JAMAICA

IN THE COURT OF APPEAL

CAYMAN ISLANDS APPEAL No. 5/1968

BEFORE: The Hon. Mr. Justice Moody, Presiding
The Hon. Mr. Justice Shelley, J.A.
The Hon. Mr. Justice Luckhoo, J.A.

BARNES et al v. THOMPSON

Mr. C. Rattray for the plaintiffs/appellants

Mr. Leacroft Robinson Q.C. and Mr. D. Muirhead
for the defendant/respondent

29th and 30th April,
1st and 2nd May, 31st July, 1969

LUCKHOO, J.A.

This is an appeal from the judgment of the Judge of the Grand Court in the Cayman Islands refusing the plaintiffs' claim in their capacity as executors of the estate of Richard Lemuel McField (deceased) for a declaration that the legal estate in an area of land comprising some 62.9 acres (hereinafter referred to as the disputed area) in the region of the Great Sound at Georgetown in the Cayman Islands vests in them in their aforesaid capacity.

The defendant before action brought had claimed that he was the legal owner of the disputed area comprised in a larger area of lands he had acquired on the 20th May, 1964 by purchase from one Benson Greenall who in turn had acquired the same and more by purchase from Thomas William Farrington and others on the 4th May, 1950. On the other hand the plaintiff claimed that the testator Richard Lemuel McField had entered into possession of the disputed area in 1925 upon the death intestate of his father Napoleon McField who himself had been in occupation of the disputed area for some time before his death and that Lemuel continued in possession of the disputed area exercising acts of ownership thereon until his death on the 23rd February, 1964. By his last Will and Testament bearing date the 14th February, 1964 which was duly proved and registered Lemuel purported to devise a piece or parcel of land (which the plaintiffs claim is the disputed area of land) as follows -

"I give, devise and bequeath unto my beloved children a piece or parcel of land, known as "WHITE HALL", situate in the area of the Great Sound, District of George Town, Island of Grand Cayman, containing 20 acres more or less, with boundaries as follows:- On the NORTH by Mangroves, on the SOUTH by lands belonging to Shirley McField, on the WEST by lands belonging to Benson Greenall, and on the EAST by the Sea in the Great Sound; the said land to be for each and every of my children in EQUAL SHARES the said children being:- (1) Wilson McField, (2) Una Uldine McField, (3) Pearl Louise Hill, (nee McField). (4) Roosevelt Frosbery McField, (5) Mabel Adeen Evans, (nee McField) (6) Henry Walton McField, (7) Orma Sadie Barnes, (nee McField) (8) Charles Verdon McField, (9) Helen Verta Hunt, (nee McField) and (10) Lemuel Linton McField ...."

The plaintiffs' claim proceeded upon the basis that there was no documentary title to the disputed area in the defendant or his predecessors in title and that even if there were Napoleon and Lemuel had been in possession of the disputed area for a continuous period of over 12 years thereby extinguishing whatever title the former may have had. The relevant enactment as to limitation in the Cayman Islands is the Limitation of Actions Law, Cap 86, enacted in 1881, sections 3, 4 and 30 of which are as follows -

" 3. 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, has first accrued to some person through whom he claims, or, if such right has not 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, has first accrued to the person making or bringing the same.

4. 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 -

(a) when the person claiming such land or rent or some person through whom he claims has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of such land, or in receipt of such rent, and has while entitled thereto been dispossessed, or 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;

(b) when the person claiming such land or rent claims the estate or interest of some deceased person who has continued in such possession or receipt in respect of the same estate or interest until the time of his death, and has been the last person entitled to such estate or interest who has been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death;

(c) when the person claiming such land or rent claims 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 has 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;

(d) when the estate or interest claimed has been an estate or interest in reversion or remainder, or other future estate or interest, and no person has 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;

(e) when the person claiming such land or rent, or the person through whom he claims, has 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.

30. At the determination of the period limited by this Part of this Law to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished."

Section 3 is the counterpart of section 2 of the Real Property Limitation (No. 1) Act of 1833 repealed and re-enacted by section 1 of the Real Property Limitation (1874) Act save that in these Acts the period

limited is 20 years. Sections 4 and 30 are the counterparts respectively of sections 3 and 34 of the Real Property Limitation (No.1) Act of 1833.

The first question to be considered is whether 12 years have elapsed since the right of entry or bringing of an action to recover the disputed area accrued whatever the nature of the possession might be. The learned trial judge in deciding this question against the plaintiffs took the view that the acts of cultivation and cutting of wood and timber relied on by the plaintiffs were insufficient in extent and in time to bring the case within the relevant provisions of the Law (Cap 86).

In order to understand the contentions of the parties it is necessary to refer to the situation of the disputed area in relation to the larger area which the defendant claimed he had acquired by purchase from Benson Greenall. Thomas William Farrington and others entitled to share in the estate of one William Farrington who died intestate on or about the 31st October, 1944 and claiming that there was vested in the deceased at the time of his death an estate in fee simple in possession in certain lands and swamps situate between Georgetown and West Bay in the Island of Grand Cayman purported to convey those lands and swamps by an indenture made on the 4th May, 1950 to Benson Greenall. The lands and swamps were described in the indenture by reference to a plan (annexed to the indenture) prepared by C.N. Clarke, Chartered Surveyor, from an aerial survey made between the 23rd and 29th December, 1949. The lands and swamps are shown on Clarke's plan as lot A containing 14 acres, lot B containing 84 acres 3 roods and 14 perches and lot C containing approximately 218 acres. The disputed area appears to form part of lot C. Lot B is described in Clarke's plan as dry land and lot C as swamps. These areas will be referred to as lands unless it is necessary to distinguish between areas of dry lands and swamps.

By an indenture made on the 17th March, 1962, 14 acres, 12 perches of these lands were conveyed by Greenall to the defendant. There is no dispute as to this area of land. By another indenture made on the 7th March, 1963, another portion of those lands were sold by Greenall to the defendant a specific term of the indenture being that title to the lands was not warranted. The disputed area forms part of this portion. Finally, by an indenture made on the 20th May, 1964, a ten foot strip of land running the length of the lands from east to west and shown on Clarke's plan immediately

north of the area sold on the 7th March, 1963, and which forms part of the disputed area was sold by Greenall to the defendant. Immediately to the north of the disputed area is land, part of the area sold by the Farrington estate to Greenall which Greenall had sold to the Coral Caymanian Hotel.

It will be observed that the plaintiffs' claim is in relation to 62.9 acres the southern boundary of which is stated in the statement of claim as the lands belonging to Shirley McField. Shirley McField (one of the plaintiffs) testified that the lands south of the disputed area had been in the possession of his grandfather Sergeant McField who was a brother of Napoleon and that he is now in possession of those lands.

Lemuel while referring in his Will to the area he claimed to be 20 acres more or less stated that it was bounded on the south by lands belonging to Shirley McField. The northern boundary Lemuel stated to be mangroves while the plaintiffs in their statement of claim stated the northern boundary likewise. However, consequent upon a survey carried out by Peter Ball, a land surveyor on the 31st August 1967, at the instance of Wilson McField, one of Lemuel's sons and a beneficiary under Lemuel's Will, the northern boundary coincides with the southern boundary of the Coral Caymanian Hotel which was fixed by Ball upon a survey at the instance of the Hotel made in the previous year. The entire area of 62.9 acres delineated on Ball's plan of the 31st August, 1967, was admittedly the result only of what Wilson McField had pointed out to him.

It was generally agreed that the disputed area was swamp land containing pockets of dry land in the dry season save for one significant area of land upon which catch crops could be cultivated all the year around. This area was surveyed by Black, a land surveyor employed to the defendant and found to be 1½ acres. Ball on the other hand did not actually survey this area which fell within the larger area of 62.9 acres but upon the basis of certain physical features he observed in relation to the lands upon which he went he made the assumption that the area of dry land was some 8 to 9 acres. However, the considerable difference between these surveyors in this regard is easily explained by the fact that Black was referring to land dry all the year round which would be lands cultivable while Ball was referring to an area which included land spongy and damp in the dry season but under water in the rainy season and therefore not cultivable. The learned

trial judge accepted Black's conception of dry land and I can see no good reason for disagreeing with his finding in this regard bearing in mind the significance of the dry land to be in respect of acts of cultivation. It will be convenient to refer to this area of dry land as the quay.

The acts of user in respect of the disputed area may be classified under four heads (1) cultivation of crops (2) cutting of logs for posts in the erection of a house in another part of the Island (3) cutting of logs to be laid in the swampy area to facilitate crossing of that area from dry land of an adjacent owner to the quay; (4) marking of trees to indicate boundary divisions.

<u>Cultivation</u>

(i) <u>Shirley McField</u> 60 years of age said that 50 years ago Napoleon McField occupied the disputed area and cultivated it. No one else did. After Napoleon's death (in 1925) Lemuel took over the disputed area and cultivated it until he died (in 1964). In 1967 when he last went on the disputed area a part of the quay was overgrown and he saw only dead coconut tree stumps. When re-examined he added that he also saw live coconut trees on his last visit.

(ii) <u>Wilson McField</u> (the eldest son of Lemuel and a beneficiary under the clause in Lemuel's Will set out above) who was born in 1901 (he was 67 years of age at the time of the hearing) said that his grandfather Napoleon used to cultivate coconuts, yams, cassava and cane in the disputed area. He went there with him when he was 12 or 13 years old. He went to sea at the age of 18 but he would go on the land while at home from sea. In 1952 he visited his mother and spent time on the Island. He then entered the disputed area with his father on several occasions. His father was cultivating it (presumably on the quay) and he was surprised to see several hundred coconut trees on it.

He next returned to Grand Cayman in 1962 to attend his mother's funeral but did not go on the disputed area. His next visit to the disputed area was in 1964 when he then visited the disputed area with his father observing some 200 to 300 coconut trees and lots of cane. In that same year his father fell ill and after an illness of 25 days his father died. His next visit to the disputed land was in January 1966 when he observed that all of the coconut trees were on the ground and the place (the quay) had started to grow back to bush.

(iii) Charles Barnes aged 56 years, a shoemaker and later a chef, one of the plaintiffs and a son in law of Lemuel testified that he first went on the disputed area in 1937 the year of his marriage to Lemuel's daughter Erma. He resided with Lemuel in 1937 and in that year Lemuel was cultivating cassava, sweet potatoes, melons, beans and coconuts among other crops "on dry solid land". He was away from the Island between 1937 and 1942 and remained on the Island from 1942 until 1949 when he left. He returned to the Island in 1957. In 1967 he went to the disputed area and saw only 10 live coconut trees. He said that Lemuel did not cultivate on the disputed area before he died but cultivated around his home.

(iv) Urdley Myles - 66 years of age who married Lemuel's niece Annie in 1927 testified that from about 1932 until 1942 he cultivated on the disputed area for Lemuel sweet potatoes, canes, melons and beans while coconuts grew on the land. He was away at sea during that period for a total period of about two years.

(v) Willoughby Ebanks aged 74 years said that he was employed to William Farrington to cultivate his land and on two occasions - in 1936 and 1937 - he went into the disputed area to see what was happening and saw Lemuel gathering coconuts there.

(vi) Irvine McField aged 56 years son of Sergeant McField said that he has been on Lemuel's land and that Lemuel farmed there but he does not say when this was. His last visit to the disputed area was in about 1966 when he saw a few canes, suckers, a few coconut trees, a weeping willow tree and a mango tree.

(vii) Vassel Johnson a witness called by the defendant spoke of seeing Lemuel crossing to the quay on one occasion in about 1948 when the testator said that he was going to "Poly Bill" meaning the quay, which Lemuel claimed to own.

On the evidence relating to cultivation on the quay the learned trial judge had this to say -

> "I accept that Napoleon and Lemuel remembering that Lemuel died in 1964 at the age of 80 years cultivated cane, cassava, beans and sweet potatoes and melons on the 1½ acre quay and collected coconuts which were either planted or self-grown and that they crossed the swamp by means of cut logs laid down and cut house posts and other vegetation growing wild. On the evidence I can make no finding as to the extent or how regular or continuous was this cultivation other than that there was cultivation. It is evidence relevant to the question of an assertion of a right

to ownership. Also I accept that Wilson McField at some date, not clearly ascertained, put in the iron peg (iP.5) found by Mr. Ball, the surveyor, in the swamp between the land now occupied by the Defendant and that claimed by the McField estate (Ex. D)."

Counsel for the plaintiffs submitted that the proper inference to be drawn from the evidence as to cultivation is that Napoleon and after his death Lemuel were continuously in possession of the quay for over 12 years - in fact for at least 50 years and that title to the quay is thereby extinguished. I do not agree. There is no reliable evidence as to what point of time Napoleon's user of the land commenced. Even if Shirley McField's ipse dixit that Napoleon cultivated 50 years ago were to be accepted there is no evidence as to the extent or how regularly or continuously Napoleon did so. As to Lemuel's cultivation the evidence was not definite as to any specific area of the quay cultivated by him. It is common knowledge that dry land in the middle of a mangrove swamp in the tropics would have to be cleared of bush for cultivation and that spots on the land would be cleared from time to time depending on such things as the nature of the crops desired and the time of the year when planting is put underway. There is no evidence that the entire area of the quay (the plaintiffs claim the quay to be at least 8 to 9 acres in extent; one witness Wilson McField gives 20 acres as the area of dry land) was put under cultivation. Again, as the learned trial judge stated, a difficulty in the case was to know how far self-interest had coloured the evidence of the members of the McField family and a faulty memory or exaggeration of the evidence of certain elderly labourers since the events of which they spoke occurred so long ago as not to admit of refuting evidence being obtained or at least of difficulty in obtaining such evidence. As was observed by the Privy Council in the case of West Bank Estates Ltd v. Arthur (1967) A.C. 665 at p. 680 where the question of possessory rights acquired by acts of cultivation fall to be considered, in the final analysis the case becomes one of appraisal of the evidence as to possession on the part of the claimants (the plaintiffs) of the disputed area itself and of decision on an issue of fact. It was not suggested that the findings of the learned trial judge were vitiated by any error of law and I think that the findings of the learned trial judge were justified on the evidence adduced.

Cutting of posts

The evidence was as to an isolated act of cutting of posts at some uncertain time in the past by the testator to take away to use as posts for a house he was erecting elsewhere. The evidence is not precise as to where the posts were cut.

Cutting of logs

There is no evidence as to number of occasions on which this was done or where it was done. In any event the logs were cut only for the purpose of affording a dryfoot means of access from Farrington's lands to the quay across the swamps.

The learned trial judge accepted that posts and logs were cut for the purposes stated but held that such acts and the using of the swamps for access to the quay could not amount to the assertion of ownership to anything except perhaps the actual logs or posts taken. Counsel for the plaintiffs however submitted that the only possible use one could make of the swamps is to cut trees or timber growing thereon. Be that as it may, the point here is that the acts in question were not carried on over any period of time - In fact isolated acts such as these could hardly found a claim in possession even to the immediate area from which the logs or posts were cut (the evidence was not precise as to where this was done) much less than to the area of 62.9 acres claimed.

Marking of trees to indicate boundaries

The evidence is to the effect that at some time during the lifetime of Napoleon McField he and his brother Sergeant decided that the boundary between the lands they claimed to occupy was a manchioneal tree and that a thatch tree was selected by Napoleon as his northern boundary another thatch tree being at the north western corner of the disputed land. Some evidence was sought to be adduced as to the existence of a custom in the division of lands in the Cayman Islands where there were swamps adjoining areas of dry lands. The learned trial judge declined to accept any such evidence but the reason for this ruling does not appear on the Record. However, Counsel for the plaintiffs before us stated that he accepted the trial judge's ruling as correct. In any event if there was a custom in this regard as some of the witnesses for the plaintiffs allege it is difficult to understand how the

northern boundary of the disputed area came to be at the edge of dry land now occupied by the Coral Caymanian Hotel and was not in the middle of the swamp between the quay and the dry land to the north.

It may well be that Napoleon and after him Lemuel always regarded the trees referred to as their boundary marks. The evidence as far as it goes also shows that neither the Farringtons nor their successors in title ever performed any act by way of cultivation or otherwise in or over the disputed area. But it is clear that there is no evidence that the defendant or his predecessors in title or indeed whoever might be the holder of the legal title ever agreed with Napoleon or the testator that those trees should form the boundary marks in respect of their lands. It would follow that neither Napoleon nor Lemuel should be held to be in constructive possession of any land he did not in fact use or occupy. The question therefore to be decided on the evidence was what was the extent of the land which they did in fact use or occupy. See West Bank Estates Ltd v. Arthur (ubi sup) and the cases cited at p.679 of that report. The evidence as to cultivation and user on this issue has already been considered.

The evidence of user or occupation not being sufficient to extinguish the title and title not being shown to be in the defendant can the plaintiffs obtain the declaration sought or a declaration of any other right? Before the learned trial judge the matter proceeded on the basis that a declaration of ownership by virtue of possession for the statutory period was sought and it was held that the evidence did not show that the title was extinguished. It was in the circumstances unnecessary for the learned trial judge to make a finding as to whether Lemuel at his death still remained in possession of the whole or any part of the disputed area. However, counsel for the plaintiffs before us has in the alternative sought a declaration as against the defendant that the plaintiffs are entitled to possession of the disputed area or of a part thereof. An examination of the evidence of Charles Barnes which from his findings the learned trial judge appeared to accept shows that at the time of Lemuel's death Lemuel had ceased to use or occupy any part of the disputed area and indeed the evidence of other witnesses as to the physical state of the quay after Lemuel's death supports such a finding.

In the light of this evidence it is not possible to grant a declaration as to possession in the plaintiffs even limited as against the defendant. In so finding I do not overlook the fact that Greenall's reason for not warranting title to lands of which the disputed area forms a part proceeded from his understanding that Lemuel was laying claim to some part of that land and that the defendant thereafter sought to purchase the quay from Lemuel for the reason as the learned trial judge found that this would avoid a lawsuit.

In view of these conclusions I do not think it necessary to deal with the question, where as it is here no title being shown in any person title remains in the Crown (The Cayman Islands are a settled Colony) or with the further question as to the extinction of the Crown's title after adverse possession for a period of 60 years except to remark that the evidence adduced falls far short of user or occupation on the part of Napoleon and Lemuel for such a period.

I would dismiss the appeal with costs to the respondent.