

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tudury v. Sanchez de Piña, from the Supreme Court of Gibraltar; delivered 19th July, 1862.*

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Present:

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

LORD JUSTICE TURNER.

AUGUSTIN PORRAL, an inhabitant of Gibraltar who died in the year 1804, appears to have been, at the time of his death, the owner, and, as owner, in the enjoyment of certain tenements there, including the tenements numbered respectively 690 and 692, of which eight-twelfth parts are the subject of the present Appeal. The term "owner," however, thus used, is to be understood as intimating not necessarily that he was proprietor in fee simple of the whole, but that he was proprietor either in fee simple, or for some term or terms of years, or as to part in one mode and as to the rest in the other.

The instruments and facts in evidence do not, in their Lordships' judgment, enable them to pronounce distinctly and positively that at his death he was the freeholder of the whole, or not the freeholder of any portion; but it may well be presumed that he meant to become, and considered that he had become, the owner in fee of the whole of the two properties in question, for he took a conveyance in fee of one of the properties, and obtained from the Governor of Gibraltar a confirmation of that conveyance, and upon the occasion of the transfer to him of the other property he also obtained from the Governor a confirmation of that transfer, expressed in terms evidently pointing to the vesting in him of the whole and absolute

interest; and he held under these titles down to the time of his death without there having been at any time, so far as appears, any disturbance of either of them.

It is from the materials in the case to be collected that those who, from his death to the latest date brought before us, have at any time or times been in the possession or enjoyment of the properties, or any part of them, have claimed and held that possession, have claimed and had that enjoyment, through and under the same Augustin Porrall. And whatever title or claim the Appellant here or either of the Respondents has, must, we apprehend, be considered as derived from one and the same source, namely, Augustin Porrall.

It appears that Augustin Porrall left an only son and several daughters. The son, Anthony Porrall, seems to have been of weak intellect, and to have never married. He died in April 1852, and at the time of his death it is to be collected that the properties were wholly held and enjoyed by himself and Anthony Tudury, or by one of them.

Anthony Tudury had married one of Augustin Porrall's daughters, and seems, after his death, to have acquired in the lifetime of Anthony Porrall all, if any, the rights and interests of the Porrall family in the properties, besides those of Anthony Porrall, and from the time of Anthony Porrall's death to the time of making an arrangement which, in 1853, was made between Patrick Porrall and Anthony Tudury, to have been in the sole enjoyment of them. That arrangement was thus: Patrick Porrall, who is represented as having been a cousin of Anthony Porrall, claimed, soon after Anthony Porrall's death, to be his heir-at-law, and entitled, in that right or character, to the whole of the properties, asserting that Anthony Porrall died seised of the whole in fee simple. The claim having been resisted by Anthony Tudury, he was sued in the Supreme Court at Gibraltar by Patrick Porrall for the purpose of establishing Patrick Porrall's alleged title and ejecting Anthony Tudury accordingly. But pending the action they compromised it and the claim of Patrick Porrall by agreeing to execute, and executing, the Deed of the 5th July, 1853, set forth in pages 13, 14, and 15 of the Record of Proceedings on this Appeal, from which time until Anthony Tudury's

death, in the year 1856, he remained in the quiet possession of the eight-twelfths allotted or confirmed to him by the compromise and Deed—the eight-twelfths, namely, which are the subject of the present Appeal. He died intestate, leaving the present Appellant his heir-at-law.

The personal representative of Anthony Tudury is the Respondent, Maria Sanchez de Piña, who, with the other Respondent, her husband, having, as in that right, taken possession of the eight-twelfths, and the Appellant as Anthony Tudury's heir having brought an action against them in the Supreme Court of Gibraltar for the purpose of recovering the eight-twelfths, and the action having been successfully defended by the Respondents, the present Appeal has been the consequence. The question decided against the Appellant by the Supreme Court, and to be decided for or against him here, was and is, whether the eight-twelfths already mentioned ought to be considered and treated as real estate of Anthony Tudury (the Appellant's proposition), or as personal estate of Anthony Tudury (the proposition of the Respondents). It appears certain, or highly probable, that at the death of Anthony Porral he had a good title to a beneficial estate in possession, or to a beneficial interest in possession, in part, if not the whole, of the properties; that at the same time Anthony Tudury claimed to be entitled beneficially to the possession of part of them; and that not any other person had, at that time, any beneficial title to the possession of any part. It may be that at the time of the death of Anthony Porral neither he nor Anthony Tudury had a good title to a freehold estate or freehold interest in the whole or even any portion of the properties: that seems to us, on the whole evidence, a question of difficulty and doubt, but we are of opinion that the intention of the Deed of July 1853 was to place or confirm Anthony Tudury in the position of owner in fee simple of the eight-twelfths which were by it made or acknowledged to be his. We consider the true construction of the instrument to be so, and that by means of it, as to every person who should derive title or claim under him, he became, if he was not before, owner of the eight-twelfths absolutely as a freeholder, and that, accordingly, his

heir, the Appellant, was entitled to succeed in the action the Judgment in which is under appeal.

It was argued for the Respondents that Anthony Tudury had, at his death, a chattel interest only in the properties conveyed to Augustin Porral; for it was said that nothing more than a chattel interest could have passed by any of the Deeds prior to Lord Chatham's grants, and that his grants operated only as waiving any forfeiture to the Crown; and further, that the heir of Anthony Tudury could not recover in ejectment when the next of kin of Augustin Porral had (as it was said) from the time of his death dealt with the properties upon the footing of his having had only a chattel interest in them; but the question in this case is merely whether the heir of Anthony Tudury was entitled to recover the eight-twelfths against his personal representative, and we are of opinion that he was so entitled to recover; for Anthony Tudury, having taken a conveyance in fee of the eight-twelfths, the proof by his heir of that conveyance was, as we think, sufficient to throw upon the personal representative the onus of disproving the heir's title, and there is not, in our judgment, sufficient to disprove it. That the properties were (if they were) dealt with as leasehold after the death of Augustin Porral is not, as we think, sufficient for that purpose, for they were so dealt with by persons whose interests ultimately centred in Anthony Tudury, who, as we have observed already, accepted a conveyance in fee of the eight-twelfths.

The Court at Gibraltar appears to have placed reliance on a case of *Breciano v. Hassan*, mentioned in the Record of Proceedings. It appears, however, to their Lordships that they are not bound by that authority, nor, indeed, are they satisfied that it bears on the present controversy.

Their Lordships will therefore humbly recommend Her Majesty to reverse the Judgment of the Supreme Court of Gibraltar, and to order that the costs (if any) of the Respondent in that Court already paid by the Appellant be repaid to him, and that the Appellant have his costs of the action in the Court below, but no costs of this Appeal.

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