ALLEN v. ROUGHLEY[1]

Real Property – Prescription – Trust

'Whiteacre' was alienated to T from the Crown in 1823. The next documentary evidence of title was a mortgage from P to H in 1877, followed in 1880 by a conveyance from P as mortgagor and H as mortgagee to C. C died in possession in 1895 leaving a will under which the plaintiffs made their claim. In 1898 the original defendant A went into occupation of 'Whiteacre' together with W, a life tenant under the will. W died in 1942. In 1937 A and R (one of the plaintiffs) became trustee of C's will which purported to convey 'Whiteacre' to them to be dealt with according to the terms of the will. In 1950 the plaintiffs (as trustee and beneficiary) sued the defendant in his representative capacity for, *inter alia*, a declaration that 'Whiteacre' was an asset in C's estate. This was granted by the Supreme Court of New South Wales, and an appeal from this decision to the High Court was dismissed.

Before Roper C.J. in Eq. the defence was based on two grounds (1) that A had obtained a prescriptive title prior to 1937, and (2) that there had been no proof of C's title (if any) to 'Whiteacre'. Both these grounds were rejected and the appeal was prosecuted *only* on the latter. The appeal was dismissed by the High Court for reasons which fall into two classes, *viz.* the legal effect of A's becoming a trustee, and a denial that it was incumbent on the plaintiffs to prove that C had either a good documentary title or had occupied 'Whiteacre' for at least twenty years.

Clearly the argument addressed by the appellants ignored A's character as a trustee.[2] On this point the principal judgment is that of Dixon C.J. who in fact rests the case here. His Honour states the principle as 'A trustee who insists that an interest which would otherwise thus devolve on the trustee and enure for the benefit of the beneficiaries, is overridden by, or must give way to, his own private rights cannot throw the burden of proof on the beneficiaries . . . Any claim he may make to the enjoyment of the property he must substantiate.'[3] The key word is 'substantiate'. It is a matter for regret that there was no detailed discussion of the degree of substantiation required. It seems that proof merely that possession was entered into free of suspicion that it was in the name of the trust, together with proof that the trustee later took office while disputing the trust title would be treated as irrelevant.[4] At the other extreme mere

[1] (1955) 94 C.L.R. 98, High Court of Australia; Dixon C.J., Williams, Fullagar, Kitto, and Taylor JJ.

[2] (1955) 94 C.L.R. 98, 101-102. See *ibid.*, 105, *per* Dixon C.J., and 126, *per* Fullagar J.

[3] *Ibid.*, 107.

[4] See however Kitto J. (1955) 94 C.L.R. 98, 142-143 where possible relevance could be inferred.

acceptance of the trusteeship would not necessarily operate to convey the trustee's beneficial interest (if any) to the beneficiaries. Hence Dixon C.J. notes that had A established a prescriptive title then 'doubtless his title would not have been destroyed by acceptance of the office of trustee.'[5] The position is far less clear for the case of a trustee unable to prove either a documentary or a prescriptive title and yet able to prove some defect in the trust title which would normally be a defence. The Chief Justice only speaks of the trustee establishing a title in himself as does Kitto J. where he states at the end of his judgment that 'a Court of Equity in these circumstances (*i.e.* acceptance of the trust) must inevitably have held that he became a trustee of "Whiteacre" unless he could establish that he had acquired a beneficial title in the interval between the date of the will and his appointment as trustee.'[6] However Taylor J. states that 'the testator had purported to devise this land by his will and the office accepted by the defendant imposed upon him the duty of executing those trusts so far as they still remained to be executed. This consideration was sufficient, at least, to cast upon the defendant the onus of establishing in the suit that such lands did not at that time form any part of the trust estate, and this he has clearly failed to do.'[7] This passage appears to indicate that the trusteeship *may* operate only to alter the onus of proof. If it were otherwise it could happen that in a case in which the title to 'Blackacre' was vested in X, where Y occupied 'Blackacre' for a period less than twenty years and discontinued possession and Z entered into possession and then became a trustee of Y's will purporting to dispose of 'Blackacre', the beneficiaries under Y's will could eject Z although Y lost all his interest in 'Blackacre' on abandoning possession.[8] In other words mere acceptance of the office of trustee could convey a beneficial interest. Perhaps it is not often that a claimant to property becomes a trustee of the interests of a rival and this accounts for the paucity of authority. It is still true that a majority of the court in opinions which may or may not be part of the *ratio decidendi* hold that the trustee must at least prove that 'such lands did not . . . form any part of the trust estate.'[9]

The appellants relied on a passage from Holdsworth[10] which the members of the court interpreted and criticized in turn in a manner more usual in statutory interpretation.

> The fact that a plaintiff, who relies solely on his own possession, must show a possession for twenty years – the period fixed by James I's

[5] (1955) 94 C.L.R. 98, 107. Kitto J., *ibid.*, 143, and Taylor J., 146, are to the same effect. [6] *Ibid.*, 143. [7] *Ibid.*, 146.

[8] See *Trustees Executors, and Agency Co. v. Short* (1888) 13 App. Cas. 793, 799; also (1955) 94 C.L.R. 98, 116, 131, *per* Williams J. and Fullagar J. respectively.

[9] *Ibid.*, 146 *per* Taylor J.

[10] *A History of English Law* (2nd ed., 1937) vii, 64-65.

statute of limitation – seems clearly to involve the consequences that possession for any less period will not do. We have seen that the necessity for showing a possession for twenty years was laid down by Holt C.J., in 1699; but it was apparently not till the beginning of the nineteenth century that it was clearly ruled that possession for less period was insufficient. In 1829, in the case of *Doe d. Wilkins v. Cleveland* ((1829) 9 B. and C. 864; 109 E.R. 321, 324) it was held that 'no possession short of twenty years was sufficient to warrant the jury in presuming the fact of livery of seisin' and this was approved by Parke B.; in 1837 – 'if' he said 'the fact of livery of seisin is saught to be inferred from possession alone such possession ought to have existed for twenty years' (*Doe d. Law's v. Davies* (1837) 2 M. & W. 503, 516; 150 E.R. 856, 862). The reason for this rule is obvious. The defendant is in possession, and therefore presumably entitled in fee simple. Though prior possession for twenty years does not raise the inference that the person so possessed had an absolute right by virtue of the statute, possession for a less time can raise no inference at all. Therefore the presumption in favour of the defendant stands. As Cole says (Cole *Law and Practice in Ejectment* (1857) 212) proof of mere possession by the plaintiff, or of the person through whom he claims, within twenty years before action, is not generally sufficient to support an ejectment, because the defendants in such action are used as tenants in possession; and their possession is presumed to be lawful, in the absence of proof of title in the claimants.' But it must be noted that this principle does not apply in the two following cases: (a) we have seen that if an action of ejectment is brought against a trespasser, the plaintiff is entitled to recover merely on proof of his possession and its disturbance by the defendant just as if he had brought an action of trespass. (b) if an action of ejectment is brought against a defendant whose possession is not adverse to that of the plaintiff (e.g., if the defendant is in possession merely as a bailiff for the plaintiff) the plaintiff, by construction of law, is and has always been in possession; and the defendant, being estopped from disputing this fact, the plaintiff is entitled to succeed.

The fundamental basis of the action of ejectment in modern times has been the subject of controversy between Sir William Holdsworth and Mr A. D. Hargreaves.[11] Broadly Holdsworth's formulation is a rule subject to the exceptions contained in the passage above, that the plaintiff must prove a title good against all the world. Hargreaves believes ejectment to be a matter of relative title hence he denies that *jus tertii* is ever a defence.

Dixon C.J. (*obiter*) Kitto and Taylor JJ. deal primarily with the rule and Williams J. primarily with the exceptions. Fullagar J. deals with both aspects. The Chief Justice and Fullagar and Kitto JJ. deal similarly[12] with the two cases on which Holdsworth relied

[11] Mr Hargreaves differed from the views expressed in *A History of The English Law* (*supra*) in a paper entitled 'Terminology and Title in Ejectment' (1940) 56 *Law Quarterly Review*, 376, provoking a reply from Holdsworth (1940) 56 *Law Quarterly Review*, 479.

[12] (1955) 94 C.L.R. 98, 110, 128-129, 140, *per* Dixon C.J., Fullagar and Kitto JJ. respectively.

for his rule.[13] To quote the Chief Justice '. . . where . . . the plaintiff's title depended on feoffment with livery of seisin and the feoffment was given in evidence but proof of the livery of seisin failed, the fact of livery of seisin could not be presumed from the circumstance that the feoffee obtained and held possession for a period. In the absence of twenty years possession the plaintiff showed no title.[14] His Honour also cites other cases where for particular reasons twenty years prior possession is required to be shown. Dixon C.J. and Kitto J. cite a number of judicial pronouncements that twenty years of possession is not an essential element. Fullagar J. suggests that Holdsworth's rule would lead to the result that on the extinction of the true owner's title the last of successive trespassers would have a good defence against the first if none of them could prove twenty years possession. Such a case would not come within the scope of Holdsworth's first exception which is concerned only with the relations between the disseisor and the disseisee. It seems there is no such defence.[15] His Honour disapproves the old Victorian case of *May v. Martin*[16] in so far as it decided there was a defence on this ground.[17] Williams J. simply accepts Holdsworth's formulation.

In place of Holdsworth's rule Their Honours[18] propounded a rule depending on competing presumptions of title. The Chief Justice formulates it as follows: 'The fact is that the proof of the plaintiff's title in ejectment will be made out according to the circumstances by such admissable evidence as tends to prove that at the issue of the writ the plaintiff was entitled as against the defendant to possession of the land.[19] Standing alone this is no more helpful than the passage from Holdsworth himself[20] cited by Kitto J.[21] However the Chief Justice goes on later to say that 'the *prima facie* presumption arising from possession may form part of the proofs.' It is this latter aspect which is significant. The court does not necessarily assert that only a relative title is required, as Hargreaves does,[22] for they do not need to deny the *jus tertii* cases. All that is neces-

[13] *Doe d. Wilkins v. Cleveland* (1829) 9 B. and C. 864; 109 E.R. 321 and *Doe d. Lewis v. Davies* (1837) 2 M. and W. 503; 150 E.R. 856.
[14] *Ibid.*, 110.
[15] *Cheshire's Modern Real Property* (7th ed., 1954) 771.
[16] (1885) 11 V.L.R. 562.
[17] (1955) 94 C.L.R. 98, 131.
[18] Williams J. dissenting.
[19] (1955) 94 C.L.R. 98, 110.
[20] *A History of The English Law* (2nd ed., 1937) vii, 61.
[21] (1955) 94 C.L.R. 98, 140.
[22] (1940) 56 *Law Quarterly Review*, 376. At least one premise on which Hargreaves bases his reasoning is that the old law of the Real actions survived the Real Property Limitation Act 1833 (Imp.) adopted in New South Wales by Act 8 Wm. IV, no. 3 (N.S.W.). This premise is denied by Holdsworth (1940) 56 *Law Quarterly Review*, 379, 382, and also by Fullagar J. in this case, 127. See also Sweet (1896) 12 *Law Quarterly Review*, 239, 249.

sary for them to say is that the mode of proof of title differs from that of Holdsworth. The significance of this alteration of mode of proof is apparent when the simplest possible case is considered. Suppose all that is proved is that X was in possession of 'Blackacre' and that he seeks to evict the present possessor Y. The simple answer given by competing presumption of title is that Y wins because a later presumption defeats an earlier one. The whole court agrees as to the result in such a case.[23] There are, however, difficulties: If X had actually had a title (and it is said he is presumed to have one), it would not have been defeated by Y unless Y had derived his title through X or unless X had conveyed his right to possession to a third party.[24] Must one presume that X conveyed his fee to Y or a third party so as to defeat the criticism made by Williams J.?[25] It is certainly a necessary inference to say in the example above that *prima facie* Y did not obtain possession within Holdsworth's exceptions.[26] It appears that this conflicts with the view of Williams J. that the onus of establishing Y's non-adverse possession (within the second exception) is on Y not X. In Holdsworth's view, which Williams J. accepts, X loses whatever the onus was, because prior possession 'raises no inference'.

Once the general rule is stated in terms of completing presumptions of titles it is quite logical to say as Kitto and Taylor JJ. do, that the plaintiff may establish his title in ejectment if it is more likely than not that he had a title. In the instant case Their Honours thought that the evidence supported the plaintiffs.[27]

As it was admitted that the defendant had no case if the plaintiffs established a title there was no need to go further. Kitto J., however, considered Holdsworth's exceptions, that mere possession is enough to eject a trespasser, and that a person whose possession 'is not adverse' to the plaintiff is estopped from denying the plaintiff's title. His Honour thought these exceptions could be brought within the general rule based on presumptions of title on the ground that the defendant's possession in these exceptions was 'explained on grounds which prevent a competing presumption arising from it'.[28] Such a principle would appear to invite a defendant to escape

[23] (1955) 94 C.L.R. 98, 111, 114, 131, 136, 145, *per* Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ. respectively.

[24] Mere discontinuance of possession does not defeat an actual title. Only possession without title is so affected. See *Trustees Executors and Agency Co. Ltd. v. Short* (1888) 13 App. Cas. 793. As to parting with a right to possession to a third party (*e.g.* tenant) see *N.R.M.A. Insurance Ltd. v. B. & B. Shipping and Marine Salvage Co. Pty. Ltd.* (1947) 47 S.R. (N.S.W.) 273.

[25] (1955) 94 C.L.R. 98, 114. A passage from Ferguson J. in *Hawdon v. Khan* (1920), 20 S.R. (N.S.W.) 703, 712-713, cited with approval by Kitto J. implies that this is so (1955) 94 C.L.R. 98, 128.

[26] The exceptions are not denied by the court although their extent is restricted by Fullagar J. (1955), 94 C.L.R. 98, 128.

[27] *Ibid.*, 140, 144, *per* Kitto and Taylor JJ. respectively. [28] *Ibid.*, 137.

by proving that the plaintiff likewise had no title. It seems, however, that a trespasser may evict a tenant obtaining possession through him or a trespasser to himself.[29] In fact some of the cases cited in support of the rule that twenty years possession is not essential to found an action in ejectment seem to come within this last case. Thus 'in *Doe d. Hughes v. Dyeball* (1829 M. & M. 346; 3 C. & P.P. 610; 172 E.R. 567) ejectment was brought to recover possession of a room in a house: the plaintiff proved a lease to him of the house and a year's possession, and rested his case there: it was objected that no title was proved in the demising parties to the lease; but, *per* Lord Tenterden, "that does not signify, there is ample proof; the plaintiff is in possession and you come and turn him out; you must show your title." '[30]

It is submitted that there is no single unifying principle as envisaged by Kitto J., but that there are two aspects to ejectment, namely the relations between the present and past successors and exemplified by Holdsworth's exceptions and the proof or disproof of title capable of being given by the plaintiff or defendant as the case may be.

Williams J. decided that this case fell squarely within Holdsworth's second exception. His Honour concedes that Roper C.J. in Eq. did not find that A's tenancy was purely permissive so as not to make it by construction of law the possession of W. However His Honour agreed with Roper C.J. in Eq. that A had to prove that his tenancy was adverse to W[31] and thus A was a tenant at will only while W was away.

Fullagar J. held that A's tenancy was adverse in the sense that time would run in his favour, that is presumably that A was a tenant at will; His Honour then went on to assume that Holdsworth had used 'adverse' in this sense and so found that the plaintiffs were not protected by the second exception.[32] Williams J. seems also to have made this assumption as to the word 'adverse' because he passes from adverse possession to time running as if the two were synonymous.[33]

With respect it is submitted that Holdsworth meant to include all tenancies not inconsistent with the title of the plaintiff within the phrase 'not adverse'. This would certainly include all permissive tenancies. To hold otherwise would be to infer that Holdsworth

[29] Very adequate reasons as to why this should be so are given by Mr T. W. Smith (as he then was) in (1938) 1 *Res Judicatae,* 302, 307. Authority, if needed, is supplied by Williams J. (1955), 94 C.L.R. 98, 115 and cases there cited.

[30] Cited by Dixon C.J. (1955) 94 C.L.R. 98, 110.

[31] This onus seems opposed to the view of the remainder of the court. *Supra,* n. 26. The nature of the tenancy as seen by Fullagar J. (1955) 94 C.L.R. 98, 124 differs markedly from the view of Williams J.

[32] (1955) 94 C.L.R. 98, 128.

[33] (1955) 94 C.L.R. 98, 116.

would allow a tenant at will, in whose favour time runs after one year, to put the plaintiff to establishing a good documentary title or twenty years' possession.

The treatment of *Asher v. Whitlock*[34] by Fullagar J. seems to involve the proposition that there is in fact some wider principle although His Honour asserts that it was not stated by Holdsworth. Thus His Honour approves[35] a passage from Lightwood that 'probably the principle of *Asher v. Whitlock* goes beyond the case of disseisin and applies whenever there is a possession in favour of which the Statute is running'. This is now known as adverse possession and it corresponds to the possession of a disseisor under the old law 'on the simple ground', said Cockburn C.J., 'that possession is good title against all but the true owner, I think the plaintiff entitled to succeed'.[36] And further 'each possessor whether under the old law he would have been a disseisor or not gains at once a possessory title which is good against a subsequent possessor.'[37] It would seem then that Holdsworth's general proposition, or in fact any proposition based on title has a limited application. It may be that it is confined to a case where the plaintiff, or the person through whom he claims, abandons possession or there is no evidence to show how he lost possession; or the defendant traces a title prior to the plaintiff's possession. If this were so it would be a matter of great importance to know what amounted to a discontinuance of possession.[38] Williams J. makes the only reference to this question but His Honour deals with it more from the angle of what does not amount to a discontinuance. It seems however that the smallest act will suffice to negative discontinuance.[39] Thus in this case A's original occupancy was not that of land which the plaintiffs' trustees had abandoned.[40] From the discussion above it seems that the plaintiff must establish that he did not abandon possession.[41]

Interesting questions as to discontinuance of possession might arise in a case where A was disseised by B who abandons possession if A sues C the present occupant.

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[34] (1865) L.R. 1 Q.B. 1.
[35] (1955) 94 C.L.R. 98, 130.
[36] (1865) L.R. 1 Q.B. 1, 6.
[37] Lightwood, *The Time Limit on Actions* (1909) 124. To be read, of course, subject to *Trustees Executors and Agency Co. v. Short* (1888) 13 App. Cas. 793.
[38] See *Trustees Executors and Agency Co. v. Short* (1888) 13 App. Cas. 793.
[39] (1955) 94 C.L.R. 98, 116.
[40] *Ibid.*, 116.
[41] Williams J. would dissent from this. *Ibid.*, 116.