

on the other hand, an action bound to fail is not properly brought. By implication, an action within these limits will be properly brought—that is, a *bona fide* action not bound to fail. But the boundaries may be yet narrower if the suggestions of Lords Porter and du Parcq are adopted. The limit may be between “not bound to fail” and “reasonable cause of action.”

It is submitted that the “bound to fail” test is a sufficiently limiting factor. The court does not then need to make an exhaustive survey of all the circumstances at issue. It cuts out the cases clearly unjust to the foreign defendant. If other cases of inequity remain, the court can always fall back on its discretionary powers.<sup>11</sup> If the Court goes beyond the “bound to fail” test, it will go perilously near to usurping the functions of the court of trial. Certainly it will be driven to deal with subtle distinctions in such terms as “reasonably arguable” (*per* Lord du Parcq), “real issue between” the parties (*per* Morton J.)<sup>12</sup>, “probable cause of action” (*per* Lord Porter), etc.

As to (b)—The court’s jurisdiction is discretionary. Consequently, even if it decides that the action is “properly brought,” it can still refuse to join the foreign defendants. This was the ground upon which Lord MacDermott based his decision. Such a discretion is exercisable in accordance with the broad principle already stated, so that the rule enures to the protection of the person out of the jurisdiction.

The unfortunate combination of circumstances which left the Tyne Commissioners responsible for £250,000 plus the costs of three court actions is unlikely to occur again, while the general principles laid down by the Lords in this case have done a great deal to clarify the application of O. XI. r. 1 (g).

J. A. ASCHE.

11. See 2 (b), *supra*.

12. *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16, at 22.

## PROPERTY : ADVERSE POSSESSION.

The law on adverse possession is at last beginning to emerge as a body of coherent rational principles, and the decision of Lowe J. in *Kirk v. Sutherland*<sup>1</sup> may be welcomed as an indication of continued progress in this direction.

The facts of the case may be summarized as follows: A was the registered proprietor of an estate in fee simple in land under the *Transfer of Land Act* 1928, described as allotments 1, 2 and 3. In 1919, he sold allotment 3 to X. X thereupon proceeded to fence his land but at A’s suggestion, in order to shorten the length of fence required, the fence was erected so as to enclose  $5\frac{1}{2}$  acres of allotment 1, which adjoined allotment 3. X claimed no title to this  $5\frac{1}{2}$  acres, but apart from the payment of rates in respect of allotments 1 and 2, neither A nor his successors in title asserted any rights of possession over it, and X and his successors in fact continued to occupy the whole of the land within the fence.

1. [1949] A.L.R. 262.

In 1940, allotment 3 was sold to Y, who in 1944 sold to Z, the plaintiff. Both Y and Z entered into possession of the entire fenced area, although X pointed out to them that he had no title to the portion of allotment 1 which was within the fence, and which we may for convenience call "the disputed land." In this action, Z claimed declarations that the title to the disputed land of A and his successors in title had been extinguished, and that he was entitled to have it transferred to, or vested in him.

In 1947, probably when the claim was first made by Z, X transferred to the defendants, the successors in title of A, all his rights to the disputed land.

Lowe J. held that A and his successors had been out of possession of the disputed land since 1919, notwithstanding the fact that they had paid the rates. He held that *Kirby v. Cowderoy*,<sup>2</sup> in which it was decided that payment of rates on wild unfenced land with the occupier's consent might amount to an act of possession, was distinguishable. On the facts proved, X was a tenant at will and therefore A's title was extinguished after X had been in possession for sixteen years—section 301 of the *Property Law Act 1928*.

It was then contended either (a) that the extinguishment of A's title gave X no title other than a mere possessory right which was lost if X voluntarily relinquished possession, and which passed to the new possessor or (b) that X had a transmissible title to the disputed land, but this title had passed to the plaintiff by virtue of the transfer of allotment 3, coupled with the enlarging words of section 121 of the *Transfer of Land Act 1928*<sup>3</sup> or section 62 of the *Property Law Act 1928*.<sup>4</sup>

As to the former argument, Lowe J. held that, though the suggestion in the older cases that the adverse possessor obtained "a parliamentary conveyance" of the land could not be supported, the adverse possessor did obtain a good title to the land against all the world, and this title was not merely a right which continued only so long as possession continued. This being the case, the title of the adverse possessor would be transmitted by registered transfer and not by transmission of possession.

As to the second argument, X's title to the disputed land had not passed to the plaintiff, since the transfer only purported to transmit title to allotment 3, and neither section 121 of the *Transfer of Land Act 1928* nor section 62 of the *Property Law Act 1928* operated to include the disputed land in the transfer.

The words in section 121 of the *Transfer of Land Act 1928* could not be construed as extending to rights, acquired by adverse possession, in land in another certificate of title registered under the *Transfer of Land Act 1928*. Nor was the plaintiff assisted by section 62 of the *Property Law Act 1928*, even if it applied to land registered under the *Transfer of Land Act 1928* (which the learned judge did not decide). The words

2. [1912] A.C. 599.

3. "The proprietor of land . . . may transfer the same by a transfer . . . Upon the registration of the transfer the estate and interest of the proprietor as set forth in such instrument . . . with all rights powers and privileges thereto belonging or appertaining, shall pass to the transferee."

4. "(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all . . . privileges, easements, rights and advantages whatsoever, appertaining . . . to the land, . . . or, at the time of conveyance, demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land . . ."

used in that section—"rights and advantages"—are not apt to describe land itself and do not include it.

In the result, the plaintiff shewed no title to the disputed land and X's title had been transferred to the defendants by the transfer in 1947.<sup>5</sup> The plaintiff's claim therefore failed.

A. L. T.

5. The common law rule as to non-assignability of rights of entry has been abolished—Section 19 (1) (b) of the *Property Law Act 1925*; and see note by Mr. A. D. G. Adam appended to the report of *Kirk v. Sutherland*, [1949] A.L.R., at p. 267.

### PROPERTY: THE RULE AGAINST PERPETUITIES.

*Re Gaite's Will Trusts; Banks and Anor. v. Gaite and Ors.*<sup>1</sup>

Most Property students are familiar with what has been called "the problem of the fertile octogenarian." One well-known example of this occurs where T leaves property in trust to pay the income to his sister A (a widow aged eighty) for life, then to pay the income to the children of A for their lives, then to pay the principal to the children of such children<sup>2</sup>. The gift of the principal is bad, since in contemplation of law, A may have further children, whose children by possibility might not be ascertained until after the period allowed by the rule against perpetuities. The courts have refused to designate any age beyond which a person may be held incapable of having further children so as to make a gift to children of such person a gift to children in being.

In *Re Gaite's Will Trusts*, Roxburgh J. was faced with a will which raised both this kind of problem and also the not dissimilar problem of "the fertile five-year old." The difficulty arose under a provision directing that a legacy of £5,000 and a share of residue should be held on trust "for such of the grandchildren of H. G. as shall be living at my death or born within five years therefrom who shall attain the age of twenty-one years or being female marry under that age in equal shares."

At the date of the testatrix's death, H. G. was aged sixty-six, and a widow. She had two children and one grandchild living at that date. H. G.'s grandchildren might be in one of two classes—either they would be children of the two children living at the date of the testatrix's death, or they would be children of children of H. G. born after that date. As to the former class, no question of perpetuity could arise, since the children of parents who are lives in being for the purposes of the rule can only attain the age of twenty-one within the period allowed by the rule. It was therefore only the possibility that there might be grandchildren in the latter class which placed the validity of the gift in jeopardy, since children of such after-born children might not attain the age of twenty-one within the required period.<sup>3</sup> At first glance, therefore, the gift

1. [1949] 1 All E.R. 459.

2. See Leach, *Perpetuities in a Nutshell*, 51 H.L.R., at p. 643.

3. In a class gift, the precise interest of every member of the class must be ascertained within the perpetuity period, otherwise the whole gift will fail. See *Pearks v. Moseley*, (1880) 5 App. Cas. 714.