Axminster County Court.

March 12th, 1891.

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Judgment

of

His Honour

Judge Paterson

in the case of

Feoffees of Colyton

v.

Richard Kittle and Hy. Fowler

Plaintiffs claim they are entitled to and claim possession from the defendants of a piece or parcel of land called "Rick Plot" part of Ridgway Green situate in the Parish of Colyton in the County of Devon, of the annual value of three shillings.

Mr Tweed for Plaintiffs Mr Every for Defendants.

W. G. W. Walton, M.I.J.

Judgment.

Judge Paterson:— This is a case against two persons one of whom, at all events is in possession of the land. Kittle is stated to be the landlord and Fowler must be the tenant in possession as he is sued. The action is to recover possession from the defendants a piece of land called "Rick Plot" which is part of Ridgeway Green in the parish of Colyton. There was a claim for rent but that was abandoned and, as amended, the action is as I have stated. It is well known if a plaintiff brings an action to recover possession of land he must rely on the strength of his own title and not on the insufficiency of the title of the defendant. Therefore the plaintiffs have got to show a title to this land. How do they try to show this? Their evidence of title is having for upwards of twelve years been in receipt of the rent of this particular plot of land and, therefore, they say having received the rent of this land for twelve years, by virtue of the Statute of Limitations they have made out a title to that land. That is how they rest their case. They do not bring any other evidence, but they rely on having received the rent from different persons who have been in possession of this land down to Lady Day 1887 when the last rent was paid. They make it out in this way. By way of introduction, which is not necessary for the purposes of this action, it may be said the plaintiffs showed they were what is called Feoffees or Trustees of the Poor

of Colyton and by virtue of that they did enclose a certain parts of Ridgway Green and made allotments of it for garden purposes. They let the land out to different persons at certain rents. Strawbridge, one who gave evidence, and, I think, Long, had allotments, but that is not necessary for the purposes of this action, because the action is not brought for recovering possession of any allotment. There was a piece of land outside, if I may say so, of the allotments, used, according to the evidence of Strawbridge, for putting manure upon, but whatever it may be a person by the name of John Long, who was one of the allottees, took possession of that piece or plot which is now called "Rick Plot", and in respect of which this action is brought, and held it up to the time of his death as tenant of the Feoffees and on the Strength of that Mr Tweed rests his proof of his title. They have evidence Long paid rent, I think it was one shilling and six pence a half-year or three shillings a year, to the Steward Strawbridge said he had a conversation with Long about enclosing this piece or plot and he said Long took it from the Feoffees and was going to pay an annual rent for it. He enclosed it with a hedge and Higgins received the rent up to his death, and a book was produced as evidence that Long had paid rent. Stokes proved he had also received rent from John Long and so entered it in the books. After Long's death the same two Sums of three Shillings, being for one of the allotments, and one shilling and six pence for this particular

plot was received from Mrs Long, the widow. From Stokes the rent was handed over to Gill and his daughter proved by his books that he had received rent up to Lady day 1887. Mrs Long after that died, She having paid the rent up to the time of her death. There it ends and upon that the plaintiffs ~~brought~~ considered they are entitled to claim the possession of this land. The plaintiffs have got more than to show, in an action to recover land, the right to receive rent. They have to show they have a right to receive possession. I mentioned that on the very first day this came before me, but I waited afterwards to hear how the case went on. I took down the evidence such as I have now mentioned, and when the plaintiff's case was over I expected Mr Every, for the defendants, would have raised that objection which I hinted at pretty strongly on the first day. To my surprise no such objection was raised. He never took the question that the plaintiff had failed to show a right of possession. But there were other points raised which I disposed of, and then he began to call evidence. It rather staggered me. I did not like under the circumstances and without looking at the books of authority to interfere then Knowing the case could not be finished I allowed it to be adjourned so that I might have the opportunity of consulting these authorities when I went to London. I have now looked up the authorities and they fully bear out the impression I had and that was that the onus lay with the plaintiff

in an action to recover land to show the right of possession. It is admitted you must show the right of entry and what is a right of entry? A right of entry in law means the right of possession. His Honour quoted "Chitty on Pleadings" page 190, and added: I also referred to a more recent case than the one which is referred to by Chitty. It is Doe. dim. Wrawn v. Horn and others 3 M & W Welsby 333. which to my mind is precisely like the present case. I have made extracts of it. It was a case for ejectment. There were four tenants in common. One brought an action for ejectment against the other three. He sued those three and he sued a Railway Company to whom the defendants had demised the premises. The three co-tenants in common defended as landlords and the Railway Company as tenants. There you have to deal with what we have not in this case. ~~That~~ You must go back to the old forms of action of ejectment when there was a particular rule for landlords and there was a rule for tenants. The usual order admitting landlords to defend and to admit ouster was proved. There was evidence at the trial that rent had formerly been paid by to all the tenants in common by Messrs Horn and Company. There was no evidence to show that any notice to quit had been given or that the tenancy had been otherwise determined. The court held it was a yearly tenancy and the fact of that tenancy not having been determined was a defence to the action. The only question was whether the defendant by the rules

they had entered into had prevented themselves from setting up that defence. Here is the judgment which was given and the judge who gave the judgment of the court was no less than Lord Wensleydale then Baron Parke. This is the judgment he delivered. He says "The lessor of the plaintiff was tenant in common with three of the defendants who defended as landlords and the Railway Company were also defendants. It appeared at the trial that rent had been paid by certain other persons named Horn and Company for the premises to all the tenants in common. This was prima facie evidence of a tenancy from year to year, and no evidence to the contrary was given. The usual special rule was obtained for the tenants in common to admit ouster," and he goes on further "Upon these facts two points arose first whether the want of a proper determination of Horne and Company's tenancy could be insisted upon by the defendants in this action. The second point was whether there was any actual ouster. Now, we think that the first of these points is against the plaintiff" That is that there was a want of proper determination of tenancy of Horn and Company." If the tenancy in Horn and Company continued to the day of the demise they would have been the proper lessors of the plaintiff; and it must be taken that it did continue, because there was no proof of its determination by notice to quit or disclaimer But it is said that the landlords rule precluded the defendants from raising this question" and the case of Doe v Davies & Creed, 5 Bingham

327, was cited as an authority. "In that case" Says Baron Parke "the tenants to whom notice to quit ought to have been given were tenants in possession and did not defend the action. But the Railway Company" who were the tenants in possession in that action, and Fowler, who is the tenant here * are not the tenants entitled to notice, because they are not the tenants who paid the rent to the Feoffees" are not the tenants entitled to notice, and they defend the action, and as they have only entered into the common rule to confess leave entry and ouster and their own possession and no more they are not precluded whether the other defendants are, or not from setting up any defence which they may have; and the want of the legal title in the lessor of the plaintiff to the possession on the day of the demise is a good defence" Therefore the Court of Exchequer made absolute the rule for a nonsuit because there was shown to be in existence a yearly tenancy and it had not been shown that the tenancy had been determined and the plaintiff did not show right of possession. It was part of the present plaintiffs case there was a tenancy created by Long. According to Baron Parke that raises a rule of tenancy and according to the evidence it has not been determined. Mrs Longs death did not determine the tenancy and they must determine it in some way The existence of the tenancy is a bar to the plaintiffs to the right of possession They have not shown that right of

possession. I nonsuit the plaintiffs.

Order:

His Honour: I nonsuit the plaintiffs with costs, and suspend execution until the next court.

familiarity, ONE OF THE JURY.

COUNTY COURT.

FRIDAY.—Before His Honour Judge Paterson,

THE COLYTON FEOFFEE CASE, which has been before the Court on several occasions, was again mentioned, a new trial being applied for.—Mr. Tweed (Honiton) said that the Feoffees had offered to let the land on yearly tenancy.—Mr. Every (Honiton) said he could not accept it on such terms.—A long legal argument took place on the question whether "Rick Plot," which was described as an orchard, was agricultural, pastural, or market garden land, so as to bring it within the provisions of the Agricultural Holdings Act.—His Honour held that the Act did not apply, and Mr. Tweed then contended that the notice to quit which had been served was regular. — His Honour said the real point was whether Clarke, the defendant, was in possession of the land. — His Honour said the man's evidence was that he had never paid rent for "Rick Plot" and had never been in possession. Unless he was in possession the notice was bad.—Mr. Tweed said Mrs. Clarke was the personal representative of her late mother.—His Honour said he was willing to amend the action in any way. Could Mr. Tweed show that the defendants were executors *de son tort*. He had since considered the case and was confirmed his judgment was right, not on the ground that the notice was bad, but that the man was not the tenant.—Mr. Every wished His Honour to try the case right through. That would be the only way of doing justice between the parties. He contended that Mrs. Long never was a yearly tenant.—His Honour said he would set aside judgment and order a new trial, giving Mr. Tweed leave to amend. Something must be done and if he found the defendants so unreasonable that no terms could be come to, he would be guided by that in the question of costs. He did not say he would, but he advised them to try and come to some settlement.—Judgment set aside; new trial granted with leave to amend, and question of costs reserved.—His Honour remarked that some £100 had been spent over a piece of land worth not more than £10.

CLAIM FOR HARVEST MONEY.—*George Matthews* v.

THE COLYTON FEOFFEE CASE AGAIN.—*The Feoffees of the Poor of Colyton* v. *Sarah Clarke*, wife of William Clarke, Great House, Colyton, and *William Clarke*, labourer, Colyton.—The plaintiffs sought to recover possession of a plot of land known by the name of Rick Plot, being a part of Ridgway Green, in the parish of Colyton, and let at 3s per annum.—Mr. Tweed, of Honiton, for the plaintiffs, and Mr. Every, of Honiton, for the defendants.—Mr. Tweed said that some time ago the Feoffees brought an action against a Mr. Kittle and Mr. Fowler, who were alleged to be in possession of a piece of land called Rick Plot. The Feoffees had enclosed a piece of land for the benefit of the poor, and it was divided into a number of allotments. One allotment was let to a man named Long and he continued in possession from 1852 down to 1885, and Mrs. Long continued the tenancy until 1887. At the last hearing His Honour held that the Feoffees had proved a right to the land, as far as it went, but they failed to prove the right of possession, because they admitted there was a tenancy and that that tenancy had not terminated by the death of Mrs. Long. His Honour further suggested it would be very desirable to come to some settlement and asked if the Feoffees could not grant a lease of fifty years at a rental of 3s a year to Mr. Kittle in order to put an end to further disputes about the matter, but it was found impossible under the Charter to grant such a lease.—His Honour thought Mr. Every agreed that might have led to a settlement. —Mr. Every said he was quite prepared at that time to fall in with His Honour's suggestion.—Mr. Tweed contended that Mrs. Long was tenant of the land up to the time of her death. Mrs. Long, His Honour said, had had no notice, and the Feoffees had not put an end to that tenancy. Clarke had now been served with notice to quit and this action was brought to recover possession.—Albert Edwards, steward to the Colyton Feoffees, produced the books of the previous stewards from 1852 to 1887, showing receipts of rent in respect to Rick Plot from John Long down to 1875. After that Sarah Long paid for the allotment down to 1887. She paid 1s 6d each half-year. When Mrs. Long died, Clarke, who married the daughter of Long, paid rent for the land in question and for another allotment. He served Clarke with notice to quit on the 24th of March, 1891. Clarke said they should not get possession from him. On the 29th September witness applied for possession, and Clarke made a similar answer. At Lady-day last another application was made, and Clarke said he dare any one of the Feoffees to go upon Rick Plot.—Cross-examined: He collected no rent for Rick Plot in 18[illegible]. Clarke was not then the tenant of Rick Plot. Henry Fowler had previously received notice to give up Rick Plot by the 25th of March, 1[illegible]. Re-examined: Fowler never paid any rent to witness in respect of Rick Plot.—Francis Stokes, of Colyton, said he acted as Feoffee steward for seven years, commencing in 1875. He received rent of "Rick Plot" from Sarah Long.—William Farmer, of Crewkerne, formerly of Colyton, said he assisted Mr. Gill, a former steward, in collecting the allotment rents. He had received rent from Sarah Long, and after her death from Clarke. Cross-examined: There was no demand made for the rent.—Walter Barrett said he knew Ridgway Green sixty-three years ago. "Rick Plot" was not then enclosed. —Cross-examined: He remembered the enclosure of the spot. At Long's death it passed into the occupation of his widow.—His Honour said that clearly the action could not lie against the two defendants. Rent did not seem to have been received at all from Mrs. Clarke.—Mr. Every, in the course of his defence, remarked that the plot of land in question at thirty years' purchase was only worth £4 10s, and already the costs in these actions had exceeded £70. The plaintiffs seemed to be guided by what His Honour said apparently, on the last occasion, that if anything was proved it was tenancy, but it by no means followed the tenancy was proved, and he should submit it had not been proved that day. He contended there was no evidence identifying the piece of ground for which rent had been paid was the same ground which was in dispute. John Long enclosed the land and occupied it without paying any rent for it.—His Honour said there was evidence he had paid rent.—Mr. Every said he contended the land in question was not Rick Plot. Long enclosed it long before Ridgway Green was enclosed. It was no part of the property enclosed by the Feoffees, and there was no reason to assume he had paid rent for it.—Sarah Clarke said she was the daughter of the late John Long. She was fifty-two years of age. She went to live near Orchard Plot when she was seven or eight years of age. She had never heard of Rick Plot. A small orchard was close to the cottage. At that time Ridgway Green was not enclosed. She remembered the enclosure. Her father lived at Ridgway Green all his life. He occupied an allotment. After his death she often paid the rent for her mother. She thought the money was for the allotment and not for the Orchard Plot. The orchard never formed part of Ridgway Green in her recollection.—William Clarke, the other defendant, said he was never in possession of the Orchard Plot. He paid 4s 6d a year for an allotment.—His Honour: If you are not in possession then you can have no objection in giving it up.—Mr. Every said he supposed it must come out that the plot of orchard land had been sold by the Long's and conveyed to another party.—His Honour said the effect of Clarke's evidence was that he paid for more than the allotment, as the rent of that had never been more than three shillings.—Witness (continuing) said the orchard in question was always called "Little Orchard." He never heard of "Rick Plot" until this case first came before the Court. The little orchard was always considered to belong to Long.—Cross-examined: He now paid 3s for the allotments for which he was charged 4s 6d previously. He paid 4s 6d up to 1887. The orchard was conveyed in 1887.—Edward Purse, sixty-seven years of age, said the orchard was enclosed before he could remember. When he was a boy he remembered small apple trees there. He was once caught there taking away apples, and had a thrashing for it. (Laughter.)—Herbert Anning, sixty-nine years old, gave similar evidence.—Mr. Every said that if His Honour held a tenancy had been established the notice was bad under the Agricultural Holdings Act.—His Honour: You ask for a joint tenancy to be given up.—Mr. Tweed: If we prove one paid rent it is quite sufficient.—His Honour: There is no tenancy at all of these two.—Mr. Tweed: Husband and wife are one.—His Honour: No they aren't now. (Laughter.) Why did you give notice to two?—Mr. Tweed: To put myself on the safe side.—His Honour: You have put yourself on the wrong side, then. (Laughter.)—An argument took place on the notice given.—Mr. Tweed contended that a year's notice had been given.—His Honour read it that six months' notice only had been given.—Mr. Every said the notice must be explicit and decisive.—Mr. Tweed said it was too bad to take this exception now after the whole day had been taken up with the case. They had assumed all the way through the notice was good.—His Honour: If you are to give a year's notice it is not good. I hold it as only half a year's notice.—Mr. Tweed then took the objection that the land in question being under two acres did not come under the provisions of the Agricultural Holdings Act.—Mr. Every said that act had been repealed for nine years and "holding" now meant any parcel of land.—His Honour gave judgment for defendant, but postponed any execution until the next Court.—Mr. Every asked for costs, which His Honour granted.—Mr. Tweed objected to that. They proved their title last time and it cost them £27, and now they were to pay the costs again. It was unaccountable. The merest technical objection had succeeded.—His Honour said under the circumstances he would reserve the question of costs until the next Court.

The Court sat for eight hours and a half.