J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 54 OF 1975.

B E F O R E : The Hon. Mr. Justice Graham-Perkins - Presiding
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Watkins, (Ag.) J.A.

VIDA BOWES and Others - APPELLANTS
v.
ALLAN SPENCER - RESPONDENT

Mr. Owen S. Crosbie for the appellants.

Mr. H.G. Edwards, Q.C., for the respondent.

April 30; May 1976.

GRAHAM-PERKINS, J.A.,

The appellant, Vida Bowes, (hereinafter referred to as the appellant), sought to recover damages under two heads from the respondent in an action in which she alleged (i) that the respondent had stopped a survey being carried out on June 13, 1974 on her land, known as Sophie, in Manchester, and (ii) that on the same day the respondent had trespassed on the said land. In a reserved judgment Her Honour Miss A. McKain held that the respondent, in stopping the survey, had acted under lawful authority and was not, in the circumstances, guilty of trespass.

It is necessary to set out briefly the case on which the appellant relied before the learned resident magistrate. The appellant is the lawful daughter of Clifford Turner who died on July 8, 1958, leaving, inter alia, 6½ acres of land, the subject matter of the action herein. For about a year before her father's death the appellant had "worked" this land and paid the taxes thereon. On her father's death she took possession of the land and continued to "work it" and pay the taxes. She went to the land every other day. On June 13, 1973, nearly 15 years after the death of her father, the appellant employed a surveyor to survey her land. She paid his fee in the sum of $74.00. The surveyor was actually engaged in the exercise of surveying the land when the respondent, without her permission,

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came on to the land and stopped the survey. He told her that he had sold the land to someone. She had not authorised him to sell the land. She did not know that her father had left a will until she was so advised by the respondent on June 13, 1973. She denied that the respondent had told her in 1963, that her father had left a will. At all material times she had been in exclusive possession of Sophie and had been under the impression that her father had died intestate.

In answer to the appellant's claim the respondent gave evidence to the following effect. Clifford Turner left a will which came into his (the respondent's) possession some time between 1959 and 1960 and in respect of which he obtained probate in 1963. By this will he was appointed sole executor and trustee of Turner's estate. He was directed to sell Sophie and to divide the proceeds of sale equally among Turner's three children of whom the appellant was one. He did not, as he was entitled to do, take possession of the land in dispute. About a year, or less, after obtaining probate he met the appellant for the first time, on a bus, and told her that he had proved her father's will. He knew that the appellant had been in possession of Sophie and he told her that she should continue in possession until he was ready to sell it. On March 20, 1973, he concluded an agreement with two brothers, named Bramwell, to sell them the land in dispute. Some time after this agreement had been concluded he received a notice from the appellant advising him that she proposed to have the land surveyed. In due course he went to the land and stopped this survey.

In her reasons for judgment in favour of the respondent the learned resident magistrate said, inter alia, that the appellant "was on the land with the knowledge and consent of" the respondent and that as the executor and trustee of Clifford Turner, he was entitled to sell Sophie to the Bramwells. I am by no means clear as to what the resident magistrate meant by finding that the appellant was on the land with the knowledge and consent of the respondent. On his own evidence he did not become aware of the appellant's possession of Sophie until some six years after her father's death. In this circumstance the fact that he told the appellant that she should continue in possession of the land until he was ready to sell it cannot be said to be material to any issue which the resident magistrate was

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required to resolve. It is unnecessary to refer to any of the other findings of the resident magistrate as they are, in my respectful view, largely irrelevant to the question posed on this appeal. What is clear, however, is that the resident magistrate does not appear to have adverted at all to the question whether the appellant had acquired a possessory title to Sophie prior to the purported sale by the respondent to the Bramwells.

In so far as the resident magistrate found that the respondent had not been guilty of an act of trespass on June 13, 1973, in entering upon the land, admittedly in the appellant's possession on June 13, 1973. Mr. Edwards attempted to justify that finding by reference to Rodgers & Perry v. Senior, (1970) 15 W.I.R. 127. I indicated to Mr. Edwards during the hearing of this appeal that that case had proceeded on a basis entirely unrelated to the factual and legal position described by the evidence in this case. It is, perhaps, desirable, therefore, to say no more than that the decision in Senior's case has not the least relevance to any issue in this appeal, and I do not purpose to burden this judgment with any discussion thereof.

I pass now to an examination of the one real issue that arose on the evidence before the resident magistrate and to which, unhappily, she did not give an answer. Did the appellant at any time acquire a possessory title to Sophie prior to the purported sale thereof by the respondent? Mr. Edwards contended that in Jamaica a beneficiary under a will cannot acquire a title to land by adverse possession as against an executor. For this proposition he relied on the proviso to s.9 of the Limitation of Actions Act and a statement by Harman, J., in Bridges v. Mees (1957) 2 All E.R.577 at p. 581.

Section 9 of the Limitation of Actions Act provides

> " When any person shall be in the possession or in the receipt of the profits of any land, or in the receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action for the recovery of such land or rent, shall be deemed to have.....

" have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy at which time such tenancy shall be deemed to have determined:

PROVIDED always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this section, to his mortgagee or trustee. "

Here again I am quite unable to detect the relevance of the foregoing proviso to any question on this appeal. The section is unmistakably clear. Firstly, it identifies and recognizes the existence of a tenancy at will of land and the right of a person (a lessor at will) entitled subject thereto to make an entry or distress, or to bring an action for the recovery of such land. Secondly, it prescribes the time at which that right is to be deemed to have first accrued. Thirdly, by its proviso, it asserts that a mortgagor or cestui que trust shall not be regarded as a tenant at will of his mortgagee or trust. This proviso comes into effect, of course, where a mortgagor or cestui que trust enters into possession of land by and with the permission of his mortgagee or trustee in circumstances which would, prima facie, give rise to the existence of a tenancy at will. Speaking of s. 7 of the Real Property Limitation Act, 1833, whose provisions are identical to those of s.9 of our Limitation of Actions Act, Wilde, C.J. said in Garrard v. Tuck, (1847-49) C.P.8 C.B. at p.489:

" The object of that section appears to be, to fix a definite period, at the end of which the right of entry of the lessor, as against his tenant at will, shall be deemed to have accrued; and it provides that no cestui que trust, shall be deemed to be a tenant at will within the meaning of that clause, which is equivalent to saying that the right of entry of a trustee against his cestui que trust, shall not be deemed to have first accrued at the expiration of one year after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time."

I respectfully accept the opinion of Wilde, C.J., as to the meaning of s.7 with its proviso. It does not, in my view, however assist the respondent. It is abundantly clear that the section, with its proviso, is directed against a cestui que trust in possession of land by virtue of an instrument relating thereto and by the permission of his trustee so that his possession may fairly be identified as a possession under his trustee.

It is not without interest to notice here, that prior to 1833 it had been authoritatively settled that the relationship between a trustee and a cestui que trust who entered into possession of land in pursuance of the trust was to be regarded as that existing between a lessor and his tenant at will for the particular purpose of avoiding the inconsistency that would otherwise have been manifest between this relationship and the general principles of law, and thus preventing the possession of a cestui que trust from being regarded as adverse to the title of the trustee. This was achieved by the fiction of a constructive tenancy at will, an invention of the common law, introduced in order to explain and support the possession of a person who held no legal title, and yet was not a trespasser since he held by virtue of an equitable title. It was on the background of this state of things that the doctrine of non-adverse possession was abolished by the Real Property Limitation Act, 1833. It was not sufficient, however, merely to abolish the doctrine of non-adverse possession since it was clear that the possession of a true tenant at will would become adverse as soon as his tenancy was determined; hence the provisions contained in s.7 of the 1833 Act. But what of the constructive tenant at will, the cestui que trust who had been let into possession by his trustee? It was, quite obviously, necessary to clothe the trustee with some measure of protection, and this the 1833 Act did by the device introduced by the proviso to the 7th section.

In Melling v. Leak, (1855) 16 C.B. at p.669 the effect of Garrard v. Tuck was stated thus:

> " The case of Garrard v. Tuck certainly supports the doctrine that a cestui que trust who is let into possession of the trust estate by the trustee becomes his tenant at will, and the right of entry under the 2nd section of the statute, 3 & 4 W. iv, c.27, accrues only on the determination of such tenancy at will. "

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See also the same effect Drummond v. Sant (1870 - 71) L.R. 6 Q.B. 763.

The evidence before the resident magistrate in this case certainly did not disclose a tenancy at will in any sense. Neither did it describe a situation in which the appellant had been let into possession of the land in dispute by the respondent. Rather did the evidence unmistakably assert that the appellant assumed possession of Sophie dehors her father's will and not in pursuance of any direction therein. By virtue of his office of trustee the respondent enjoyed a right to possession of Sophie at all material times up to July 1970. His entitlement to that right was unqualified. It was subject to a right in no other person. He did not, however, exercise that right at any time. It followed that time began to run in favour of the appellant from the date of her father's death. The respondent, on the other hand, did nothing to prevent time running. Wherefore the relevance of the proviso to s.9 of the Limitation of Actions Act?

The situation disclosed by the evidence in this case is not dissimilar to that in Bolling v. Hobday, (1882) 31 W.R.9. The headnote of this case which makes somewhat insructive reading is as follows:

" A testatrix, by her will devised real estate to trustees, their heirs and assigns, in trust for her daughter for life, and after her death to sell and to devise the proceeds between four persons M.A.S., S.S., T.S., and J.S., share and share alike. On the death of the testatrix the tenant for life entered and occupied until her own death in 1857. On her death T.S. and J.S. entered and remained in possession until the death of the latter in 1874. T.S. remained in possession until his death in 1880. The trustee never in any way acted, so far as the real estate was concerned, and the property was enjoyed by T.S. and J.S., and after the death of J.S. by T.S.. without interruption and acknowledgment.

Held, that the legal estate in fee of the trustee was extinguished by the expiration of 20 years from the death of the tenants for life, and with it the trusts by which it was affected; and that it would be wrong to ascribe the possession

of....

" of T.S. and J.S., which was unlawful for all the purposes of the will, to the supposed lawful title which they each had in respect of one-fourth share of the proceeds of sale. "

It is perfectly clear, in my view, that where a cestui que trust acquires possession of land to the exclusion of other cestuis que trustent and of their trustee the cestui que trust so in possession will acquire a title as against that trustee and the other cestuis que trustent. See also Re Cussons Ltd. (1904) 73 L.J. Ch 296.

As to the statement made by Harman, J., in Bridges v. Mees, it is as follows:

" Before I leave this part of the case, I ought perhaps to refer to the change in the law brought about by the Limitation Act, 1939, in the relations of trustee and cestui que trust. Before 1939, the cestui que trust, having regard to a proviso attached to the Real Property Limitation Act, 1833, s.7, could not acquire a title against the trustee. "

I have already referred to s.7 of the Real Property Limitation Act, 1833. The statement by Harman, J., which, for the purposes of this case, appears to be not only irrelevant but is, if I may respectfully say so, quite inaccurate, does not, in my opinion, assist the respondent's case.

The law applicable to the question raised on this appeal is clear. When once time began to run in favour of the appellant, as I conclude it did, on her assumption of possession of Sophie on her father's death, there were only two ways in which the respondent could prevent time from continuing to run. Firstly, he could have asserted his right to possession either by making an effective entry upon the land or by taking proceedings to recover possession thereof. The evidence discloses that he did neither. Secondly, he could have secured an acknowledgement in writing from the appellant at any time prior to July 7, 1970. Here again the evidence discloses that the respondent did not even attempt this Having failed to pursue any of the courses open to him so as to prevent time running in favour of the appellant it followed that his title to Sophie was effectively extinguished at the end of 12 years from the death

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of Clifford Turner.

In the result, I conclude that the resident magistrate erred in holding that the respondent had any lawful authority to stop the survey or to enter upon land in the appellant's possession. I would, therefore, allow the appeal and enter judgment in favour of the appellant, with costs to the appellant in the sum of $50.00 in respect of the appeal, and costs in the court below to be taxed or agreed. I would remit the matter to the resident magistrate to enable her to assess such damages as the appellant is entitled to recover, and to consider the desirability or otherwise of granting the injunction prayed for by the appellant.

Before parting with this case it is, perhaps, desirable to say a word or two about the persons in whose names the action herein was brought. The record discloses the names of two plaintiffs, the appellant and her sister, Pearl Taylor. I am far from clear why it was thought necessary to join the appellant's sister as a co-plaintiff. It appears that Pearl left Jamaica some time prior to her father's death and that she paid a visit to this Country in December, 1965. I would have thought it elementary that in order to maintain an action for trespass to land a plaintiff was required to prove possession of that land. No evidence was led in this case that Pearl Taylor was ever in possession of Sophie. The resident magistrate quite rightly in my view, dealt with this case on the basis that the appellant was the real and only plaintiff.