

THE JAMAICAN LAND REGISTRATION SYSTEM
A N D
POSSESSORY TITLES

Lloyd Barnett

A - INTRODUCTION

1. The essential philosophy of the Torrens System which is implemented by the Jamaican Registration of Titles Act is that public registration should be the touchstone of entitlement. Whereas as a normal principle the registration of a void deed or instrument is null and ineffective, under the Torrens System registration is in itself the critical factor in its validity. The necessity for an historical research into the origins of the registered title is thus removed. Lord Watson, in delivering the Opinion of the Privy Council in Gibbs v. Messer [1891] A.C. 248 at p. 254, stated:

"The main object of the [legislation] Act and the legislative scheme for the attainment of that object, appear ... to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."

Cf. A.G. of Dominica v Shillingford (1970) 14 WIR 526
(indefeasibility maintained against the Crown).

2. Two important consequences emerge from this basic principle. First, that the prior registration of any interest or claim, apart from fraud, confers a good and indefeasible title; and a registered interest must be protected against attack by the

Administrators of the system. George Boothe & Carlos Clarke v.

Colin Cook (1982) S.C. Civil App. No. 70/81 (July 16, 1982).

3. The resulting indefeasibility of title which is the main feature of the system is not absolute, however. As Lord Wilberforce stated in Frazer v. Walker [1967] 1 A.C. 569 at pp. 580-1:

"The expression [indefeasibility of title], not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever ... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him."

4. From a practical point of view, the major qualification of the principle of indefeasibility is the possessory title. This is especially so, because of the number of landowners who have migrated, the shortages and high cost of good agricultural or building land the widespread squatting on lands which prevails throughout Jamaica, and the highly developed techniques of capturing land. Section 70 contains the relevant statutory provision. It provides that all preferential and prior rights are defeated in favour of the registered proprietor, except in the case of fraud, and thus entrenches the principle of indefeasibility. But at the same time the following important qualification is expressly stated in the proviso to the section:

"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 of 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 assessments, 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."

5. The relevant statutory provisions on the subject of limitations and prescriptive rights are contained in the Limitation of Actions Act. Section 3 provides for the limitation period in actions for recovery of land in the following terms:

"No person shall make an entry, 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 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 to bring such action or suit, shall have first accrued to the person making or bringing the same."

Further, Section 30 states:

"At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

In the case of Crown lands, the Crown is barred on the expiration of sixty years after the accrual of its title or claim. See Section 38. In the case of reputed boundaries acquiesced in for

seven years all challenges against them being the true boundaries are barred after seven years. See Section 45; Lynch & Lynch v. Ennevor, S.C. Suit No. C.L. 081/1978 (June 11, 1982).

6. In the result, the title of a registered proprietor will be completely defeated by adverse possession for the prescribed period. In this respect, the Registration of Titles Act has not altered the basic position regarding adverse possession, excepting to the extent that the registered proprietor will find it easier to establish his prima facie right to the land by virtue of his possession of the registered title. Cf. Levy v. Cooper (1871) Stephens S. C.D. 803. It is also significant that the statutory scheme, although based on the notice imputed to the world by registration, does not require the adverse possessor to give any notice of his right inchoate or mature. In preserving the limitation provisions in respect of registered land, it expresses the ancient maxims that "it is more important that an established and peaceable possession should be protected than that the law should assist the agitation of old claims". A statute which affects this purpose is "an act of peace". "Long dormant claims have often more of cruelty than of justice in them". Cholmondeley v. Lord Clinton (1820) 2 Jac. & W. et 140; A'Court v. Cross (1825) 3 Bing. 329 at 332; Megarry & Wade, The Law of Real Property (3rd ed.) p. 996.

7. It is understandable that in the situation in which there is no simple and clear system of proving ownership and in which English land law evolved, possession should be 9/10ths of the

law. Accordingly, the principles of the law of real property developed from the action of ejectment and is based on continuity of possession rather than legality of acquisition. The objective of the law was to prevent forcible recovery of possession rather than to protect a proprietary title. It is questionable whether in the social circumstances of Jamaica, the argument in favour of protecting the squatter against the registered owner whose identity is disclosed in a public document and to whom notice can easily be given is morally justified. The most obvious public interest in the matter is that since land is a scarce resource, it should be put to use. But this interest could be efficiently and fairly protected by the use of a land utilization scheme to acquire idle lands, compensate the true owners and ensure that the new owners are competent to put them to the best use. It is worthy of note that under some Torrens registration systems, such as in New South Wales, a registered title cannot be defeated by adverse possession.

C - NATURE OF ADVERSE POSSESSION

8. Time under the Limitation Act begins to run against the owner of land and in favour of the person who takes possession adverse to him immediately on the former discontinuing his possession or being dispossessed. The basic principles apply whether the land is registered or unregistered. Allen v. Roughley (1955) 94 C.L.R. 98. Adverse possession consists of acts which are inconsistent with the owner's enjoyment of his property for the purposes for which he intended to use it. Leigh

Jack (1879) 6 Ex. D. 264 (273); Christian Mission v. Jones (1978) 33 W.I.R. 24; Beckford v. Cumper (1987) S.C. Civil App. No. 38/86 (June 12, 1987). The possession must be open, visible, exclusive and continuous to satisfy the requirements of the Limitation Act. Clement v. Jones (1909) 8 C.L.R. 133. Thus, payment of taxes, fencing, cutting and removing timber, or picking fruits will not necessarily be sufficient to establish such possession and may only amount to a series of acts of trespass. McLeod v. McRae (1918) 43 D.L.R. 350; Littledale v. Liverpool College [1900] 1 Ch. 19; Buckinghamshire C.C. v. Morgan [1989] 2 All E.R. 225. Farrington v. Bush (1974) 12 J.L.R. 1492. Occupying the lands, refusing to pay rent when demanded and resisting the owner's entry will amount to adverse possession. David Bent v. Melvina Williams (1976) 14 J.L.R. 122; Vincent Davis v. James Harris R.M. Ct. Civ. App. No. 28/1980 (June 5, 1980).

9. The continuity of the adverse possession for the statutory period is an essential factor in the acquisition of a possessory title under the Limitation Act. The rules relating, firstly to the fixing of the moment of the accrual of the owner's right of action with respect to an adverse act of possession and the running and interruption of time thereafter are therefore of critical importance. The burden is on the adverse possessor to prove his claim and if it appears that he shared occupancy with others so that it is not clear that he exercised exclusive possession his claim will fail. Vincent Davis v. James Harris R.M. Ct. Civ. App. No. 28/1980 (June 5, 1980).

10. These rules may be summarised in the following propositions:

- (i) The counting of time begins when the owner's right to claim or reclaim possession accrues, which is usually indicated by the commission by the intruder of acts inconsistent with his right of enjoyment of the property. West Bank Estates Ltd v. Arthur [1967] A.C. 665. Thus, the last time rent was collected from the occupant is the first point in time when the cause of action accrued. In the case of the estate of a deceased person who remained in possession or receipt of rents or profits at the time of his death, time begins to run at the time of his death. See Limitation Act, S. 4 (a); Vida Bowes, et al v. Allan Spencer (1976) 14 J.L.R. 215; Aneita Grant v. Crystal Coast Development Co. Ltd S.C. Civil App. No. 77/89 (Nov. 28, 1991);
- (ii) Time begins to run in the case of an interest derived from an inter vivos instrument, or in the case of a future interest, at the time when the donee or beneficiary becomes entitled to possession. Ibid. Section 4 (b); Morals v. Rodriques (1859) Stephen's S.C.D. 798 (vendor left in possession by purchaser).
- (iii) Where a person takes possession under a tenancy, licence or by permission of the owner, time cannot begin to run until the tenancy licence or permission has been terminated. Aneita Grant Case (supra); Edwards v. Braithwaite (1978) W.I.R. 85; Hughes v. Griffin [1969] 1 All E.R. 460. Express acquiescence by the owner will not stop time which has begun to run. Vida Bowes Case (ante).
- (iv) It is not enough for the owner to be out of possession. The claimant must take possession for time to begin to run and time will cease to run if he ceases at any point before the expiration of the statutory period to hold possession. Smith v. Lloyd (1854) 9 Ex. 562; 23 L.J. Ex. 194; Trustees & Agency Co. Ltd v. Short (1888) 13 App. Cas. 793; Harris v. Jackson, et al (1971) 17 W.I.R. 84; Brandis v. Craig (1981) 30 W.I.R. 136.
- (v) "Time continues to run in favour of a succession of persons, each claiming through the original dispossessor, since the interest of such a possessor is good against the whole world other than the true owner and is transmissible and inheritable." Helmore, The Law of Real Property in N.S.W. (2nd ed.) p. 395; Perry v. Clissold [1907] A.C. 73.

(vi)

Where the true owner has been out of possession for the statutory period and several persons take possession in succession but not claiming through their predecessor in possession, each must remain for the full statutory period as an intruder's possession ceases on abandonment to be effectual for any purpose. Trustees & Agency Co. Ltd v. Short, (supra); Salling v. Broughton [1893] A.C. 556. It is possible though doubtful that if there is no interval between the possession of the different intruders time will continue to run. Willis v. Earl Howe [1893] 2 Ch. 545 (C.A.); Salter v. Clarke (1904) 4 S.R. 280.

(vii)

The nature and extent of the acts of possession necessary will vary with the nature of the property in question. Thus, adverse possession is more difficult to prove in the case of large and underdeveloped land than in the case of a building lot in a developed area. Treloar v. Nute [1977] 1 All E.R. 230; Wuta-ofei v. Mabel Dunquah [1961] 1 W.L.R. 1328 (P.C.); Archer, et ux v. Georgiana Holdings Ltd (1974) 12 J.L.R. 1421; Miller v. Commr. of Lands (1968) 10 J.L.R. 429.

(viii)

Where the intruder takes possession to the exclusion of the true owner, the latter will not succeed in interrupting the running of time in favour of the former merely by entry without remaining in possession, suing for rent, without recovering payment or protesting the trespass. David Bent v. Melvina Williams R.M. Civ. App. No. 64/75 (March 2, 1976). His safest course is to retake possession if this can be done peacefully or to institute an action for recovery of possession. Clement v. Jones (1108) 8 C.L.R. 138. The retaking of possession even in breach of the Forcible Entry Act will stop time from running.

11. It would appear that since registration does not protect the registered owner who is not in possession against the operation of the Limitation Act, dispositions of the property or dealings by him on the register which does not require him to give notice to the occupants, should not interrupt the running of time. This proposition is implicit in the Privy Council's Opinion in Chisholm v. Hall. The dicta in the Aneita Grant's Case which

placed some weight on the fact that the owners had sought to dispose of part of the land cannot be placed any higher than a finding that it was evidence in proof of the owner's intention to continue in possession and to permit the claimant to remain there merely as a licensee.

12. On the effluxion of the statutory periods, the Limitation Act expressly extinguishes the title of the owner who has been out of possession and implicitly confers a good and legal title on the adverse possessor. Since he can no longer be ejected by the former owner whether he was registered or not or by any third party he acquires a right in rem. Accordingly, he is able by proving that he acquired the possessory title to invoke the procedures of the Registration of Titles Act for obtaining registration of his interest. S. 28 (1). On registration, he will enjoy all the benefits of registration. It appears that he must follow the procedure under the Act and cannot, at least in ex parte proceedings, apply to a Judge to declare his entitlement and to order the cancellation of the registered title of the previous owner. In the Estate of Pearline Agatha Taylor, S.C. Suit E 40/79 (June 18, 1981).

D - INTERRUPTION OF TIME BY REGISTRATION

13. It is quite clear from the proviso to Section 70 that the claim to acquiring title to registered land by adverse possession must be with respect to "rights acquired over such land since the same was brought under the operation of" the Act. Thus, if adverse possession begins while the land was unregistered, the

subsequent registration will stop time from running in favour of the dispossessor. In the Jamaican locus classicus, Chisholm v. Hall (1959) 7 J.L.R. 164, the Judicial Committee of the Privy Council examined the effect of registration on possessory titles.

The Head Note describes the facts and issues as follows:

"The appellant and the respondent were the registered proprietors of adjoining plots of land in Kingston, Jamaica. The appellant was registered as proprietor on the 16th April, 1928. The respondent was registered as proprietor on the 30th October, 1941, having purchased from the Administrator General for Jamaica, the legal personal representative of the former owner. The Administrator General had been registered on transmission and a new Certificate of Title issued in his name on the 7th May, 1919. This Certificate of Title became lost and another new Certificate of Title dated 16th October, 1941, was issued to the Administrator General in place of the lost Certificate of Title, which was cancelled.

The Dispute concerned the proper position of the boundary between the two lots. At the time of action brought there was and had for many years been in existence a physical boundary dividing the lots. The appellant's contention was that the physical boundary existing upon the land was rightly placed and was the true dividing line. The respondent's contention was that the physical boundary encroached a matter of seven feet on his lot along his entire northern boundary. The respondent's action was for a declaration that the disputed strip of land was comprised in his Certificate of Title, possession and mesne profits, and the appellant counterclaimed for a declaration that the boundaries as now existing were the true boundaries and for rectification of the Register."

14. The Privy Council in affirming the judgment of the Jamaican Court of Appeal held that the disputed strip formed part of the land comprised in the Respondent's Certificate of Title; but the Appellant having shown over twelve year's continuous possession of the disputed strip from the date of the purchase to the commencement of the action had gained a possessory title. The Board also held that "whenever a duplicate certificate of title

or special certificate of title is lost or destroyed and a new certificate of title registered in place of the former certificate, such new certificate is merely a substitute for the lost or destroyed certificate and merely has the effect of placing the proprietor in the same position as if the former certificate had not been lost or destroyed, and does not bring about any alteration of rights." The case thus establishes that the date of the certificate of title is not the determinant factor, but the date of first registration.

Lord Jenkins in delivering the Opinion of the Board stated at p. 175:

"The scheme of sections 69 [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 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 sections 69 [70] is applicable."

"The combined effect their Lordships would attribute to sections 67 [68] and sections 69 [70] may perhaps be criticised as inconvenient, in that it places upon a purchaser of registered land the onus of going behind the register, and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more

than twelve years have elapsed since the title was first registered. But that is simply the result of the policy adopted by the law of preserving rights acquired by limitation notwithstanding that they are not noted in the register."

15. The Privy Council expressly disapproved of the decision of the majority of the Jamaican Court of appeal in the earlier case of Goodison v. Williams (1931) Clark's Reports 349. In this case, the Plaintiff was the registered proprietor of 'Needham Wood', St. Catherine, of which the three acres in question was a part. He brought an action to recover possession of the three acres but the Resident Magistrate held that the Defendant had acquired a statutory (possessory) title thereto against the registered proprietor after the land had been brought under the operation of the Registration of Titles Act and that the latter passed no better title to his transferee than he himself had. H.I. Brown, Ag. C.J., dissentiente, held that the issue of a new certificate of title to the transferee of the three acres did not extinguish the possessory title which had come into being since that certificate of title was subject to the liabilities and interests stated in the exception. Adrian Clark and Radcliffe, JJ. held that the possessory title had been defeated by the issue of the new certificate to the transferee. It is this majority decision that was overruled by the Privy Council in Chisholm v. Hall (ante). See also Dartadeen et al v. Watson (1937) 3 J.L.R. 876, where the Jamaican Court of Appeal were equally divided.

16. In the Guyanese Case of Brandis v. Craig (1981) 30 W.I.R. 136 is merely authority on the question of what action may

usually interrupt time from running in favour of an adverse possessor. It was not concerned with land falling under the Torrens System. A plot of land was owned by the father of the Appellant. He died in 1956 leaving by Will the eastern half of the plot to his son and the western half to his daughter, the Appellant. The Appellant took possession of the whole plot in 1957. In 1977, the Appellant claimed in an action brought by the son that she had acquired a prescriptive right under the Title to Land (Prescription and Limitation) Act to the eastern half. The Court of Appeal of Guyana held that when the son passed transport to a third party in 1966 who in turn passed transport to the Respondent there was in each case an effective entry in assertion of title and in the case of each successive owner of the eastern half it interrupted the running of time. This case is explicable on the basis of the special procedures under the Guyanese system for passing transport which involves advertisement of the transports and the right of persons with adverse claims to oppose the transaction. In the light of the clear pronouncement of the Privy Council in Chisholm v. Hall (supra), this case is of little value on this question. In any event mere change of ownership by the proprietor who is dispossessed will not interrupt the running of time since the transferee will take the title subject to the exceptions and reservations implied by the Act and will be treated as a person claiming through the prior owner.

E - THE SURVIVAL OF INCUMBRANCES

17. The proviso to Section 70 of the Registration of Titles Act gives protection to certain incumbrances not specifically notified as well as to possessory titles. It provides that registered land shall be deemed to be subject to ... "any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land ... notwithstanding the same respectively may not be specifically notified as incumbrances in such certificate or instrument."

18. It is clear that under the Limitation Act, an easement or right of way may be gained against registered land by virtue of long user. The problem arises where there is an unregistered easement which is sought to be enforced against a registered transferee who takes without notice of it. In James v. Stephenson [1893] A.C. 162, the Privy Council held that the omission of the notification of a right of way granted by deed prior to the issue of the certificate did not prevent its grantee from enforcing it. In Jobson v. Nankerris (1943) 44 S.R. (N.S.W.) 277, Nicholas, C.J. held that an exception similar to that stated in the Jamaican proviso applies only to easements created before the land was brought under the registration system or to cases in which the land was transferred to the registered proprietor by reference to a plan which plan showed the existence of a right of way. Dabbs v. Seaman (1925) 36 C.L.R. 538.

19. In Wilkinson v. Spooner [1957] Tax. S.R. 181, the Tasmania Court held that the exception covered easements whether they come

into existence before or after the land was brought under the Act. Wallace, P. in James v. Registrar-General (1968) 1 N.S.W.R. 310, expressed disagreement with Jobson v. Nankerris (ante) and held that a duly created easement over registered lands, which was omitted from a subsequent issue of a new certificate of title was protected by the exception.

20. In the case of Barber v. Mayor, etc of Petone (1908) 28 N.Z.L.R. 609, the Supreme Court of New Zealand sitting "In banco", held that the Municipal Corporation could not, apart from specific statutory provision, enforce a grant of an easement over land for the purpose of laying water-pipes as it had not been registered as required by the Land Transfer Act which stated that no easement can be created except by a proper instrument duly executed and registered. In Crisp v. Snowsill [1917] N.Z.L.R., the Supreme Court of New Zealand held that the provision of Section 5 of their Land Transfer Act that a certificate of title shall not be conclusive as to the omission of an easement created in or existing upon any land must be read subject to the provisions of Sections 197 and 198 of the Act for protecting a bona fide Purchaser against unregistered interests. It appears therefore, that in New Zealand the corresponding provisions, admittedly somewhat differently worded, are construed differently, and no easement affecting land can be created excepting by a proper instrument duly executed and registered.

21. If the principle of indefeasibility of title expounded in Frazer v. Walker is given full effect, the issue may be resolved

eventually in favour of the New Zealand approach. Nevertheless, it appears that in any event, a Court would be inclined to hold that easements of necessity, of common intention, by estoppel or based on continuous and apparent accommodation are incorporated in the exception. Stevens v. Allan (1955) 58 W.A.L.R. 1. On the proper interpretation of the exception, it is submitted that, in the case of easements created by instrument after the land was registered, it could only refer to easements in existence at the time of the issue of the certificate.

22. The possessory title acquired under the Limitation Act is subject to the rights of third parties which are not equivalent to a claim to possession of the same interest. Restrictive Covenants, for example, will continue to apply. The basic principle is that the squatter takes the former owner's estate by operation of the statute and without giving value. Re Nisbet and Potts Contract [1912] 2 Ch. 1. It should follow therefore that rights of way and easements which were enjoyed over the land during the period of adverse possession will continue by virtue of the proviso to be valid and enforceable even if not registered.