and Ordinance No. 2 of 1978, section 23 of the principal Ordinance relating to appeals provides:-

"23(1) Any person including the Governor who is aggrieved by any act or decision or omission of the Adjudication Officer and desires to question it or any part of it may within 90 days from the date of the certificate of the Adjudication Officer under section 22 or within such extended time as the Court of Appeal, in the interest of justice, may allow, appeal to that Court in the form prescribed in the Court of Appeal Rules for civil appeals from the High Court.

(2) On an appeal the Court of Appeal may, if it is satisfied that the act, decision or omission is erroneous, make such order or substitute for the act, decision or omission of the Adjudication Officer such decision as it may consider just and may under section 140 of the Registered Land Ordinance, 1970 order rectification of the register.

(3) A decision of the Court of Appeal under subsection (1) shall be in writing and copies of it shall be furnished by the Court to the Registrar, to the appellant and to all other parties to the appeal and, by the Registrar, to all other parties who, in his opinion, may be affected by the appeal. ..."

It was under these statutory provisions that this dispute came before the Ajudication Officer and that the appeal was taken from his decision to the Court of Appeal of the Virgin Islands and now to their Lordships' Board.

Their Lordships pass now to consider the statutory provisions bearing on the matter in dispute to which the Adjudication Officer was obliged by the provisions under which he operated to have due regard. In 1883 the British Virgin Islands were part

of the Leeward Islands. By the Real Property Limitation Act passed on 1st January 1883 applying to the Leeward Islands it was provided by section 10 that:-

> "From and after the commencement of this Act, all the provisions of the Imperial Act passed in the session of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall be in full force in the Colony, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained [in specified sections of it] ..."

The Real Property Limitation Act 1874 applying in England and Wales was in effect applied in the Leeward Islands with twelve years being substituted for twenty years as the prescriptive period. The Act of the third and fourth years of the reign of King William the Fourth chapter 27 is the Real Property Limitation Act 1833 passed by the Parliament of the United Kingdom and applicable to England and Wales. Section 12 reads:-

> "... when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more of his or their undivided share or shares of such land or of the profits therof, 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."

This provision accordingly was effective in the Leeward Islands for so long as the Real Property Limitation Act of 1883 applied. In particular it applied in the British Virgin Islands until 1961 when it was repealed. On repealing the provision the Limitation Ordinance No. 20 of 1961 of the Virgin Islands provided by section 31:-

> "Nothing in this Ordinance shall -
>
> (a) enable any action to be brought which was barred before the commencement of this Ordinance by an enactment repealed by this Ordinance, except in so far as the cause of action or right of action may be revived by an acknowledgment or part payment made in accordance with the provisions of this Ordinance: or
>
> (b) ..."

It is also necessary to have in mind section 2 of the Real Property Limitation Act of 1883 which is the equivalent of section 2 of the English Act of 1833 as repealed and re-enacted in the English Act of 1874 with the substitution of twelve years for twenty. Section 2 of the Real Property Limitation Act 1883 is in these terms:-

> "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 twelve 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 twelve 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 effect of these statutory provisions was considered in *Paradise Beach and Transportation Co. Ltd. and Others v. Cyril Price-Robinson and Others* [1968] A.C. 1072 in which the judgment of the Board was delivered by Lord Upjohn. At page 1083B Lord Upjohn, quoting from Denman C.J. in *Culley v. Doe d. Taylerson* (1840) 11 Ad. & E. 1008 at 1015 *et seq*, said:-

> "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
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> > ' The effect of this section [No. 2] is to put an end to all questions and discussions, whether the possession of lands, etc., 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.'
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> 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.
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> 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* (1837) 2 M. & 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 ed. (1893), 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* (1839) 3 Y. & C. (Ex.) 617, *Doe d. Jones v. Williams* (1836) 5 Ad. & 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 [these were the daughters who were tenants in common in that particular case] were rightfully in possession of the whole land and were committing no wrong by farming all of it, see *Henderson v. Eason* (1851) 17 Q.B. 701; *Jacobs v. Seward* (1872) L.R. 5 H.L. 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 Act of 1874 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 showing 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 Act of 1833. 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. ...

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 Act of 1874 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 rises upon section 12 of the Act of 1833. 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 *In re Landi* [1939] Ch. 828 at page 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 *In re Hobbs* (1887) 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."

With the substitution of twelve years for twenty where it occurs in that passage these observations apply precisely to the present case. In the present case there was evidence that William McFarlane Penn left the British Virgin Islands in 1919 and returned only in 1971, having sold all his land in the British Virgin Islands when he left. Accordingly it was open to the Ajudication Officer to conclude as he did that there was no possession at all by William McFarlane Penn for the period of fifty-two years from 1919 up to 1971 either by himself or by any agent.

There was evidence that overseers appointed by Ella Urania Penn and Ethelinda Leonora Penn paid taxes on the lands, sold sand from them and made arrangements for fish to be given to Ella Urania Penn when it was hauled up on the shore. In addition Hope Stevens, a son of Ethelinda Leonora Penn Stevens testified that he from time to time had picked coconuts and

inspected the old ruins and had considered possibilities for development.

Having regard to the nature of the lands, their Lordships consider that the Adjudication Officer was entitled to conclude that Ella Urania Penn was in possession of the disputed lands from 1919 at least until her death in 1938 when her niece, Ethelinda Leonora Penn Stevens, remained in continuous possession through herself and her agents until her death in 1973. Counsel for the appellant in his very persuasive submissions pointed out the very discontinuous nature of the activities founded on by the respondents as amounting to possession and said with force that for a good part of the time the respondents' predecessors were just as absent from the disputed lands as was William McFarlane Penn. However their Lordships consider that this fails to take proper account of the nature of the lands, their remoteness, and the type of possession of which they were, during the relevant period, capable. The Adjudication Officer was familiar with the area and with all the circumstances and concluded that there was sufficient and indeed abundant evidence to establish adverse possession for over forty years. On appeal the Court of Appeal affirmed this finding. As they point out, the acts founded on as possession by the respondents:-

> "... must be seen in the light of the fact that the land was largely non-arable at that time; and indeed Great Camanoe was inaccessible for the greater part of the period under consideration. Probably the only way that the island could be reached from Tortola was by a row boat and it was unlikely that there could have been frequent visits."

They concluded that it was essentially a question of fact for the determination of the Adjudication Officer and that there was no reason to depart from his conclusion. In their Lordships' opinion the question at issue, as indeed counsel for the appellant recognised, is essentially a question of fact for the determination of the Adjudication Officer. He had a basis in the evidence for the finding which he made. The Court of Appeal agreed with this finding and in these circumstances, in their Lordships' opinion, there is no ground for them to interfere.

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