(9)

SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 of 1984

BETWEEN:

RANDOLPH RUSSELL - Appellant

and

LUTHER ROBERTSON - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: H. Matadial and A. Williams for Appellant
O. Sylvester, Q.C., and H. Williams for Respondent

1985: Dec. 9
1986: March 17.

JUDGMENT

BISHOP, J.A.

This is an appeal by Randolph Russell, a businessman and proprietor, against the decision of Mitchell J. who granted Luther Robertson, also a businessman and proprietor, (1) a declaration that he is entitled to all that piece or parcel of land being Lots 43 and 44 situate at Lower Middle Street, Kingstown (2) a perpetual injunction restraining the appellant by himself his servants or agents from entering or crossing and/or exercising acts of ownership over the respondent's property being Lots 43 and 44 at Lower Middle Street, Kingstown, and (3) a mandatory injunction ordering the appellant to pull down and remove the small chattel house erected on the respondent's said premises at Lower Middle Street, failing which the respondent is authorised to do so and claim the cost of dismantling and removing. Damages for trespass in the amount of $3,000.00 (special and general damages) and taxed costs were also awarded the respondent. The appellant's counterclaim was dismissed.

While I did not allow the absence from the record, of a formal order, to prevent my consideration of this appeal, it must not be regarded as the

/view to.....

view to be taken whenever there is an omission to file the order by the party having its carriage.

Learned Counsel for the appellant submitted that this case crystallised into a single issue, which he described as "a straight contest", between title deed No. 696 of 1970, dated 4th May 1970, by which Lyric Theatre Limited conveyed to Luther Robertson Lots 43 and 44 mentioned above, and title deed No. 407 of 1973, dated 8th March 1973 by which Gladys Adina d'Andrade conveyed a part of Lot 44 to Joyce (also called Molly) Gellizeau.

Counsel conceded that the property conveyed by title deed No. 404 of 1959 dated 23rd May 1959, was the same property mentioned in title deed No. 696 of 1970 and that the validity of the latter deed depended upon that of the former deed. Put another way, the deed No. 696 of 1970 stood or fell with deed No. 404 of 1959. Mr. Matadial agreed that if this Court was satisfied that title deed No. 404 of 1959 was a valid deed, then this appeal must, of necessity, fail; and also that deeds Nos. 407 of 1973 and 408 of 1973 would have no legal effect.

Learned Counsel attacked the validity of deed No. 404 of 1959, urging two reasons why this Court ought to find it to be null and void; (i) Arthur Coleman Gellizeau was named therein as the administrator of the Estate of Edwin Martin Gellizeau but he was never such administrator, and (ii) at the time when the deed was executed Gladys Adina d'Andrade had acquired adverse possession in Lots 43 and 44.

In dealing with the first reason Counsel quoted the following passage from the Judgment:-

> ".....Arthur Coleman Gellizeau is described in the deed as administrator but there is no reference by which it could be gleaned that Letters of Administration were actually granted to him. The references suggest that the Letters of Administration were granted to Conrad Fitzallen Gellizeau."

/Counsel also.....

Counsel also read extracts from a power of attorney whereby Conrad Fitzallen Gellizeau was appointed by Arthur Coleman Gellizeau (I shall refer to this document later), and submitted that the latter had no power in the capacity of an administrator to appoint the former. Learned Counsel contended that since the deed described Arthur Coleman Gellizeau in that manner or capacity, it had the legal effect of rendering the deed a nullity.

Learned Counsel for the respondent submitted that upon a careful consideration of the power of attorney and of the appropriate part of the deed No. 404 of 1959, there was no more than a misdescription of Arthur Coleman Gellizeau; and, in law, this could not be said to vitiate the deed, the purpose of which was to transfer the property therein clearly indicated, from one identifiable party to another identifiable party. In Counsel's view the operative part of the deed was unambiguous and as long as this was so, then the property passed between the parties therein named; further, that the appellant Randolph Russell could not in a case brought against him personally, by Luther Robertson, seek to attack the deed because he - personally - was neither a party to that deed nor one who could allege that he would suffer prejudice by any misdescription of Arthur Coleman Gellizeau.

The relevant part of the deed reads like this:-

> "THIS INDENTURE is made.....BETWEEN ARTHUR COLEMAN GELLIZEAU.....Administrator of the Estate of Edwin Martin Gellizeau, deceased, (hereinafter referred to as "the Administrator") acting herein by CONRAD FITZALLEN GELLIZEAU.....his duly constituted Attorney (hereinafter referred to as "the Attorney") of the FIRST PART and MARIE OLGA GELLIZEAU.....EDNA MARIE GELLIZEAU.....and HILARY STELLA GELLIZEAU (hereinafter called "the beneficiaries") and acting herein by the said Conrad Fitzallen Gellizeau as their attorney (heinafter referred to as "the Attorney") of the SECOND PART and LYRIC THEATRES LTD. a company incorporated under the provisions of the Companies Ordinance.....and having its registered office at Kingstown.....(hereinafter referred to as "the Company") of the THIRD PART....."

The power of attorney from Arthur Coleman Gellizeau to Conrad

/Fitzallen.....

Fitzallen Gellizeau showed unequivocally, that Edwin Martin Gellizeau died in St. Vincent on the 1st September 1952, intestate, leaving the said Arthur Coleman Gellizeau, his oldest nephew and oldest next of kin surviving him. It also stated clearly as follows:-

> "KNOW ALL MEN that I Arthur Coleman Gellizeau.... by these presents hereby appoint Conrad Fitzallen Gellizeau.....to be my attorney to obtain a Grant of Letters of Administration of the Estate of the said Edwin Martin Gellizeau deceased from the Supreme Court of the Windward Islands and Leeward Islands.....for me and in my name and for my use until such time as I shall myself obtain Letters of Administration of the said Estate of the said Edwin Martin Gellizeau, deceased
>
> .....
>
> To sell any Real or Personal property of the Estate of Edwin Martin Gellizeau deceased and give good receipts for all purchase moneys paid to him in respect of such sales and to account for the purchase moneys in respect of such sales....."

The power of attorney, which was dated 4th May 1959, was registered at 2.55 p.m. on the 14th May 1959, or about nine days before the deed 404 of 1959 was executed.

As I understand the deed, all the surviving next of kin of the late Edwin Martin Gellizeau, who lived outside of St. Vincent and who were interested parties in the Estate, appointed Conrad Fitzallen Gellizeau as their attorney, and he then sought to take steps on their behalf which he was empowered to take.

On the 19th May 1959, Conrad Fitzallen Gellizeau by virtue of the power of attorney from the oldest surviving next of kin, applied for and obtained from the Supreme Court sitting in St. Vincent letters of administration of the Estate of Edwin Martin Gellizeau. He then subsequently took steps to sell Lots 43 and 44, Lower Middle Street - the property described and delineated in the deed 404 of 1959. The power of attorney from Arthur Coleman Gellizeau authorised Conrad Fitzallen Gellizeau to sell real property of the Estate of Edwin Martin Gellizeau. The other next of kin, namely Marie Olga Gellizeau, Edna Marie Gellizeau and Hilary Stella Gellizeau, authorised Fitzallen Gellizeau to act as

/their.....

their attorney in the transaction with Lyric Theatres Limited and they confirmed and ratified the sale of the property in which they had an interest.

In his judgment the learned trial Judge pointed out that

> "That grant of letters of administration of the Estate of Edwin Martin Gellizeau was never.....revoked by any expressed judicial act. The status of an administrator is conclusive against all parties and in all courts until set aside.
>
> Both the plaintiff and the defendant in their respective pleadings accept that Conrad Fitzallen Gellizeau was the duly registered attorney of Arthur Coleman Gellizeau who was out of the jurisdiction of the court..... The references suggest that the Letters of Administration were granted to Conrad Fitzallen Gellizeau .....
>
> It does seem that the identifiable beneficiaries on the intestacy of Edwin Martin Gellizeau consented to the grant and acted upon such a grant in terms of the identure 404 of 1959 by which their interests were transferred to Lyric Theatres Limited."

Two questions arise. Firstly, were there parties to the deed who could be bound by it? Secondly, if so, who were these parties? The first question must be answered in the affirmative because there were ascertainable and clearly identified parties mentioned. The second question can be answered thus: on the one hand there were the surviving next of kin of Edwin Martin Gellizeau each of whom was acting through Conrad Fitzallen Gellizeau, and on the other hand there was the company registered in St. Vincent. The surviving next of kin (Arthur Coleman Gellizeau, Marie Olga Gellizeau, Edna Marie Gellizeau and Hilary Stella Gellizeau, were conveying property to the company known as Lyric Theatres Limited for which Randolph Russell, as its managing director, acted in the transaction, fully aware of what was being done.

There was no further complaint by Counsel about the deed 404 of 1959 as it stood, and it is unnecessary to deal in any detail with it. It will suffice to say that Conrad Fitzallen Gellizeau and Randolph Russell in their respective capacities at the time, accepted the facts stated.

/I am.....

I am unable to say that the reference to Arthur Coleman Gellizeau as administrator of the Estate of Edwin Martin Gellizeau had the legal effect of rendering deed No. 404 of 1959 null and void. The first reason relied on must therefore fail.

In dealing with the second reason for attacking the deed, namely, that when it was executed Gladys Adina d'Andrade had, through adverse possession, acquired a title to Lots 43 and 44, learned Counsel for the appellant submitted that when the company purported to purchase the property in question, that was not a good or legal purchase, because, according to him, the Attorney had 'nothing' to convey and the company bought 'nothing'; then later, in 1970, the company sold 'nothing' to Luther Robertson. It may be appropriate to point out here that in the course of his argument Mr. Matadial also contended that the company, through its general manager Robert Russell, was always aware of these facts.

Counsel asked this Court to find that (1) Gladys d'Andrade first entered into possession of Lots 43 and 44 either after her aunt Caroline Gertrude Gellizeau died in October 1939, or following the death of her uncle Edwin Martin Gellizeau, in September 1952. (Caroline Gertrude was the sister of Edwin Martin); (2) whichever date was accepted, she thereafter remained in continuous, undisturbed and exclusive possession for a period of time in excess of the statutory twelve years; (3) that she thus acquired a good legal title to the two Lots at Lower Middle Street; (4) that she later conveyed or transferred title to a part of the property to Joyce Gellizeau, from whom the appellant got possession.

As I understood him, Mr. Matadial conceded that if it was decided, that on the evidence before the learned trial Judge, it was a proper finding that Gladys d'Andrade was not in adverse possession of the property then she had no title that she could convey or transfer and the deed 404 of 1959 must be regarded as a valid deed properly conveying the property from the surviving next of kin of Edwin Gellizeau to the company.

/Learned....

Learned Counsel for the respondent submitted that there was no basis in law or on the facts, for finding adverse possession of the property. He submitted that the facts of the matter revealed conflicting grounds of possession. Firstly, Gladys d'Andrade claimed that she entered into and was entitled to possession as a devisee under the will of Caroline Gertrude Gellizeau and secondly, she relied upon prescription. Mr. Sylvester contended that possession could not become adverse and at the same time be referrable to a legal title, and he asked this Court to find that the totality of the evidence but more expecially the documentary evidence in the case, led to the irresistible conclusion that Gladys Adina d'Andrade could not be said to have been in exclusive possession for her sole use and benefit; and that when she was occupying the premises she was doing so with the consent or approval of the other beneficiaries. Learned Counsel urged that as late as June 1970, when deed No. 1015 of 1970 was prepared, Gladys Adina d'Andrade regarded the property as belonging to the Estate of Edwin Martin Gellizeau. It was further submitted by Counsel that it was clear that up to 1970 Gladys Adina d'Andrade never had the intention to possess the property, Lots 43 and 44, for herself alone.

If in the instant appeal, this Court found as a fact - as learned Counsel for the appellant has asked us to do - that Gladys Adina d'Andrade first entered into possession of Lots 43 and 44 in September 1952, then it is clear from the evidence that she cannot claim to have been in uninterrupted or undisturbed and continuous possession for 12 years. I say so because, as will be seen later in a review of the facts, her right to possession was not accepted and was challenged in Court in 1960. For possession did not continue without a claim against her for recovery of the land. Consequently, as I see it, she must succeed or fail according to the facts which are shown to have existed from 1939 when Caroline Gertrude died.

The following facts are helpful.

/At the.....

At the date of the death of David Patrick Gellizeau in 1884, he was the legal owner of the property referred to in this appeal as Lots 43 and 44. He died testate, leaving the property to his eleven children - among whom were Edwin Martin Gellizeau and Caroline Gertrude Gellizeau - equally.

Shortly before the death of Caroline Gertrude on the 8th October 1939, her brother Edwin Martin had become entitled to a 9/11th share or interest in addition to his own 1/11th share or interest in the property; and she, Caroline Gertrude, had her own 1/11th share or interest in the said property. Now Caroline Gertrude died testate and by her will dated 15th December 1924, she appointed Edwin Martin as sole executor. She also made the following devises: (a) "........all my share or interest in Lot 43 Middle Street unto my niece Gladys Adina Gellizeau her heirs and assigns forever", and (b) "........the residue of my real estate and all my personal estate unto my brother Edwin Martin Gellizeau absolutely." Gladys thereby became entitled to 1/11th share or interest in Lot 43 alone. She had no share or interest in Lot 44. Edwin Martin became entitled to an additional 1/11th share or interest in Lot 44 thus giving him the entire interest in Lot 44. His share or interest in Lot 43 remained, as before, at 10/11th.

Now the learned trial Judge found that there had been a good relationship between Caroline Gertrude and Edwin Martin and that in 1939, following her death, he became seised in possession of all the premises of Lots 43 and 44, except the beneficial interest of 1/11th share in Lot 43 which Caroline Gertrude had devised to Gladys Adina Gellizeau, later to become, by marriage, Gladys Adina d'Andrade. This was a proper finding from the evidence.

On the 1st September 1952 Edwin Martin Gellizeau died. His surviving next of kin were Arthur Coleman Gellizeau, Marie Olga Gellizeau, Edna Marie Gellizeau and Hilary Stella Gellizeau.

It was not until the 19th May 1959 that Conrad Fitzallen Gellizeau was granted, out of the Supreme Court of the Windward Islands and Leeward Islands , letters of administration to all the estate of Edwin

/Martin....

Martin Gellizeau, deceased. This grant was never revoked and it therefore remained a valid and conclusive document. Relying upon the judgment (there was no exhibit on the Record before this Court), the original grant showed inter alia that Conrad Fitzallen Gellizeau was given full power and authority "to demand receive and take into his hands, custody and possession and to administer.....the real and personal estate of the deceased, and the same well and faithfully to dispose of in a due course of administration and to do and perform all such other things as administrator ought to do". Therefore, as Mitchell J. observed:-

> "He could effect a conveyance of the property and marshal the assets and liabilities of the estate. The land of the deceased Edwin Martin Gellizeau vested in Conrad Fitzallen Gellizeau as his personal representative for the purposes of administration."

About three months or so before Edwin Martin Gellizeau died, Lyric Theatres Limited was incorporated under the Companies Act, Chapter 219 of the Laws of St. Vincent. Its registered office was located in Kingstown and the directors were

(a) Luther Robertson (the respondent in this appeal)
(b) George Robertson (the respondent's father)
(c) Randolph Russell (the respondent's nephew)
(d) Othneil Sylvester (the respondent's brother)

The last mentioned director was also the company's solicitor and the solicitor for Randolph Russell. One H. Robertson was an alternate director.

Sometime in 1959 agreement was reached between Conrad Fitzallen Gellizeau, acting on behalf of the surviving next of kin of Edwin Martin Gellizeau, deceased, and Randolph Russell, the appellant, acting on behalf of Lyric Theatres Limited of which he was managing director. A written agreement was drawn up by the company's solicitor (and solicitor for the appellant) and according to the testimony of the appellant

/"In pursuance.....

> "In pursuance of this agreement.....a deed of sale was executed for the two properties lots 43 and 44 and then a separate deed of sale in respect of lot 73 to me personally. The deeds were executed by Conrad Gellizeau... I was present when the agreement was made."

There is no doubt or dispute that the appellant was then seeing after the company's affairs, and indeed he said under cross-examination -

> "I purchased Lots 43 and 44 in question on behalf of Lyric Theatres Ltd. I agreed to purchase for $8,000.00. I obtained a deed of purchase No. 404/59 in which it was stated that the purchase price was $8,000.00."

Not long after the purchase of Lots 43 and 44, the appellant, acting on behalf of the company, went to see Gladys d'Andrade, who was living there, to advise her of the sale. According to the appellant, she claimed that she was owner of the property having been in possession for over 20 years.

Notwithstanding this advice from the appellant and the alleged claim by Gladys d'Andrade, she did nothing to upset the transaction between Conrad Gellizeau and Lyric Theatres Limited. Rather, efforts were made to get Gladys d'Andrade off the land; or, to put it a different way, to recover possession of the land. Actions were brought by Conrad Fitzallen Gellizeau and Lyric Theatres Limited against Gladys Adina d'Andrade and Beatrice Browne. The first action to be brought was that by Conrad Fitzallen Gellizeau against Gladys d'Andrade. The plaintiff in case No. 68b of 1959 claimed recovery of possession, as did the plaintiffs in case No. 80 of 1960. No defence was filed or none was exhibited with the Record before us in No. 68b of 1959. In the defence filed in 80 of 1960 the defendants merely asserted that they are in possession of the hereditaments and premises. There was no assertion that Gladys d'Andrade was owner having been in possession for more than 20 years; and it is reasonable to infer that if she did tell the appellant so in 1959 she was not ready or quick to plead and prove it in 1960. It is but fair to

/point.....

point out that Case No. 80 of 1960 was never decided on the pleadings. The real issues raised were never resolved as the plaintiffs failed to appear at the trial; and in case 68b the plaintiff failed to establish a case judgment being entered for the defendant.

Learned Counsel for the parties referred to Case No. 187 of 1970 but it is irrelevant to the decision on the validity of deed No. 404 of 1951. It will suffice to point out that in the Statement of Claim delivered on 30th November 1972 - more than 10 years after the date of the defence in Case No. 80 of 1960 - Gladys d'Andrade asserted (a) that she occupied the premises known as Lots 43 and 44, exclusively, from October 1939 until she was forced to leave in October 1970, (b) that she enjoyed the rents and profits of the premises absolutely during that period and (c) that she was a devisee under the will of her aunt Caroline Gertrude Gellizeau (who died on 8th October 1939) and by it she is entitled legally to possession of an undivided share in Lot 43. Caroline Gertrude's will was dated 15th December 1924.

By that Statement of Claim Gladys Adina d'Andrade sought to rely on a lawful title and on prescription at least in respect of Lot 43, and on prescription in respect of Lot 44.

The learned trial Judge found that her actual entry into possession of both Lots was initiated by the devise in the will.

I turn now to the law which I regard as applicable. I wish to refer to a case decided by the West Indies Associated States Court of Appeal (as it was then known), in this jurisdiction: Civil Appeal No. 11 of 1976 between Gerald Pollard, attorney for Mary Matthews and Edna Stevenson, devisees under the will of Athaline Matthews, deceased and William Dick. The Court of Appeal allowed the appeal against the decision of Berridge J. who ordered that judgment be entered for William Dick on the ground that he had been in undisturbed possession of the land, the subject of the claim, (and that Gerald Pollard was barred from bringing

/the actions ...

the action by section 3 of Chapter 86). Peterkin J.A. in his Judgment said this:-

> "In the case of Bruce v Johnson 1954 1 D.L.R. 571, it was held that in order to succeed in establishing a possessory title against the rightful owner of land a claimant must show (a) actual possession for the statutory period (b) that such possession was with the intention of excluding from possession the owner or person to possession and (c) discontinuance of possession for the statutory period by the owner and all others entitled to possession. If the claimant fails to show all these things he cannot establish a right to possession, and in addition he must show that the owner was aware of his exclusive possession and that it was notorious."

I wish to emphasise that it is a possessory title which is established.

Halsbury's Laws of England Volume 28 paragraph 769 (4th edition) states as follows:-

> "Dispossession occurs where a person comes in and puts another out of possession; discontinuance of possession occurs where the person in possession goes out and another person takes possession and that possession must be continuous and exclusive..... To constitute dispossession, acts must have been done which were inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it."

In the instant case the learned trial Judge found that in October 1939 after Caroline Gertrude Gellizeau died, her brother and sole executor Edwin Martin Gellizeau remained in possession of the property comprising Lots 43 and 44; that Gladys Adina d'Andrade, his niece, entered on that property because she was a devisee in respect of Lot 43 and she remained there until 1952 when her uncle died, "with the consent, permission and acquiescence of all those concerned, including Edwin Martin Gellizeau..... Gladys Adina d'Andrade never had to put out or dispossess anyone and she did not have to expand or encroach on the possession or occupation of anyone else.

Mitchell J. also found that on the facts and circumstances "the acts

/of Gladys.....

of Gladys Adina d'Andrade were not done with a view of defeating the purposes of interests of any other beneficiaries who might have been entitled"; and he continued:-

> "It seems to me that she did not intend to be a trespasser or to infringe upon another's right. She acted in good faith and in the honest belief that she was doing that which by her devise she was entitled to do. There is no evidence that she had put out any other person to gain possession."

The person who claims adverse possession has the burden of proving the ingredients, as was indicated by the above quoted passage from the Judgment of Peterkin J.A., and in the matter now before us, when dealing with the ingredient of animus possidendi, the learned trial Judge found that "there was no acceptable evidence of animus possidendi and of ouster on the part of either Caroline Gertrude Gellizeau or Gladys Adina d'Andrade. Rather, he was satisfied that

> "taking into account the prevailing family relationship between the Gallizeaus and all the circumstances....., on the balance of probability there was no change in the possession of Caroline Gertrude Gellizeau or of Gladys Adina (Gellizeau) d'Andrade to ouster the possession of the other beneficiaries in common of the Estate of David Patrick Gellizeau and the beneficiaries of those beneficiaries in common, and Gladys Adina (Gellizeau) d'Andrade in all probability recognised and accepted that state of affairs up to 1970."

I have reviewed the facts and circumstances contained in the evidence adduced at the trial and I am satisfied that the trial Judge had before him evidence, properly admitted, which justified his finding that the appellant had not proved adverse possession by Gladys Adina d'Andrade or anyone through whom she claimed, at the time when deed 404 of 1959 was executed. So I ought not to interfere with his decision in this respect. Therefore the second reason relied upon by Counsel for the appellant for saying that No. 404 of 1959 is not a valid deed and ought to be declared null and void, cannot succeed. That ought, as Counsel for the appellant agreed, to end the matter since the deed is a valid one.

/Deed....

Deed No. 696 of 1970 by which Lyric Theatres Limited conveyed Lots 43 and 44 to Luther R bertson, had for its root title the deed No. 404 of 1959; and as I stated earlier, its validity depended upon the validity of the deed No. 404 of 1959. Since the latter stands as a valid deed, deed 696 of 1970 stands with it also as a valid deed; and, the "straight contest" (Counsel's expression) must be decided in favour of the 1970 deed over the deeds Nos. 407 of 1973 and 408 of 1975.

There is only one other point in this appeal with which I ought to deal. Mr. Matadial submitted that the respondent could not bring a claim for damages for trespass because there was evidence that he had tenants who paid him rent for the premises, the subject matter of the appeal. Counsel submitted that a landlord could only bring an action for damages done to his reversionary interest.

The evidence of Luther Robertson showed that when he bought Lots 43 and 44 he entered into possession of them through Freddie Gaynes (in the lower portion of the building on Lot 44) and through St. Aubyn Wilkes, Ardon Morris and others (in the upper portion of the said building). Luther Robertson made it clear under cross-examination that he did not receive payment of rent for fourteen years after the purchase; and in re-examination he explained: "I did not charge rent because the property was bought for development and before development the only fit thing I saw was to allow some of my employees to use it". There was, in my view, ample evidence before the learned trial Judge, from which he could properly have decided that the property was occupied by the respondent's servants or agents and that there was damage done by the appellant through his servants or agents. The occupation by servants or agents vests possession in the master or principal; and the master or principal can sue in trespass. Therefore the respondent Luther Robertson could bring a claim for the damage done in the course of the trespass.

The other reasons for appeal were without merit in the light of this

/finding.....

finding that deed 404 of 1959 was valid.

I would therefore dismiss this appeal with costs.

E.H.A. BISHOP,
Justice of Appeal.

I agree.

L.L. ROBOTHAM,
Chief Justice

I also agree.

G.C.R. MCE,
Justice of Appeal.