TORTOLA

IN THE COURT OF APPEAL

Civil Appeal No. 9 of 1995

BETWEEN

THOMAS FRETT **Appellant**

and

GEOFFREY COBHAM **Respondent**

Before : The Hon. Mr. Justice C.M. Dennis Byron Chief Justice (Ag)
The Hon. Mr. Justice Satrohan Singh Justice of Appeal
The Hon. Mr. Justice Albert Redhead Justice of Appeal

Appearances : Mr. Joseph S. Archibald, QC,
Mr. Oscar Ramjeet and Mr. Ian Sandy
with him for the Appellant

Mr. S. J. Husbands for the Respondent

[June 30 July 2, 1998]

JUDGMENT

SATROHAN SINGH J.A.

This is an appeal from a judgment of Ephraim Georges J delivered on August 4th 1995, just over one year after a hearing that ended on July 14th, 1994. The matter in issue revolved around the ownership of approximately 1.071 acres of land, (the disputed land) situate at Stoney Bay in Tortola.

By a decision of the Land Adjudication Officer of September 29th, 1972, absolute title of the disputed land was awarded to the respondent. Because of the nature of the evidence before the Land Adjudication Officer, it was the allegation of Queens Counsel Mr. Archibald for the appellant that this award of the Adjudication Officer was erroneous. However, because of the nature of the proceedings before us, we were not empowered to enquire into that matter. That notwithstanding, the uncontroverted evidence before Georges J showed that the appellant, though not in actual occupation of the disputed land, has been exercising acts of ownership thereon before 1972 and continued this occupation uninterrupted, openly and without permission from the respondent or anyone else until sometime in 1984 when the respondent's agent, Pamela Romney, started visiting the land in an effort at having it sold.

Some time in July 1991, she found a purchaser in one Derrick Fitzpatrick. It was only after Derrick Fitzpatrick signed the contract to buy the land and was told by the appellant that the land was his, the appellant's), and not that of the respondent, that the respondent for the first time took the first step towards having the appellant

removed. He filed suit. Georges J heard same and declared that the respondent was the rightful owner of the disputed property and that the appellant was not entitled to the said lands.

This appeal challenges this decision of Georges J. The real issue for our determination was whether, on the acceptable evidence before the judge, the respondent's claim to the disputed property was barred by September 1984, by virtue of Section 6(3) of the Limitation Act Cap 43, to be found in volume 1 of the Revised Laws of the Virgin Islands, which states:

> **"No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him,....."**

The law on this matter was not disputed and the judge's application of that law was not challenged before us. What was seriously challenged was the judge's evaluation of the evidence. Learned Queen's Counsel for the appellant, recognized up front his uphill task in attempting to have a Court of Appeal dislodge a judge's finding of fact. However, in his own inimitable way, Mr. Archibald demonstrated to this Court, the folly of a judge in seeking to

recount and evaluate facts or remember the demeanour of witnesses when delivering a judgment over one year after he had heard the evidence.

In the interest of brevity, I do not propose to recount all the arguments here. But, alarming examples show the judge treating a witness whose evidence was tested in cross-examination, as being a witness whose evidence was not so tested. Or, describing the appellant and his witnesses as witnesses who "seem to have their heads in a single barrel," when a scrutiny of their evidence shows that they did not testify parrot-like and that such evaluation was erroneous. We also share the view of learned Queen's Counsel, that it must be a virtually impossible task for the judge, when he waited that long before deciding the case to remember the demeanour of witnesses.

For these reasons, we feel we have the legal basis which allows us room to disagree with the judge's evaluation of the evidence and his conclusions and inferences to be drawn from such evidence if the circumstances so warrant. Because of the delay in writing his judgment, we are also of the view that he was in no better position that us on the issue of demeanour.

The evidence of the appellant and his witnesses as to the acts of ownership exercised by him over the disputed property was to a certain extent

supported by certain of the witnesses of the respondent. We can find not justifiable reason why this evidence should have been disbelieved. These acts of ownership included the grazing of cattle on the disputed property, the burning of coal thereon, farming the land, taking sand therefrom to construct a building, giving permission to someone else to use sand therefrom also to construct a building and fishing thereon. The evidence also shows that the appellant even employed one Hugo Hodge to work on the land and to assist him in the burning of the coals and attending his cattle.

In deciding the issue whether the abovementioned acts of the appellant were capable of establishing adverse possession, Georges J said that even if accepted, they could not. We disagree with this opinion. Even if the judge's opinion that the coal burning was sporadic as he said in his judgment, that finding cannot weaken the appellant's case because, such an activity, would of necessity be a sporadic activity. In our judgment, these acts done on the land by the appellant between 1972 and 1984 were sufficient to support a finding that the appellant had been in adverse possession of the disputed land since 1972. [See Treolar VS Nute [1977] 1 All England Report, 230.] The evidence showed that the appellant carried out these acts

openly, without interruption, and without permission from the respondent.

Whilst we recognize that in the proceedings before us we are not empowered to interfere with the Adjudication Officer's decision, we feel obliged to express the opinion that prima facie, on the evidence presented to us, the Adjudication Officer may have made a mistake when he awarded the disputed land to the respondent. The Adjudication Officer's decision showed that he acted on Anker's Survey Plan when he made his decision. That plan clearly showed the boundaries of the respondent's entitlement. Those boundaries correspond with the boundaries in the Deed of the respondent when he first acquired his property. Those boundaries in both the deed and Ankers Plan did not include therein the disputed land.

The effect of the Adjudication Officer's decision, erroneous though it may appear to be, gave the respondent absolute ownership of the disputed property, under Section 23 of the Registered Land Act Cap. 229. However, by Section 28 of the said Act, such absolute ownership was subject to the rights of any individual "acquired or in the process of being acquired by virtue of any written law relating to the Limitation Act or by prescription". We therefore do not feel that this appeal brought by the appellant was an exercise in futility because of

the absolute nature of the respondent's ownership of the 1.071 acres of land. He has a right to the disputed property acquired by virtue of the Limitation Act (Supra).

For these reasons we would order that this appeal be allowed. The judgment of the trial judge is set aside. We order that the respondent's action do stand dismissed on the ground that his claim was statute barred by September, 1984 by virtue of Section 6(3) of the Limitation Act, by reason of the 12-year adverse possession by the appellant of the parcel of land formerly described on the Land Register as Parcel 57 of Block 3240A of the Long Look Registration Section. The appellant is awarded his costs of this appeal and in the Court below to be taxed if not agreed.

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SATROHAN SINGH
Justice of Appeal

I concur

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C. M. DENNIS BYRON
Chief Justice (Ag.)

I concur

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ALBERT REDHEAD
Justice of Appeal