

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 61/1969

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Hercules, J.A. (Ag.)

LUCIUS WHITE v. CARLOS COTTERELL

H.G. Edwards, Q.C. for the appellant.

C. Rattray, Q.C. and N. Wright for the respondent.

February 25,26; April 2, 1971

LUCKHOO, J.A.

On February 26, 1971 we dismissed this appeal with costs \$40 to the respondent and promised to put our reasons therefor in writing. This we now do.

The respondent brought a claim in the resident magistrate's court for the parish of Trelawny for £3 as arrears of rent owing by the appellant for the period January 1, 1965 to June 30, 1967 at 2/- per month in respect of 2 acres of land situate at Sherwood in the parish of Trelawny and called Jack Wisdom under an agreement of tenancy entered into by and between them on September 1, 1964. The appellant in resisting the respondent's claim alleged that the respondent in executing the tenancy agreement had represented himself to be the agent for the owner of the land whose name he did not disclose and that he (appellant) had subsequently paid the amount of the rental for the abovementioned period to one Bernard Scharschmidt who had claimed to be the owner and had demanded payment of the rent due. The learned resident magistrate found that the respondent had been in continuous possession of the land from 1939 and that Scharschmidt had never been in possession thereof nor held any right, title or interest therein. He further found that it was not until 1965 that Scharschmidt started to claim ownership of the land. He held that as the appellant had not proved that there was anyone with a title paramount to that of the respondent and as his defence to the respondent's claim was based on superior title in

Scharschmidt the respondent's claim succeeded. He accordingly entered judgment for the respondent.

At the hearing of the appeal leave was granted to the appellant to have the original grounds of appeal filed argued. Leave was refused to argue the additional grounds of appeal filed in September, 1970.

The evidence disclosed that one Joseph Cotterell had claimed to be the owner of an area of some 200 acres of land at Jack Wisdom Mountain, the two acre portion now in question forming part of that larger area. Joseph Cotterell went to reside in Cuba and by a document dated February 15, 1939 purported to appoint the respondent, whom he described in that document as his cousin, his "agent and general manager and landlord bailiff for my property Jack Wisdom Mountain situated in the parish of Trelawny from the above date exclusive". The respondent entered into possession of the lands in pursuance of that appointment, rented portions of those lands to various persons and paid taxes levied on those lands. Joseph Cotterell died in Cuba in 1963 apparently intestate and thereafter the respondent continued in occupation of the lands claiming to do so as one of the heirs ab intestato of the deceased. On September 1, 1964, as is evidenced by a document signed by the appellant as tenant and the respondent as landlord, the respondent agreed to rent the two acre portion in question on a monthly tenancy for the sole purpose of depasturing cows with the right reserved to the respondent to recover possession of the portion of land upon three months' notice to quit. The amount of rental was not specified in the document but it is common ground that the sum of 2/- per month was agreed as rental. As a result of this agreement the respondent put the appellant in possession of the land and the appellant duly made payment of the rent for the first three months of his occupation. In 1965 Bernard Scharschmidt who had been residing in the United Kingdom for several years returned to Jamaica and claimed to be the owner of the lands, including the portion rented by the appellant to the respondent which Joseph Cotterell in his lifetime had claimed to be his and in respect of which he had purported to appoint the appellant as his "agent and general manager and landlord bailiff". Bernard Scharschmidt based his claim of ownership on a devise contained in the Will of his father E.B. Scharschmidt (deceased) (duly

proved and registered) dated January, 16, 1940 and in which he was named as one of the executors. E.B. Scharschmidt died on or about February 2, 1940 and the last clause numbered 4 appears therein as follows -

"The same claim and authority I have on Belmont Mountain I leave to my sons."

Bernard Scharschmidt claimed that Belmont Mountain is the same as Jack Wisdom Mountain and that the words "the same claim and authority I have" in the clause referred to ownership and possession in E.B. Scharschmidt. The opening words of the devises which preceded the clause numbered 4 were as follows: "I devise my piece of land" "My portion of land at" and "I leave a house spot" and they leave no doubt as to the quality of the testator's claim to ownership in the respective areas of land. The learned resident magistrate rejected the appellant's contention that clause 4 had the effect of devising Belmont Mountain to Bernard Scharschmidt and his brothers and we see no reason to differ from him in this regard. In 1966, Bernard Scharschmidt obtained a consent judgment against Zachariah Williams and Rosalind Cotterell for damages and an injunction restraining them from entering upon certain lands "at Belmont Mountain" which the respondent had rented to them as being lands formerly in the ownership of Joseph Cotterell. Apparently Bernard Scharschmidt's claim against those two persons was in trespass.

There was no evidence of a paper title in either Joseph Cotterell or E.B. Scharschmidt or in any other person.

For the appellant it was submitted that even if Joseph Cotterell was the owner of the land at his death, the agency in the respondent came to an end on his death in 1963 and the land would have devolved upon the deceased's personal representatives upon statutory trusts by virtue of the Real Property Representation Law, Cap.332, s.3(1) had there been persons in whose favour such trusts could operate as provided for by s.4(1) of the Intestates' Estates and Property Changes Law, Cap.166. There being no such persons, it was submitted that the deceased's estate escheated to the Crown and it was therefore incompetent for the respondent after the deceased's death to rent any portion of that estate to the appellant. It was further submitted on behalf of the appellant that if a tenant repudiates a tenancy agreement under which he holds and pays rent to a third party possession

of the land passes to the third party. For the respondent, Mr. Norman Wright submitted that even assuming that the respondent had no estate in the land and conceding that in such a case the grant of a tenancy of the land can pass no actual estate, the appellant is estopped from denying that the grant was effective to create the tenancy that it purported to create there having been brought into being a tenancy by estoppel with the right of the respondent as landlord to distrain for rent. In support of this submission Mr. Wright referred to paragraph 2 appearing at p.652 of the 3rd Edition of the Law of Real Property by Megarry and Wade. This submission which we accept is a complete answer to Mr. Edwards' first submission as to the legal effect of the tenancy agreement entered into between the parties in 1964. Further, the payment of rent to the respondent as landlord and the fact that it was the respondent who put him into possession of the land operated to estop the appellant from disputing the title of the respondent, there being no suggestion that the payment of rent was made through a mistake or in consequence of any misrepresentation by the respondent. In any event the appellant has failed to show a better title in anyone else. The second submission by Mr. Edwards that if a tenant repudiates a tenancy agreement and pays rent to a third party possession of the land would pass to the third party is untenable and is unsupported by authority. The case of Mountnoy v. Collier (1853) 1 E.& B. 630 cited by Mr. Edwards really supports the proposition that a tenant is not estopped from showing that his lessor's title has determined and that if he has a new arrangement with the person who really has the title to hold under him it is not necessary that he should actually go out of possession; otherwise he must surrender possession before he disputes his lessor's title or have been evicted actually or constructively by a person having title paramount.

Both submissions made by Mr. Edwards having failed we dismissed the appeal.

J. A. Sutcliffe

JA

R. D. Hercules

J. A. C.