IN THE MATTER OF LAND AT LUMLEY BEACH, ATTORNEY-GENERAL v. DAVIES and OTHERS

Supreme Court (Purcell, C.J.): May 29th, 1929

[1] **Land Law — adverse possession — time does not run unless area of land defined, possession not referable to any right, and owner dispossessed and excluded:** A prescriptive title to land is not obtained by the mere possession of an unascertained area during the statutory period: the area must be defined, preferably by enclosure; possession must not be referable to any right to use or possess the land, such as a tenancy at will or a customary right; and the trespasser should dispossess the rightful owner, demonstrating his intention to possess adversely to him by excluding him and preventing him from exercising acts of ownership over the land (page 168, line 35—page 169, line 11).

[2] **Land Law — unoccupied land — Unoccupied Lands Ordinance (cap. 223) — land may be "unoccupied" under Ordinance if occupied by person claiming under defective title by prescription:** Land which is occupied by a person claiming under a defective title by prescription may be claimed by the Crown as "unoccupied" land under the Unoccupied Lands Ordinance (*cap.* 223), s.4 if the land was not cultivated or inhabited during the 12 years prior to the commencement of the Ordinance, *i.e.* 1899—1911 (page 168, lines 10—25).

[3] **Limitation of Actions — land — adverse possession — time does not run unless area of land defined, possession not referable to any right and owner dispossessed and excluded:** See [1] above.

The plaintiff brought proceedings under the Unoccupied Lands Ordinance (*cap.* 223) so that the defendants might prove their right to certain land claimed as Crown land.

The land in question was originally Crown land and was part of a large area, divided by a cemetery and a salt pond, which was cultivated in parts by one Doweh Walker from about 1840. He also permitted members of the Aku and Kroo tribes to farm on it. He did not enclose any of the property, nor did he ever exclude the Crown from it.

When he died in 1885 his son continued to cultivate isolated areas sporadically, but from 1899 to 1911 no serious cultivation took place. The Crown continued to exercise acts of ownership over the property, such as the settling of boundaries, removing and admitting cultivation, and road building.

In 1912 one of the defendants built a house on the land now claimed, without the permission of Doweh Walker's son, but in 1915 the latter purported to convey this land to the defendants by deed. In the absence of a known boundary, however, the area

of land conveyed was not clearly defined. The defendants remained in possession from that time but, like their predecessors in possession, they did not exclude the Crown until 1928 when they prevented lorries from entering the property.

In 1926 the Government posted notices over a large area of land under s.3 of the Unoccupied Lands Ordinance (*cap.* 223), claiming the property as Crown land. The defendants claimed parts of the land posted, which they described as not extending beyond the "Road to the Sand Scheme." There was some dispute as to what area was described by this expression when the plaintiff brought the present proceedings so that the defendants might prove their right to the land.

The defendants relied on the deed by which the land had been conveyed to them, contending that their predecessors in possession had acquired a prescriptive title to the property having possessed it adversely to the Crown for more than 60 years. They also contended that since they lived upon the land it could not be claimed as "unoccupied" land.

For the Crown it was contended that the property fell within the terms of the Unoccupied Lands Ordinance (*cap.* 223), s.4, having been uncultivated during the 12 years immediately prior to the commencement of the Ordinance in 1911. It was also contended that the deed upon which the defendants relied was ineffective to convey any title to the property because the Walker family had moved from the land before 1915, never having acquired a prescriptive title to it, since — (a) the area of land in question was undefined and so could not be the subject of adverse possession, and (b) there had been no possession adverse to the Crown since it had never been excluded before 1928 and since the use to which those in possession had put the land had not been adverse to the wishes or interests of the Crown.

The court gave judgment for the Crown.

Cases referred to:

(1) *Att.-Gen. for British Honduras v. Bristowe* (1880), 6 App. Cas. 143; 44 L.T. 1.

(2) *Billage v. Southee* (1852), 9 Hare 534; 68 E.R. 623.

(3) *Doe v. Roberts* (1844), 13 M. & W. 520; 153 E.R. 217, followed.

(4) *Harvey v. Mount* (1845), 8 Beav. 439; 50 E.R. 172.

(5) *Jones v. Williams* (1837), 2 M. & W. 326; 150 E.R. 781.

(6) *Leigh v. Jack* (1879), 5 Ex. D. 264; 42 L.T. 463, followed.

(7) *Tate v. Williamson* (1866), L.R. 2 Ch. 55; 15 L.T. 549.

(8) *Thomas v. Thomas* (1855), 2 K. & J. 79; 69 E.R. 701, followed.

Legislation construed:

Unoccupied Lands Ordinance (Laws of Sierra Leone, 1925, *cap.* 223), s.4:

"For the purposes of this Ordinance, all land shall be deemed to be unoccupied land where it is not proved, by the person claiming the same, that beneficial use thereof for cultivation or inhabitation, or for collecting or storing water, or for any industrial purposes, has been made for twelve years next prior to the commencement of this Ordinance.

Provided that the following lands shall not be deemed to be unoccupied land, namely:—

(1) Where the person claiming the same is able to produce the instrument. . . by virtue of which he is in possession thereof. . . showing a title so such lands extending over a period of not less than twelve years prior to the commencement of this Ordinance."

PURCELL, C.J.:

This case is brought (and is the first to be so brought) under the Unoccupied Lands Ordinance (*cap.* 223). Notices under s.3 of that Ordinance were posted by the Government on September 15th, 1926 on land lying in Aberdeen and on December 2nd, 1926 on land in Lumley. Mr. Davies and the other defendants claimed certain parts of the land posted and this action has been brought to oblige them to prove their title.

The claimants' contention is that some time prior to 60 years before this action was begun, probably about 1840, one Doweh Walker, a Krooman, obtained possession of this and the adjacent land stretching as far as two trees known as "The Two Sisters." The circumstances of his coming there are in doubt: it is said that — (a) he was fishing off that part of the coast, landed on the beach, met and married a Sherbro woman who was living nearby; or (b) he was settled there by the Royal Navy as a reward for his services, though at the time he arrived there he must still have been a comparatively young man; or (c) he was sent by or went under the authority of King William. Suffice it to say that he obtained a lodgment on the southern extremity of the land and while living there he obtained, according to the claimants, possession of land extending to "The Two Sisters" and Aberdeen Creek; but the land now claimed does not extend beyond the

"Road to the Sand Scheme." There has been some dispute as to what is meant by this expression.

Possession is said to have been obtained by 1840, considerably more than 60 years ago. It was obtained by occupation of the district afterwards known as Kroo Town, by making farms, and by permitting the Aku people to farm part of the land. Other Kroo settled in the same place and held the land — so it is said — from Doweh Walker. On the character and consequence of this possession the claimants refer to *Jones* v. *Williams* (5) and *Att.-Gen. for British Honduras* v. *Bristowe* (1).

Doweh Walker died in 1885 leaving two sons, Matthew Sillah Walker by his first wife and Zaccheus Walker by his second wife, the aunt of the claimants. Very soon after his father's death Matthew Sillah Walker, who seems to have been a sailor and a fisherman, left Kroo Town but retained possession of the land through his brother Zaccheus who remained for some years at Kroo Town and then removed into Lumley but continued to farm at "Zac Water" up to 1916 at which date he was prosecuted for cruelty to a dog.

Matthew Sillah Walker is said to have carried on or completed the prescription of his father. In 1915 he conveyed to the claimants by a deed of gift dated September 10th, 1915 the land now claimed. In this deed Zaccheus Walker joined; the reason for joining him is not apparent but if this transaction were good in all other respects this joinder would not invalidate it. The consideration alleged was the natural love and affection of the grantors for their cousins the grantees, and also the sum of £5. The claimants also alleged that the consideration was the past and future maintenance of the grantors. It is, I think, clear that except insofar as this matter may be opened by the other side the claimants cannot now go outside the deed. The claimants also relied on facts which they say are inconsistent with the Crown's recent ownership; the question before me, however, is whether the claimants can show a good title in themselves.

The claimants further contend that these proceedings under this Ordinance are wrongly brought, because the land in question carries some buildings. The Crown asserts that this land is still Crown land. The Ordinance provides that the land shall be deemed Crown land only after six months from the posting of the notices and in the absence of any claim. The letter written by the claimants' solicitor to the Government did not truly invite the

Government to bring these proceedings because the notices had already been posted; it only requested the Government to continue the necessary steps which the Government had initiated to give the claimants the opportunity of declaring before this court the erroneous procedure.

The Crown's reply is that this land was originally Crown land by virtue of the Sierra Leone Company Act, 1807 together with a treaty made with King Tom dated July 10th, 1807. Other lands in the Colony were similarly vested in the Crown and were granted to imported settlers. These Crown grants are generally recognised as the best root of title in the Colony. Many of these original lots were abandoned and other land occupied or "jumped" in exchange. The mode of cultivation has assisted this process and a chaotic condition of titles has resulted. Abandoned lots may certainly be posted: see s.4 of the Unoccupied Lands Ordinance (*cap.* 223). This Ordinance was passed to meet the conditions referred to and to discover how far the process has gone, *i.e.* what claimants there are and with what title.

The word "unoccupied" has a highly technical meaning; it is obviously not limited to "unoccupied" in the ordinary sense but includes land as to which there are claims of ownership adverse to the Crown. In fact this Ordinance is meant to ascertain how far land has been prescribed as is claimed in this case. There is no evidence of any serious or general cultivation of the land from 1899 to 1911. Kroo Town itself was abandoned in 1892 — the Aku were leaving in 1906 and what cultivation there was by Zac Water was local and sporadic. The only sign of continuous cultivation was on Cole's land (coloured yellow on the plan) and this land was in consequence not posted but abandoned to the occupier. Lastly, the claimants' solicitor gave an unconditional invitation to the Crown to bring proceedings under this Ordinance.

The Crown admit that Doweh Walker obtained a footing in Kroo Town, but denied that he ever had such possession there of all or any of the land now claimed as would support a prescriptive title. There are two aspects of possession — mental and physical. The first consists of an intention to possess and to possess adversely to the owner. This intention requires a definite object, not a vague unascertained extent of land. The intention must be clear and demonstrated to all the world. Here and elsewhere tenants at will farmed Crown land and there is no evidence of an intention adverse to the Crown, which was never excluded before 1928

when the motor lorries were stopped. The use Doweh Walker made of this land would not have been contrary to the wishes of the true owner: see *Leigh* v. *Jack* (6).

The physical factor in possession is the dispossession of the true owner and the new possession of the trespasser, exclusive, undivided and not referable to any right to possess or use the land. In this case no-one was excluded before recent years when those excluded included Abraham Freeman's grandchildren, Nieh Davies and the Government motor lorries, and until recently there was no marked boundary. There was never any enclosure which is the strongest evidence of appropriation and exclusion. Possession which is possibly referable to customary rights over the land claimed must be so referred, *e.g.* the custom of fisherman to build huts (see Mr. Macauley's evidence and Nieh Davies' attempt to build such a hut) or to cultivate as tenants at will as the Aku people did on this very land: see *Thomas* v. *Thomas* (8). Use of isolated portions even if adverse and continued over 60 years cannot prescribe the whole district: see *Doe* v. *Roberts* (3).

The Crown was never dispossessed but during the 60 years before this action was brought continued to exercise acts of ownership and was never interfered with or excluded before 1928. The acts of ownership alleged are the settling of boundaries; removing and admitting cultivation twice in 1906 and once in 1917 when Mr. Davies himself was removed with his dwelling place; the building of the sand elevator and road alongside it for six months in 1913—1914; the making of the beach road in 1919 when no compensation was paid, and cutting a track for the lorries in 1928 when for the first time the Crown was opposed.

The Crown contends that the nature and the history of this land support their contention. The village was not one of agriculturists but fisherman. The greater part of the cultivatable land was occupied by the Aku people. The Kroomen were cut off from this by the cemetery extending from the Kroo village northwards between the good land and the sea. Between the Kroo village and Lumley village was the salt pond, and then the good land round Zac — formerly Bludo — Water. This land was farmed and water dug by Bludo and since then has been farmed by Abraham Freeman and Daddy Pettias. There is no evidence that Zac Water was there before Doweh Walker's death. The farms that the claimants allege were made are not identified as to area or position. Such user as can be proved at all was isolated and

sporadic. Matthew Sillah Walker evinced little or no interest in the land at all until 1915. Zaccheus Walker has his main farm on the Goderich Road. Matthew Sillah Walker left Kroo Town and lived at Congo Town and at Freetown; he evinced no interest in the land and there is some evidence that, falling on evil days, he became something of a mendicant. Zaccheus Walker left Kroo Town and lived at Lumley and founded his main farm on the Goderich Road.

Mr. Davies seems to have returned to this neighbourhood about 1912. He was apparently engaged in cutting wood and then worked for the Government on the sand elevator; he also built a house down there at Kroo Town for his brother Pope Henessy Davies and a house appears always to have been assessed in that name. All this occurred before the transfer of this land under the deed and there is no evidence that Walker's permission was ever sought for or obtained.

It has also been argued on behalf of the Crown that in the circumstances disclosed this deed would be set aside by a court of equity, and the following cases were cited: *Harvey* v. *Mount* (4); *Billage* v. *South* (2); *Tate* v. *Williamson* (7). I express no opinion in this judgment whether in fact that submission is well founded — but I am happy to rest in the knowledge that if it ever becomes necessary to decide such a momentous question, the responsibility of giving a decision upon it will not be mine.

I have thought it necessary in this case — which has aroused a good deal of local interest and is beyond all doubts of very considerable importance to the parties themselves — to set out all the facts at some length in order that there may be no mistake about them.

I have very carefully and anxiously considered this matter from every standpoint and I have come without doubt to the conclusion that the evidence which the claimants have placed before me in order to establish their claim to this land entirely fails to convince me that Doweh Walker and Matthew Sillah Walker ever acquired a prescriptive title to this land and the deed is consequently worthless. The claim therefore fails and must be dismissed, but in view of the length of time which has elapsed since Mr. Davies first went on this land, and in view of all the facts and circumstances surrounding his occupancy of that portion of it where he and his brother are now residing, I shall make certain recommendations to the Government under the provisions of s.8 which I earnestly trust the Government will see their way to adopt.

I cannot take leave of this case without expressing my warm thanks to the counsel who conducted it for the manner in which all the facts have been laid before this court. The work entailed must have been laborious in no ordinary degree and I am specially obliged to Mr. Evans for the able and masterly way he has elucidated this matter.

Order accordingly.

KING v. WILLIAMS (C.P. JOHNSON and L.J. JOHNSON Third Parties)

Supreme Court (Prior, Ag. C.J.): August 8th, 1929

[1] **Family Law — property — married women's property — legal estate of wife's separate property vests in husband as trustee, wife retains beneficial interest — property conveyed by husband and wife both executing deed and no acknowledgment before judge necessary:** If property is devised directly to a married woman for her separate use her husband acquires the legal estate by virtue of the *jus mariti* but becomes a trustee in equity for the married woman who retains the beneficial interest, if the woman is single at the time she acquires the property, the same situation pertains if she subsequently marries; the later execution of a mortgage deed by both husband and wife is sufficient to transfer both the legal and beneficial interests in the property and since the wife transfers only the beneficial interest her acknowledgment before a judge is unnecessary (page 174, lines 33—41; page 175, lines 11—15).

[2] **Land Law — estate tail — words of limitation — devise to A and the heirs of his body as tenants in common — "as tenants in common" has no effect, A takes estate tail:** A devise which is expressed in technical terms but with the addition of incompatible words of modification is construed as if those superadded words had not been used, so that in a devise to *A* and the heirs of his body as tenants in common the words "as tenants in common" have no effect and *A* takes an estate tail; similarly a devise to *A*, her heirs and assigns forever as tenants in common is effective to transfer a fee simple estate to *A*, the words "as tenants in common" again being ignored (page 175, line 30—page 177, line 27).

[3] **Land Law — fee simple — conditional fee simple — devise to A absolutely subject to gift over in event of death without issue confers fee simple on A defeasible if no issue living at his death:** When a testator devises property to *A* absolutely subject to a gift over in the event of *A* dying without issue, *A* takes a fee simple estate defeasible in the event of his leaving no issue living at his death and he cannot therefore convey an indefeasible fee simple estate in the property (page 178, lines 1—5; page 179, lines 2—6; lines 12—16).