JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 77/89

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

BETWEEN	ANEITA GRANT	-	PLAINTIFF/APPELLANT
A N D	CRYSTAL COAST DEVELOPMENT CO. LTD. & ORS.	-	DEFENDANTS/RESPONDENTS

Dr. L. G. Barnett & Clarke Cousins for appellant

Dennis Goffe & Miss Minette Palmer for first respondent

October 14, 15, 16 and November 28, 1991

CAREY P. (AG.):

The appellant (the plaintiff in the Court below) is now an elderly lady nearing 80 summers. In 1954, an uncle of hers Reuben Shaw became very seriously ill indeed: he suffered from some debilitating skin ailment or disorder which caused his skin to slough away. Shortly before his death on 9th July 1954, he became bed-ridden and malodorous. Save for a son Simeon, his other children neither those who resided in this country or abroad, visited him. He had six children. He resided in Negril, Westmoreland. His condition necessitated frequent baths each day and every day. The appellant, at the request of this son Simeon Shaw, ministered to his needs. She lived there with him alone, altogether for six months prior to his death. She had been living in a common-law relationship with one Joseph Grant but was not permitted to live with him in the house until after Reuben Shaw's death. Indeed they were not allowed to live together in that house until they had regularised their marital status which took place in 1956. Since the death of Reuben Shaw, she has lived in that house unmolested.

She claimed in a writ dated 16th May 1963 for a declaration that:

> "The Plaintiff claims against the Defendants:
>
> a. For a declaration that the Plaintiff has acquired Title as Fee Simple Owner of the land comprised in Certificate of Title registered at Volume 1035 Folio 293 of the Register Book of Titles;"

I would observe parenthetically that the land the subject of this dispute was registered under the Registration of Titles Act on 6th May 1957 for the first time. This important fact was altogether ignored by the parties both in this Court and in the Court below.

By an order dated 14th July 1969 Theobalds J. dismissed the appellant's claim, holding (inter alia) that the occupancy of the land was in virtue of her status as a "caretaker continuing on the land with the approval of members of the family after Reuben's death". This appeal is against that order and judgment of the learned judge. In my view the point at issue on this appeal is whether or not time began to run in favour of the appellant so as to extinguish the rights of the true owners.

We have been furnished with the reasons for the learned judge's decision and these appear at pp. 41-42 of the Record. He expressed himself thus:

> "The second head of claim was based on the Limitation Act - the plaintiff claiming to have been in possession and to have lived on the land from 1954 till the present time. But two aspects of her cross examination weakened her claim. Firstly she admitted that after Rueben's death she 'accepted Simeon as owner' of the land and on two occasions she appeared not to be claiming ownership, once was when Constantine Shaw returned from the U.S.A. and plaintiff never told him a word about his father Rueben having left the land for her although he challenged her right to be on his father's land, and secondly was before the Resident Magistrate in Sav-la-mar when the Court case over arrears of land

"taxes was heard, when she refused to pay taxes on the ground that she was not the owner of the land. Merely living on the land for the statutory period is not by itself sufficient for adverse possession to run against the true owner's (sic). It would depend on in what capacity one is in occupation. I accept the evidence adduced by the defence that plaintiff was merely a caretaker, continuing on the land with the approval of members of the family after Rueben's death. Rueben's purported promise to give her the land after his death has to be balanced against the proven fact that by his will the land was left to his children.

I accept the evidence that plaintiff was at times paid for her services and am not concerned with the frequency or adequacy of such payments. The importance of it is that plaintiff was at all times aware of the capacity in which she was in occupation of Rueben Shaw's land that is as a caretaker to protect the interests of the true owners all of whom resided elsewhere and were therefore in no position to look after the property on their own behalf. Indeed the concern of Constantine Shaw that the premises should be kept bushed is not without significance. P. 4. 'Condition of house was liveable then - I was concerned with how it stayed'. 'Wanted place to look good'. 'Place belonged to the Shaws'. This is the attitude of a family member/owner who had long before migrated to the U.S.A. and was gainfully employed there and even became a citizen.

Further evidence that plaintiff was at all times aware of her role as caretaker are in fact that during her possession certain parts of the land were sold off to Government and by her stance in relation to the claim by the Collector of Taxes before the Resident Magistrate. In relation to this claim on this issue I accept the evidence of Winston Finnekin, the Senior Revenue Officer, whose records show that on 28/9/82 before the Resident Magistrate plaintiff stated that 'she owned no land and land owned by Shaws' and on 12/10/82 'I not paying the taxes as land owned by Shaws'. There was further evidence which I accepted that at the hearing before the Resident Magistrate where this plaintiff was represented by an Attorney and 'the case thrashed out', plaintiff then asked 'for time to remove' and ... was allowed to 33/3/83(sic)' ."

Dr. Barnett skilfully deployed a range of arguments against the judgment. He called attention to Sec. 4(b) of the Limitation of Actions Act which provides as follows:

> "(b) when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death."

He said that where a relative has been allowed to remain after the death of the owner and it cannot be shown that he was the servant of the owner or beneficiaries or has been paying rent or has acknowledged the title of the owner, the Act commands that time begins to run no matter the understanding of both parties on the question of legal ownership. So far as the evidence of the appellant's status as care-taker was concerned, it was hearsay which did not fall within any exception to the rule against hearsay. Any visits he submitted which were made to the land by successors, did not amount to entries intended to stop the period of limitation from running.

With all respect to these careful crafted arguments of Dr. Barnett, this appeal must fail.

A possessory title cannot be obtained merely by occupying land for twelve years. The onus is therefore on the person claiming such a title to prove that possession is adverse. Section 4(b) of the Limitation Act which has already been set out speaks to the point at which time begins to run when a claim is being made against a deceased owner. But that does not relieve the person on whom the burden rests from proving that his possession is adverse. Sir Raymond Evershed, M.R. in Moses v. Lovegrove [1952] 1 All E.R. 1279 at p. 1281 said obiter:

> "... [under] the Limitation Act, 1939, that for the limitation period to run and extinguish the title of the plaintiff, two conditions must be satisfied -
>
> (i) that a right of action accrued at a date (in

> " this case) not less than twelve years before the proceedings, and
>
> (ii) that thereafter throughout the intervening period there has been adverse possession by the person in occupation."

In that very case, Romer L.J. accepted as good law the proposition that possession is never adverse if it can be referred to a lawful title. At p. 1205, he said this:

> "'It seems to me that one can, in addition to looking at the position and rights of the owner, legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse, ...' "

Although the learned trial judge did not refer to this case, he must have had this principle in mind. His judgment is based on this principle.

Dr. Barnett argued that the evidence as to permission is all hearsay. The fact of the matter, he said, was that at the death of Reuben Shaw, the licence came to an end. The appellant was to all intents and purposes a squatter in whose favour time would run, from the death of the owner. That is not entirely true.

The appellant herself stated that it was Simeon Shaw who gave her the right to live on the premises in order to care for Reuben. After his death, she said that Simeon told her he would not be selling the land. The plain inference was that her permission to remain on the land was being continued. She recognized and accepted that that was the position. Proof of this lies in her statement that after Simeon Shaw's death, i.e. in 1972 she started to cultivate the land. She did not actually build on the land until 1982. On her own evidence therefore time would not begin to run in her favour until 1972 at the earliest.

But in 1967, two sons of Reuben Shaw had brought the land under the Registration of Titles Law. The certificate of title was an exhibit in the case. Neither of the parties hearkened to its significance. But its effect was to destroy any rights which the appellant might have gained by adverse possession. Lord Jenkins who delivered the opinion of the Board in Chisholm v. Hall, 7 J.L.R. 164 at pp. 175-176 stated the effect of a first registration in these words:

> "... The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission."

We were told if I understood Dr. Barnett aright, that this issue not having been raised, we ought not to consider it. I am not attracted by that approach. In Harris v. Johnson & Ors. [1971] 17 W.I.R. 84 at p. 88 Edun J.A. delivering the judgment of the Court said:

> "This point was never taken at the hearing of the action but as the fact of the non-recording of the deed within 90 days from the date of execution was uncontradicted and proved beyond controversy, this court considered it not only competent but expedient and in the interest of justice to consider the submission: See per Lord Watson in Connecticuit Fire Insurance Co. v. Kavanagh [1892] A.C. 473 at p. 480; 67 L.T. 508; 61 L.J.P.C. 50; 57 J.P. 21; 8 T.L.R. 752, P.C."

Lord Watson, in the case on which reliance was placed, stated as follows:

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

The issue of the certificate of title to the beneficiaries, puts the matter beyond argument. But, it is right to say that time never began to run in favour of the appellant because her possession can be referred to a lawful title. In my judgment, she was never in adverse possession. It is perfectly true that hearsay evidence was adduced in the deposition on commission by Constantine Shaw, but as I have endeavoured to show, there was other evidence emanating from the appellant herself, which establishes that her possession was referable to a lawful title. See Hughes v. Griffin [1969] 1 All E.R. 460.

There is one other aspect of the matter with which I must now deal. As Hall v. Chisholm (supra) decided, a registered title may be destroyed by adverse possession which begins after the first registration. It is necessary to consider whether there was adverse possession in the appellant after 8th May 1967, the date of registration because the appellant was and is in occupation of the land. By paragraph 5 of the amended Statement of Claim the appellant pleaded that in May 1974 well within the limitation period there was an agreement for sale between the respondent Crystal Coast Development Co. Ltd. on the one part as purchaser and Henry Shaw (a son of the deceased Reuben Shaw) on behalf of himself and the remaining registered proprietors of the premises as vendor. The registered proprietors were therefore exercising their rights as proprietors in the land.

Even if the appellant's cultivation of the land in 1972 could constitute dispossession so as to allow time to begin to run from then, the fact is that in 1974 the registered proprietors exercised

their rights as owners to dispose of part of the land in quesiton. The exclusivity of possession over the limitation period would not have been continuous. At all events, the owners' action would be sufficient to show that there was no intention on the part of the registered owners to discontinue possession - Leigh v. Jack [1879] 5 Ex.D. 264.

Accordingly I would dismiss the appeal and affirm the judgment of the Court below. The appellant should pay the costs of appeal to be taxed if not agreed.

DOWNER, J.A.

The appellant Aneita Grant seeks to set aside the order of Theobalds, J., which refused the appellant's claim for a declaration that she was the owner in fee simple on the basis of adverse possession of the land comprised in Certificate of Title registered at Volume 1035 Folio 298 of the Register Book of Titles. The learned judge below also refused to direct the Registrar of Titles to register the appellant's name on the Certificate of Title as the absolute owner. The land is in Negril and is valuable. Crystal Coast Development Company Limited entered into an initial agreement dated 10th May, 1974 and further agreement dated 27th October, 1977 to purchase the estate from the Shaw family. The purchasers have secured planning permission to erect apartments for the tourist trade. Aneita Grant is a first cousin of the Shaw's who are brothers and sisters. Their father was Reuben Shaw who died in 1954.

In paragraph 3A of her amended statement of claim, the appellant acknowledged the existence of registered proprietors. This is how the owners were recognized:

> "The registered proprietors of the said premises are:
>
> (i) The Third Defendant
>
> (ii) Mabel Adina Shaw, now deceased
>
> (iii) Henry Uriah Shaw, now deceased
>
> (iv) Simeon Alexander Shaw, now deceased
>
> The Fifth Defendant has been joined in her capacity as Executrix of the Estate of Henry Uriah Shaw, deceased and the Fourth and Sixth Defendants joined as personal representatives for the purposes of this Suit for the Estates of Mabel Adina Shaw and Simeon Alexander Shaw respectively."

After these significant recitals, the crucial claim is made in paragraph 6 and it is as follows:

> "6. The Plaintiff states that by virtue of the facts stated at paragraphs 1 to 3 inclusive hereof the Plaintiff has acquired a possessory Title to the said premises and further or in

' alternative by virtue of Section 3 of the Limitation of Actions Act the Plaintiff's possession, occupation of and Title to the said premises are protected by lapse of Time and neither the First Defendant nor any other person may make any entry or bring any action or suit to recover the said premises. Wherefore the Plaintiff claims to be entitled to be registered as the fee simple owner absolute of the said premises.'

The Law applicable to the Pleadings

The law governing the registration of titles and the effect of the limitation of actions so as to acquire a possessory title is set out in Sections 68 and 70 of the Registration of Titles Act (The Act). It ought to be sufficient therefore to examine the Certificate of Title Exhibit 1, and the relevant sections of the Act, to determine the validity of the appellant's claim. Furthermore, the classic authority on this aspect of the law is the decision of the Privy Council in **Chisholm v. Hall** [1959] 7 J.L.R. 164 which was applied by Bingham, J.A. (Ag.) recently in the case of **Beckford v. Cumper** (unreported) S.C.C.A. 38/86 at pp. 41-42 delivered June 12, 1987. What does this Certificate of Title say? It reads as follows:

" JAMAICA

Certificate of Title under the Registration of Titles Law, Chapter 340

SIMEON ALEXANDER SHAW

of Middlesex in the Parish of Hanover, School Teacher and HENRY URIAH SHAW of 36 Border Avenue in the Parish of Saint Andrew, Registered Medical Practitioner

are now the proprietors of an estate as joint tenants in fee simple

subject to the incumbrances notified hereunder in ALL THAT parcel of land a part of **LONG BAY** situate at NEGRIL in the parish of WESTMORELAND containing by survey Three Acres Two Roods and Nineteen Perches of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed.

Dated the Eight day of May One Thousand Nine Hundred and Sixty-seven.

/Sgd. Ag. Deputy Registrar of Titles."

It is clear that the first registration under the Act was on 8th May, 1967. So it is appropriate to refer to the Act to ascertain the evidential value of the certificate and how the appellant may acquire this title by adverse possession.

Section 68 of the Act formerly Section 67 reads:

> "67. No certificate of title registered and granted under this law shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate, and every certificate of title issued under any of the provisions herein contained shall be received in all Courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."
> (Emphasis supplied)

Since the proviso to Section 70, formerly Section 69, specifies how the Statute of Limitations is applicable, it is obligatory to set out that section. It states:

> "(Section 70) 69. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Law might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Law shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor

"not being a purchaser for valuable consideration or deriving from or through such a purchaser.

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this law under any statute or limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessment, quit-rents or taxes, that have accrued due since the land was brought under the operation of this Law, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument."
(Emphasis supplied)

To interpret properly the effect of Section 70, Sections 68 and 70 must be harmonized. The emphasized words in Section 70 resolves the seeming ambiguity in Section 68 and so gives the scope of the statutes of limitation as regards registered land. The scope has been set out with precision by Lord Jenkins at p. 175 in Chisholm v. Hall (supra) and it is necessary to quote it as it explains the effect of the emphasized words in Section 70. It also governs this case:

" The scheme of section 69 now (70) is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any rights of that description. but from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are

> "not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission. See as to transfers section 84 which provides that the transferee shall be 'subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor.' This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor, and although the words used are not particularly apt to describe rights acquired by limitation, a transfer is in any case one of the instruments to which the 'deeming' provision of section 59 now (70) is applicable."

What are the notices and "advertisements" of which Lord Jenkins speaks? Here is how he states the position at p. 170:

> "Section 32 provides (to put it shortly) that when the registration of any title has been provisionally approved by one of the referees under the Act notification thereof is to be given by advertisement or advertisements as therein mentioned and also personally to all persons in possession or charge of the adjoining lands so as to give them an opportunity of lodging a caveat against the registration of the title in question."

The question may be posed as to what is the compelling conclusion in law from the Act and Section 3 of the Limitation of Actions Act? Section 3 of the Limitation Act reads:

> " 'No person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims, or if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.' "

Assuming that the appellant had possessory rights before 8th May, 1967, they were destroyed by the registered title of 1967 which the appellant recognizes at the outset in paragraph 1 of her amended statement of claim. Here is how she stated her recognition:

> "1. On or around the 14th day of January 1954, the Plaintiff for the purpose of looking after her sick uncle, Reuben Shaw, went to reside upon premises at Negril in the Parish of Westmoreland being the premises consisting of land and building registered at Volume 1035, Folio 298, of the Register Book of Titles."

Be it noted that this Certificate of Title was put in evidence by consent before the appellant closed her case.

It is appropriate to cite also paragraphs 2 and 3 of her amended statement of claim to demonstrate the basis of her claim and how the issues were conducted in the Court below. They are as follows:

> "2. During the period of his illness and before his death the said Reuben Shaw, who to the Plaintiff appeared to be the owner thereof, promised to give her the said premises.
>
> 3. Reuben Shaw died on or around the 9th of July, 1954, and the Plaintiff took possession and control of the said premises and has continued in uninterrupted and undisputed possession and control thereof and has openly and continuously exercised all the rights and privileges of an absolute owner and has done so adverse to the rights of all who but for her claim are the true owner or owners."

It is clear that the appellant claims a possessory title on the basis of her occupation and intention to possess from 9th July, 1954. In this case, however, for any claim to be effective, time must run to 7th May, 1979. This is so, as she would have had to prove adverse possession since the first registration in 8th May, 1967.

Against this background when Dr. Barnett commenced his reply in this Court, this question was put to him - "What would your response be to the contention that exhibit 1 issued on 8th May, 1967

destroyed any claim for adverse possession before that date?" It must be stressed that paragraph 5 of the appellant's amended statement of claim recognizes that before 7th May, 1979, on 10th May, 1974 the registered owner in exercise of his unchallenged right as owner, exercised a "power to ... dispose of the land" pursuant to Section 66 of the Act and it was the respondent purchaser, Crystal Coast Development Company Limited who entered the caveat mentioned in paragraph 5 of the amended statement of claim. That paragraph reads as follows:

> "5. Caveat No. 94149 dated the 14th day of September, 1983 was lodged by the First Defendant claiming an estate and interest as purchaser of the property under and by virtue of an Agreement of Sale dated the 10th of May, 1974 between the First Defendant as Purchaser and Henry Shaw on behalf of himself and the remaining registered proprietors of the premises as Vendor and forbidding the registration of any person other than the First Defendant as transferee or proprietor or of any instrument affecting such estate until after notice of the intended registration or dealing be given to or unless such instrument be expressed to be subject to the claim of the First Defendant."

Dr. Barnett's response was that such a contention was never advanced either in this appeal, in the Court below or pronounced on by Theobalds, J. in his judgment. That was correct. What was incorrect was his further statement that it would be unfair for this Court to take the point at this stage.

The mode by which this Court hears an appeal is by way of rehearing: see Rule 12 of The Court of Appeal Rules 1962. This Court rehears from the pleadings in an instance of a point of law which could be decided at the threshold. In other instances, the evidence adduced before the judge below is also referred to. It could not be otherwise as this was the mode of rehearing Chancery Appeals which was adopted by all appeal courts when writs of errors were abolished and appeals permitted on the common law side. See

Quilter v. Mapleson (1882) 9 Q.B.D. p. 676. Here is how Lord Wright puts the rehearing point in **Powell v. Streatham** (1935) A.C. at 263:

> " ... in effect, therefore, the rehearing is very different from the original hearing: it is a rehearing on documents, also the shorthand notes, whereas the judge who originally heard the case both saw and heard the witnesses, and during an examination and cross-examination, often prolonged and searching, had abundant opportunity of forming an opinion as to their relative trustworthiness or the reverse." (Emphasis supplied)

Lord Wright was dealing with an appeal on facts and earlier observations of Lord Macmillan must be understood in that light. So understood they pinpoint that an appeal by way of rehearing is on fact as well as law. Here is how his Lordship puts it at p. 256:

> " But the case was tried by a judge sitting alone, and on appeal from the decision of a judge the Court of Appeal and this House have a duty to exercise their jurisdiction as tribunals of appeal on fact as well as on law, a jurisdiction which your Lordships have never hesitated to exercise when satisfied that the Courts below have erred on a question of fact."

Lord Atkin at p. 255 was of the same mind. He said:

> "... I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge." (Emphasis supplied)

So entrenched is this principle in appellate work that it was applied in two of the cases cited by the appellant. In **Sanders v. Sanders** (1882) XIX L.R. Ch. 377 Jessel, M.R., said at 379:

> " The appeal, however, is from the judgment, not from the reasons given for it, and not infrequently a judgment can be supported on grounds not taken in the Court below." ...

The other instance appears in **Trustee in Bankruptcy of Bowring-Hanbury v. Bowring-Hanbury** (1943) 1 All E.R. 48. There at p. 50 Lord Clauson delivering the judgment of the Court of Appeal said:

> " ..t remains, however to deal with an entirely different point, which was raised for the first time in this court."

In the light of all this the appellant's claim ought therefore to be dismissed at the outset of this appeal on the ground that, the proviso to Section 70 of the Act defeats her claim.

How the case was conducted below

Theobalds, J., decided the matter on the pleadings and the evidence which he accepted. Particular note must be made of paragraphs 2 and 3 of the amended statement of claim which was quoted above. Here are his findings of fact:

> "... Merely living on the land for the statutory period is not by itself sufficient for adverse possession to run against the true owners." ...

This finding was based on the evidence of the appellant where in relation to her commencing occupation she said, "Simeon asked me to go and take care of him - his condition was very bad." It must be borne in mind that Simeon was jointly with Henry the first registered owner. He continued his findings thus:

> " I accept the evidence that plaintiff was at times paid for her services and am not concerned with the frequency or adequacy of such payments. The importance of it is that plaintiff was all times aware of the capacity in which she was in occupation of Reuben Shaw's land that is as a caretaker to protect the interests of the true owners all of whom resided elsewhere and were therefore in no position to look after the property on their own behalf. Indeed the concern of Constantine Shaw that the premises should be kept bushed is not without significance. P. 4. 'Condition of house was liveable then - I was concerned with how it stayed.' 'Wanted place to look good.' 'Place belonged to the Shaws.' This is the attitude of a family member/ owner who had long before migrated to the U.S.A. and was gainfully employed there and even became a citizen."

This approach to the findings was supported by Mr. Goffe for the first respondent and rightly so, as after Reuben's death the appellant said Simeon bought off Benjamin's interest and further she said "Simeon tell me all the time he is not selling the land" and she admitted that Simeon gave her money.

Once those findings were made, there were cases which the appellant cited which reinforced the judge's findings. Take **Hughes v. Griffin** [1969] 1 All E.R. 460. At p. 464 Harman, L.J. cites **Moses v. Lovegrove** [1952] 1 All E.R. 1279. At 1283 Romer, L.J., said:

> " 'It seems to me that one can, in addition to looking at the position and rights of the owner legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings.' "

Cairns, L.J., in **Hughes** (supra) was of like mind for at p. 466 he said:

> "... if that was the position, then in my view the decision of this court in **Cobb v. Lane** [1952] 1 All E.R. 1199 is conclusive against the running of the statute in favour of the testator whilst he was a licensee. All three of the learned Lord Justices in that case made it the basis of their judgments that, once a person in exclusive possession is found to be there as a licensee, he could not acquire rights under the statute--- because he was not in adverse possession."

To my mind the learned judge must have taken this aspect of the law into account although he did not expressly mention it. The learned judge also specifically mentioned the Certificate of Title thus:

> "... Several members of the Shaw family are now registered on the Certificate of Title and indeed one Henry Shaw (now deceased) had contracted to sell his interest in the land to the 1st Defendant Crystal Coast Development Company Limited."

Generously construed, it could be contended that the judge based his conclusions in part on the effect of the Certificate of Title although regrettably he failed to expound the law in Sections 68 and 70 of the Act and **Chisholm v. Hall.** (supra)

It should be pointed out that, had the appellant in her statement of claim included an averment based on the principle stated in **Ramsden v. Dyson** Law Rep. 1 H.L. 129 and developed in **Plimmer v. Mayor of Wellington** [1883-84] 9 Appeal Cases at 699, the appellant might have acquired an equitable interest in the property. She told the Court that she had built a substantial house on the land which was completed in 1963. She had also cultivated 35 coconut trees as well as bananas, cane and breadfruits and that she sold the produce and kept the funds. She also rented out a plot of land on which a house was constructed and built four wooden cabins. On the basis of this evidence and coupled with the relevant pleadings, a Court might have found that the appellant had acquired an equitable interest in the property and granted the appropriate relief which may have been compensation. Of course, any such finding would have had to take into account the dates on which coconut groves and permanent structures commenced and the nature of the acquiescence. This was vital as a notice to quit was served on her in 1963.

To my mind, it is unnecessary to go into the details of all the cases cited by Dr. Barnett in his elaborate submission. It is sufficient to cite one as it is so appropriate. **Archer v. Georgiana Holdings Ltd.** [1974] 21 W.I.R. 431 at 436 puts the law thus:

> " The onus of proving that the true owner has been effectively dispossessed is on the party who alleges it. The question whether this onus has been discharged does not always admit of a ready answer. At the outset it is necessary to appreciate the difference between 'dispossession' and 'discontinuance' of possession.
>
> > 'The difference, said Fry, J. in Rains v. Buxton (1880) 14 Ch. D. 537, 49 L.J. Ch. 473; 43 L.T. 88; 28 W.R. 954 between 'dispossession' and 'discontinuance' of possession might be expressed in this way: the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in by others.'
>
> The mere fact that the true owner does not make use of his land does not necessarily mean that he has discontinued

> "possession of it. Leigh v. Jack (1879) 5 Ex.D. 264; 49 L.J.Q.B. 220; 42 L.T. 463; 44 J.P. 488; 28 W.R. 452. Non-user is equivocal. To establish discontinuance it must be shown positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it. Evidence of lack of user which is consistent with the nature of the land in issue and the circumstances under which it is held is not sufficient to justify a finding of an intention to abandon and thus of discontinuance. **Tecbild Ltd. v. Chamberlin** (1969) 20 P. & C. Reports."

These words are apt, as Theobalds, J., found on good evidence that the appellant was a caretaker for the property and continued thus until she was served with a notice to quit. In these circumstances, she could never have proved that the true owners, the Shaws were dispossessed or had discontinued possession. I therefore agree with the determination made below.

It is sufficient to say that I would affirm the order below both on the findings of the learned judge and the alternative basis in law adverted to previously. The taxed or agreed costs of this appeal should go to the first respondent.

BINGHAM, J.A. (AG.)

This appeal is from a judgment of Theobalds, J., entered on 14th July, 1989 in which he rejected the appellant's claim for a declaration to be the fee simple owner along with certain other reliefs, in respect of certain lands situated at Long Bay, Negril in Westmoreland and registered at Volume 1035 Folio 298 of the Register Book of Titles. He also ordered costs in favour of the first, third and fourth respondents, such costs to be agreed or taxed.

This judgment followed a hearing covering a period of three days.

Before us the hearing of this appeal lasted for two days during which one main ground and several supplementary grounds relating to the findings of fact arrived at by the learned trial judge were exhaustively and critically examined and challenged by learned counsel for the appellant. Curiously enough although the written judgment of the learned trial judge was bereft of any specific reference to the questions of law which arose for his consideration, ground 2 of the grounds of appeal challenged the judgment on the basis that:

> "2. That the learned trial judge misdirected herself on the facts and the law and applied the wrong principles of law and came to conclusions which were wrong."

Theobalds, J. in a relatively short written judgment made a number of crucial findings of fact which for the purposes of this judgment, it is necessary for me to make reference to two namely:

> "1. Several members of the Shaw family are now registered on the Certificate of Title and indeed one Henry Shaw (now deceased) had contracted to sell his interest in the land to the 1st Defendant Crystal Coast Development Company Limited,"

In assessing the plaintiff's evidence he also found that:

> "2. ... two aspects of her cross-examination weakened her claim. Firstly, she admitted that after Reuben's death she accepted Simeon as owner of the land and on two occasions she appeared not to be cla claiming ownership."

The first finding was relevant to the issue raised on the pleadings as to the effect of the issuance of a registered title to certain of the beneficiaries of Reuben Shaw on any claim of an adversary nature by the plaintiff. I shall return to this question later on. Suffice it to say that regrettably, the learned judge did not examine this matter. Had he done so, it would not only have "weakened" the appellant's claim, it would have so materially affected the bona fides of her claim to such acts of adverse possession going back to July, 1954.

The second finding was, when examined, also a proper basis for his conclusion that:

> "I accept the evidence adduced by the defence that the plaintiff was merely a caretaker continuing on the land with the approval of members of the family after Reuben's death."

The appellant's claim of adverse possession commencing from 1954 in order to succeed meant that the onus of proof was on her to establish a claim that required:

> "Some affirmative unequivocal evidence going beyond mere evidence of discontinuance and consistent with an attempt to exclude the true owner's possession."

per Swaby, J.A. in **Archer v. Georgianna Holdings Limited** (1974) 21 W.I.R. 431.

The nature of the appellant's claim

The appellant Aneita Grant had been let into possession of the property in dispute by Simeon Shaw when his father Reuben Shaw, who was her uncle took seriously ill in early 1954, and required nursing care. Reuben Shaw died in July 1954. Before his death, according to Aneita Grant, he is alleged to have told her "anytime I dead you must take the land." However, no deed of gift or other instrument sufficient to convey the property to the appellant was executed, hence

no property passed to her.

Following upon the death of Reuben Shaw the plaintiff, based on her account, carried out certain acts of possession demonstrating her control over the property, e.g. renting a house spot, planting coconut trees and building a new house - this last act, however, was carried out after the writ had been filed by her in 1983 and could not therefore advance or assist her claim.

When the appellant's claim is examined, it is in my opinion, unfounded both on the facts, based on her own testimony as well as on the law which is applicable.

Under cross-examination, she said (referring to the property):

> " I accepted it as Simeon's land. After Simeon died I started to cultivate it. Up to Simeon's death I repaired the house. Is me plant all the coconut trees on the land."

She also said:

> "In 1982 I build on the land. Benjamin never repair the house when Connie come to Jamaica. I said, 'If you think it is right for me to care uncle Tom and Simeon and don't get anything."

She later recited that:

> "I know piece of land cut off. Simeon was then in possession in 1972 ... before Simeon died he say he is not selling the land so I take charge of it as the land is there and nobody come to claim it so I continued to occupy it and first (sic) I built was in 1983."

From the above evidence, it is clear beyond peradventure that during the lifetime of Simeon Shaw, the plaintiff acknowledged his claim as to ownership and control of the property in dispute, and along with it an equal right to grant her permission to stay in the house to nurse his sick father and to remain in occupation following his father's death. It follows from this that no claim of an adverse nature could arise during the lifetime of Simeon Shaw.

It is in the nature of the appellant's testimony, referred to above, that supports the contention of Mr. Goffe that the licence granted to her in the capacity of nurse to Reuben Shaw, contrary to Dr. Barnett's submission did not cease with his death. It continued thereafter in a changed situation as a caretaker of the property. This contention in the light of her own admission has merit.

Such acts of an adversary nature whereby she sought to advance her claim to ownership did not commence until 1983 and thereafter when the appellant said that she built a house along with four movable houses on the land. It is of some significance that this activity occurred at a time when the present litigation was either commenced or being contemplated.

By virtue of her acknowledgement of the title of Simeon Shaw time would not commence to run in her favour until after his death in January, 1972. When the nature of her occupation during the life-time of Simeon Shaw is examined, the highest that such possessory acts would amount to, would be in the capacity of a licensee. As it was Simeon Shaw who, by virtue of his beneficial interest, was the grantor of the permission to the appellant to be on the property, while such a status continued no adverse claim could arise during his lifetime so as to cause time to run in her favour.

Romer, L.J. in **Moses v. Lovegrove** [1952] 1 All E.R. 1279, [1952] 2 Q.B.D. 533 applied in **Hughes v. Griffin** [1969] 1 All E.R. 460 at 464 E-F puts the matter this way:

> "It seems to me that one can in addition to looking at the position and rights of the owner legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived it is adverse even if the owner is by legislation prevented from bringing ejectment proceedings." (Emphasis supplied)

Apart from the evidential situation, the appeal must fail as a matter of law for the further reason that when examined the appellant's claim sought not merely a declaration that she was the fee simple owner by virtue of adverse possession from 1954, but she also sought at paragraph 6 of the amended statement of claim (page 8 of the record) the following relief:

> "8. And the Plaintiff claims against the Defendant -
>
> (a) For a Declaration that the Plaintiff has acquired Title as Fee Simple Owner of the land comprised in Certificate of Title registered at Volume 1035 Folio 298 of the Register Book of Titles;
>
> (b) For an Order directed to the Second Defendant that the Plaintiff be registered on the Certificate of Title referred to at a. above as Fee Simple Absolute Owner;
>
> (c) That the Caveat lodged by the First Defendant be withdrawn;
>
> (d) Costs;
>
> (e) Such further and other relief as may be just."

This claim referred to the acquisition by Simeon and Henry Shaw, of a registered title in respect of the lands the subject of the claim on 8th May, 1967, as joint tenants in fee simple. It was this title which the appellant now sought cancellation of, and to have her name registered thereon as the fee simple owner. This title by virtue of sections 68 and 70 of the Registration of Titles Act would have defeated any claim to adverse possession by the plaintiff from 1954. In this regard the dictum of Lord Jenkins in **Chisholm v. Hall** [1959] 7 J.L.R. 164; [1959] 1 W.I.R. 413 in dealing with this very question is apposite. In delivering the judgment of the Board of the Privy Council he said:(pp. 175 and 421 H-I of the respective reports)

> "The scheme of section 69 (now 70) is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to the notices and advertisements which are considered a sufficient protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but displaced by any subsequent transfer or transmission."

The effect of the first registration of the lands in dispute o Simeon and Henry Shaw in May 1967, therefore, was to destroy any such claim that the appellant may have had to the said lands prior to that date.

Although raised on the pleadings, this point was not advanced by counsel at the hearing below or considered by the learned judge. Learned counsel for the appellant seized upon this fact to contend at it ought not in the circumstances, to form the basis of a matter falling for consideration by this Court. I must stoutly resist any such contention. In my opinion, it ought to be considered.

It is worthy to mention in passing that in two of the several authorities relied on by Dr. Barnett, there is clear dicta in which the very same question was considered by the Court.

In Sanders v. Sanders [1881] 19 Ch. D 373, Jessel, M.R. while acknowledging the principle that once a title is barred or extinguished by virtue of non-payment of rent for the limitation period, it cannot be revived, had this to say: (p. 379)

> "If then there was nothing more in the case, I think the appellant would have been entitled to our judgment. **The appeal, however, is from the judgment,** not from the reasons given for it, and not infrequently a judgment can be supported on grounds not taken in the Court below. That in my opinion is so here." (Emphasis supplied)

The learned Master of the Rolls then went on to deal with and determine the particular issue raised.

In **Trustee in Bankruptcy of Bowring-Hanbury v. Bowring-Hanbury** [1943] 1 All E.R. 48 at page 50 H-51 B Lord Clauson in delivering the judgment of the Court of Appeal puts the matter in this way:

> "It remains, however, to deal with an entirely different point, which was raised for the first time in this Court. The plaintiff assumed for the purpose of this point, that the Statute began to run from June 1929, the last date on which a payment was made on the account of the debt but contended that in computing the period of 6 years referred to in the act, the term subsequent to March 17, 1931, must be disregarded since that date owing to the fact that the wife had appointed her husband her executor, there was only one hand to pay and to receive and that in consequence as it was said the operation of the Statute was "suspended" and the statute ceased to operate while that state of affairs continued."
> (Emphasis supplied)

His Lordship then went on to consider and to decide the matter.

As the contention of learned counsel for the appellant is that time in favour of the appellant commenced to run from July 1954 and has been continuous, the question which naturally follows therefore is as to whether, assuming this to be so, there was any act intervening to bring about a cesser of such a state of affairs? This question would, therefore, in the light of the decision in **Chisholm v. Hall** (supra) admit of an affirmative answer for the reasons stated.

In conclusion, it is not necessary to go into the merits of any claim arising after Simeon Shaw's death in 1972 and 1983 when this action commenced as such a period would not qualify under Sections 3 and 30 of the Limitation of Actions Act so as to bar the title of the registered owners and those claiming under them: (1st, 3rd, 4th, 5th and 6th respondents).

When the findings of the learned trial judge on the material issues of fact are examined, therefore, it is clear that he had sufficient material on the evidence presented to come to the conclusion

which he arrived.

I would accordingly dismiss the appeal and affirm the judgment of the learned trial judge with an order for costs as proposed in the judgments of Carey, P. (Ag.) and Downer, J.A.