JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1971

BEFORE: The Hon. Sir Cyril Henriques, President
The Hon. Mr. Justice Robinson (Ag.)
The Hon. Mr. Justice Swaby (Ag.)

BETWEEN	JOHN BELL ARCHER) GWENDOLYN ARCHER)	Plaintiffs Appellants
AND	GEORGIANA HOLDINGS LTD.	Defendant Respondent

Mr. Hugh Small instructed by Messrs. A.E. Brandon & Co. for the Appellant.

Mr. David Muirhead, Q.C. instructed by Messrs. Judah, Desnoes & Co. for the Respondent.

October 16, 17, 18, 19
November, 14, 1973
April 5, 1974

SWABY, J.A.:

On November 14, 1973 the Court dismissed the appeal herein and awarded costs to the respondent; and promised to put its reasons for so doing into writing.

The appeal was from a judgment of Henry, J. delivered on December 4, 1970 in favour of the defendant company, in a suit in which the plaintiffs, registered proprietors of land known as No. 1 Belair Avenue in the parish of St. Andrew, sought, inter alia, a declaration that by virtue of their alleged continuous adverse possession of a portion of the adjoining land to the east of No. 1 Belair Avenue for the full statutory period in the Limitations of Actions Law, Chapter 222, they were now the owners thereof.

The plaintiffs became the registered proprietors of No. 1 Belair Avenue on November 10, 1951. In the certificate of title registered at V 529 F 89, this land is described as Lot 23 Block G, on a plan of Eden Gardens, St. Andrew, deposited in the Office of Titles on October 13, 1945, containing by survey eleven thousand six hundred and ninety-two square feet, of the shape and dimensions and butting as appears by the said plan and being part of the land formerly comprised in certificate of title registered at V 138 F 10 dated September 11, 1920.

The portion of the adjoining land claimed by the plaintiffs by virtue of their alleged continuous adverse possession thereof is admittedly within the boundaries of the land owned by the defendant and registered at V 1048, F 443, dated July, 18, 1968 which comprised three parcels of land originally registered at V 138 Folios 9 and 10, on September 11, 1920. As shown by the plan attached to this latter certificate, the land claimed by the plaintiffs (hereinafter referred to as the disputed land) is part of and within a larger area of land which was developed by the defendant or its predecessors in title into building lots. This larger area consisted of two elongated strips of land running along both banks of the Antrim Gully (now the Munroe Gully). At the time of the purchase of No. 1 Belair Avenue by the plaintiffs the gully was unpaved and its width varied. In times of flood it would break its banks. As a result, there was considerable erosion on both sides of the gully. Erosion was particularly severe in 1951 and 1963 when, as is well known, Kingston was hit by hurricanes.

The plaintiffs built a house on the land in 1952. They wished to raise a mortgage to be secured on the property, but this they could not easily obtain because of the nearness of the house and garage to the gully at the north-eastern section of the land. They had therefore to take action to secure the land from the ravages of erosion from flooding. In addition as a requirement of the mortgagee in order to get the loan, they had to enclose the lot with a suitable fence. Fencing was also a requirement of incumbrance No. 3 on their certificate of title. It was as a result of this necessity to secure the land from erosion and as a consequence of their obligation to fence that the plaintiffs allegedly undertook over a number of years after their purchase, certain works and operations on land on their side of the gully outside the area of their registered plan, which the plaintiffs claimed constituted the continuous adverse possession upon which they relied to establish their claim to the disputed land. The works and operations consisted of (1) reclamation (2) cultivation and (3) fencing. The plaintiffs called as a witness in support of their case, Mr. Keeble Jobson, a Commissioned Land Surveyor. The gist of the evidence under these headings was as follows:-

(1) Reclamation

The male plaintiff said inter alia, that in order to secure the house, he constructed a retaining wall, 7 feet deep, at the north eastern section of the land between the building

and the gully, before filling. To describe the position in his own words he did this, because the gully was pointing too near to the house. He was to create land and push back the gully as a requirement of the mortgagee. If he didn't put up the wall it appeared to him that the house was likely to collapse because of the gully which was eight and a half feet from the edge of the garage after the rains of 1951. The gully would have come into the house and damaged it. Putting up the wall had the effect that the land remained protected. The judge considered that this evidence was corroborated to some extent by Jobson who recalled seeing refilling of the land actually in progress in 1953. What he saw was necessary to preserve the house. Accordingly, the judge found that an area near to the house had been reclaimed and filled. The male plaintiff said further that in 1954 the Kingston and St. Andrew Corporation had constructed a groyne along the entire length of the gully course, and that he had built a wall of blocks and steel on top of the groyne on his side of the gully which wall marked the eastern boundary of the land he occupied. Over a period of time he had back-filled the land to the line of this wall. Reclamation in this way was gradual. In the words of the male plaintiff it was a 'creeping process', but a process which was completed by 1954. This evidence was contradicted by Herman Reece, a surveyor employed by the Ministry of Housing who was called for the defence. Reece said that in 1967 and 1968 the Ministry undertook major works in the gully. There was evidence which the judge accepted that in the years 1964 to 1967 the course of the gully had been paved by the K.S.A.C. Reece said, that although there was a groyne further south in the gully, there was no groyne in the area of the disputed land, and that in this area, the rubble walls of the paved gully course had been topped by a parapet wall of blocks and steel which Reece estimated had been built atop the rubble wall about ten to twelve months before the Ministry undertook its major works in 1967 and 1968. Reece also said that the walls of the gully including the parapet wall were knocked down by his department and new walls sufficiently high and strong to contain the flood waters of the gully were erected in 1967 - 1968. After construction of the channel the Ministry back-filled the land west of the western wall of the channel for a distance of about thirty feet west by eight feet at its deepest parts covering an area of about four thousand square feet in the southern part of the disputed land. The judge accepted Reece as a witness of truth. On the other hand he thought that he

could place little reliance upon the evidence of the male plaintiff.

(2) Cultivation

The male plaintiff said that having reclaimed the disputed land he cultivated it with citrus, bananas, pumpkins and congo peas and that in 1967-68 when the Ministry constructed a paved channel in the gully he gave them authority to bulldose five coconut trees, a pear tree, one breadfruit tree, two plum trees as well as bananas and small crops to facilitate their operations. Reece directly contradicted this evidence. The judge did not believe the plaintiff on this issue. He found as a fact that there was on the disputed land no such cultivation as the male plaintiff described.

(3) Fencing

The third matter upon which the plaintiffs relied to establish their claim to adverse possession of the disputed land was its enclosure. In this respect, the evidence of the male plaintiff was regarded by the judge as being neither sufficient nor reliable. The judge said:-

> "Looking first at his evidence I find such contradictions as render it uncertain not only when some of the fences were erected, but even whether they were erected by the plaintiff himself at all."

However, the judge accepted the evidence of Jobson who said that pursuant to a request by Solicitors to identify on ground the boundaries of lot 23 with a view to their preparing a mortgage for the client of theirs he went in May, 1953 to the land then in the apparent occupation of the plaintiffs. On this visit he did not see the plaintiffs on the land. The registered land and a portion of the disputed land hereinafter identified as "A" in a sketch referred to below, appeared to be fenced on all sides as one lot. He measured along the fences and calculated that an area had been enclosed which was considerably in excess of the area of the land shown in the registered title. The sketch which Jobson made for the purposes of his report dated May, 21, 1953 was sent to the Solicitors direct. It is important to observe that Jobson did not inform the plaintiffs of his finding. The report and sketch were put in evidence as exhibits 4A and 4B respectively. The sketch shows in a general way the area of the adjoining land in the apparent occupation of the plaintiffs in May, 1953 in relation to the land on the plan in the registered title. Jobson's evidence was, as indicated

on the sketch, that in 1953, on the western side, the boundary line measuring 166 feet as called for by the registered plan had been extended on earth in a slightly south-westerly direction for 71 feet, making the western boundary altogether 237 feet. From this point what was roughly the southern boundary (it is shown lying slightly north-easterly) ran from a distance of 107 feet, ending at a point which would fall within the gully course then in existence at the time of the trial. From this point the sketch shows a line running due north for a distance of 155 feet, then turning slightly eastwards and joining the northern boundary at a distance of seven feet east beyond where the northern boundary was shown to cease according to the registered plan. This portion of the disputed land marked "A" is roughly of the same area as that of the land in the registered plan.

Jobson again went to No. 1 Belair Avenue during the trial in 1970. He found the disputed area then almost double what it had been in 1953. The northern boundary had been extended a further distance of 34 feet which with the 7 feet extension noticed in 1953, made a total distance of 41 feet east of the point where the northern boundary stopped as shown by the registered plan. The western boundary he found in roughly the same position as in 1953, but in 1970 a concrete pillar was now at the south-western end of that boundary. From that pillar Jobson indicated on the sketch (exhibit 4B) a line representing the southern boundary running due south-easterly a distance of 94 feet. In his evidence, the male plaintiff said that early in 1952 he had erected fences on the northern, southern and eastern boundaries of the land. As a result of the creeping process of the extension and reclamation eastwards, it would appear that over the years the northern and eastern fences were extended and replaced and came to include finally the wall of the gully on the western side of the channel which Jobson saw in 1970, and indicated on his sketch as the eastern boundary of the disputed land. But in so far as the fence on the southern side of the disputed land was concerned, the male plaintiff said that it remained there until 1968 when he replaced it with a wall running along the same line of the fence. In referring to this evidence the judge noticed that it was contradicted by Jobson who said that when he inspected the land in 1970 that wall at the eastern end appeared to have been 4 to 5 feet south of the fence he saw in 1953. In addition, the judge accepted the evidence of Reece who said that in 1967 and 1968 he saw no fence on the southern side of the plaintiffs' land. The extended areas are also shown on the sketch exhibit 4B. The disputed area in 1953 for the

purposes of easier reference during the hearing of the appeal, was as I have already stated, marked "A". The other extended areas beyond area "A" seen by Jobson in 1970 were marked "B" and "C".

The Complaint on appeal

Counsel for the appellants did not challenge the primary findings of fact of the judge. The substantial complaint on appeal was that the judge had drawn wrong inferences from these findings and had misapplied the relevant law. In particular, it was contended that having regard to the finding that the plaintiff was in (apparent) occupation of the land marked "A" on the sketch from the date of Jobson's visit in May, 1953, time commenced to run against the defendant as from that date. Consequently, in accordance with the provision of the Limitations of Actions Law, twelve years after May, 1953, that is in May, 1965 the plaintiffs' uninterrupted occupation of area "A", whether fenced or unfenced, would have given them a good possessory title thereto which the defendant had violated by the entry on the land made by its servants or agents in 1968. On the strength of Jobson's evidence, coupled with Reece's evidence the same contention was repeated with respect to the areas "B" and "C" on the sketch. It was submitted that accepting that in 1970 the wall of the southern boundary at its eastern end was erected 5 feet south of the fence which Jobson saw in 1953 in view of the fact that Jobson also said that this southern boundary wall appeared to run at the western end in the same position in which he saw the fence in 1953, the plaintiffs must have been in uninterrupted occupation of all the land area "B" and "C" except a small wedge triangular in shape at the south eastern corner of the disputed land, which wedge could have been conveniently excluded from the declaration in favour of the plaintiffs which the judge should have made.

In relation to all the disputed land to the west of the western wall of the gully channel, Counsel for the appellants stressed that Reece admitted that the plaintiffs were apparently in occupation thereof. Counsel submitted further that neither the primary findings of fact nor any material in the evidence permitted the judge to infer that at some undetermined time prior to 1965 the plaintiffs had abandoned their possession of the land they had been occupying since 1953. On the totality of the evidence contended Counsel, the proper inference was that no such abandonment by the plaintiffs had occurred and that the judge should have so found. Finally, Counsel for the appellants

emphasised the absence of any evidence that the defendant or its predecessors in title had exercised acts of ownership over or had been in possession of the disputed land from 1953-1968.

The Relevant Law

Under the Limitations of Actions Law Cap. 222, time does not begin to run against the owner of land so as to extinguish his right thereto unless it has been established that:-

(a) he has been dispossessed of the land; or
(b) he has discontinued his possession of the land; and that in either event,
(c) some other person in whose favour the period of limitation (twelve years) can run is in adverse possession of the land. Time then runs against the true owner at the time adverse possession is taken of the land.

(See Section 3, 4(a) and 30 of the Limitations of Actions Law, Cap. 222.)

The onus of proving that the true owner has been effectively dispossessed is on the party who alleges it. The question whether this onus has been discharged does not always admit of a ready answer. At the outset it is necessary to appreciate the difference between 'dispossession' and 'discontinuance' of possession.

> " The difference, said Fry, J. in Rains v. Buxton (1880) 14 Ch. D. 537, at 539, between 'dispossession' and the 'discontinuance' of possession might be expressed in this way: the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in by others."

The mere fact that the true owner does not make use of his land does not necessarily mean that he has discontinued possession of it. Leigh v. Jack (1879) 5 Ex. D. 264. Non user is equivocal. To establish discontinuance it must be shown positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it. Evidence of lack of user which is consistent with the nature of the land in issue and the circumstances under which it is held is not sufficient to justify a finding of intention to abandon and thus of discontinuance. Tecbild Ltd. v. Chamberlain Vol. 20 Property and Compensation Reports (1969).

Again, the mere fact that a stranger has interferred in some way with the land of the true owner is not enough to show dispossession. The stranger must go further. He must prove occupation and use of the land of a kind altogether inconsistent with the form of enjoyment which is available to or intended by the true owner. In Leigh v. Jack the true owner of a strip of land intended it to be used as a street. The defendant who was the purchaser in 1854 and 1872 from the true owner of the strip of land of two plots to the north and south of the strip, used the strip for various purposes connected with his own property. For instance, from 1854 he regularly encumbered it with materials used at his factory so as to close it to all except pedestrians; in 1865 he enclosed an oblong portion of it: in 1872 he fenced the ends. Within a few years of the action, the true owner of the strip had repaired the fence. It was held that these acts of interference by the defendant did not amount to dispossession of the true owner of the strip of land. In his judgment Cockburn, C.J. said (pp 270-1):-

> " I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land, either by himself or by some person claiming through him, he does not necessarily discontinue possession of it. I think that the title of the plaintiff is not barred by the Statutes of Limitations."

Leigh v. Jack and subsequent cases show that the intention accompanying the acts of interference are of crucial importance in determining whether the true owner has been dispossessed. Thus in Littledale v. Liverpool College (1900) 1 Ch. 19, the plaintiffs had a right of way over a strip of land separating two fields. The defendants were the true owners of the fields and the strip. The plaintiffs erected a gate at each end of the strip and kept them locked. They then brought an action to exclude the defendants from passing across the strip on the ground that they had acquired a title by adverse possession. It was held that, as the acts of the plaintiffs in erecting and locking the gates were in their nature equivocal and might have been done merely with the intention of protecting the plaintiffs'

right of way from invasion by the public, the defendants had not been dispossessed of the strip of land. In the judgment of Sir Nathaniel Lindley, M.R. at pages 22 and 23 this passage occurs:-

> ".....but there is no evidence to show that the gate was put up with the intention of dispossessing Solomon, the defendant's predecessor in title. The gate was in fact a protection to his property as well as to the plaintiffs' rights. Nor is it, I think, true to say that, whatever the plaintiffs' intentions may have been, the defendants or Solomon were in fact dispossessed of the land by the erection of these gates. They could not be dispossed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves animus possidendi - i.e., occupation with the intention of excluding the owner as well as other people.
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> ..... When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important; see Leigh v. Jack. I am myself convinced that the gates were put up, not to exclude the defendants, but to protect the plaintiffs' right of way, and to prevent the public from going along the strip of land now claimed by the plaintiffs."

The decision in Littledale v. Liverpool College was followed in Philpot v. Bath (1905) W.N. 114. In that case a defence to an action to restrain an encroachment to a foreshore was that it had been in the possession of the defendant and his predecessors in title for so long and that they exercised so many acts of ownership over the land, especially by placing large stones and boulders on the foreshore to prevent sand and earth being washed away by the sea, that the title of the owner had long ago been ousted, and that the defendant had now a title by adverse possession under the Statute of Limitations. At the trial Warrington, J. rejected this defence and granted an injunction. In disposing of the defendant's contention of dispossession, the Court of Appeal (Vaughn Williams, Stirling and Cozens-Hardy L.JJ.) said at page 114:-

> "The question was one of intention. What, then was the intention of the persons who deposited on the foreshore in front of the defendant's premises these boulders which had been brought from a considerable distance?

> Was this done by the defendant's predecessors in title in order to claim possession of the foreshore itself, so as to exclude the owners of the foreshore therefrom, or was it done for the protection and convenience of the predecessors in title of the defendants? At the moment of the act being done it would have been the duty of the Court in considering such a question, to say, how has the particular article come into the place in which it is found, and what was the object of that article being placed there? It was not sufficient for the present defendant to say that the article had been placed there a long time. It was necessary to show whether the article was placed there in order to assert a title of ownership to the soil, or whether it was intended to be merely ancillary to the use by the defendant of his property. In a case of this kind it was always open to inquiry how the article came to be in the place in which it was found, and what the parties intended as to its use; and their respective rights must be subject to explanation by evidence: Lancaster v. Eve (supra) Wood v. Hewitt (1846) 8 Q.B. 913. Here there was nothing binding one to hold that the acts of the defendant or his predecessors in title had indicated any intention to exclude the plaintiff's rights, and therefore the decision of Warrington, J. must be affirmed."

The same point is made in Williams Brother Direct Supply Stores Ltd. v. Raftery [1957] 3 All E.R. 593. There, the defendant relied upon his cultivation of land without the owners permission and upon his erection of a shed thereon from greyhound breeding to establish his defence of a squatter's title to the owner's action for possession. This defence was upheld at the trial. In reversing this decision, the Court of Appeal ruled that the evidence was insufficient to support a finding that the plaintiff had been dispossessed by the action of the defendant. After an exhaustive analysis of all the judgments in Leigh v. Jack, Hodson, L.J. said at page 597:-

> "I cannot see that any act which the defendant did is capable of being treated as sufficient to dispossess the plaintiffs. The defendant never even thought he was dispossessing the plaintiffs. He never claimed to do more than work the soil, as he thought he was permitted to do. He had some vague idea in his head, derived from a source which is not clear on the evidence, that it was quite alright for him to work it, but, so far as I know, he never had nor claimed any intention of asserting any

right to the possession of this piece of ground."

Of course, if a person enclosed land of his neighbour within his own land so as to exclude his neighbour alltogether, and the properties were of the same kind and nature, and in a similar state of development, a Court may find that the clear intention of the person enclosing was to preclude alltogether the owner from exploiting that portion of his land which had been enclosed, and that therefore the act of enclosure was sufficient to establish dispossession. This was the position in Marshall v. Taylor (1895) 1 Ch. 641. Even where there has been no enclosure, the land of a true owner may be used in such a manner and under such circumstances as to oust his title. This happened in Seddon v. Smith (1877) 36 L.T. 168, when a defendant who had a right of way with others over a piece of land used three-quarters of it for years as if it was part of his farm in a way entirely inconsitent with the ownership of any other person. It was held that he had acquired a statutory title to that three-quarters, though not to the remainder of the piece of land over which the right of way remained. In rejecting the argument that the cultivation of the land was not an assertion of an adverse right of possession, and that there must be something excluding other people, such as erecting fences, Cockburn, C.J. pointed out that the defendant had used three-quarters of the right of way "exactly as he would any other land on his farms." The learned Chief Justice continued (page 169):

> " I care not what he grew, he used it in all respects as if it were his own; and such a user, I am of opinion would at last (sic) give a title because the lord of the mannor had many ways of putting an end to it had he chosen to do so instead of standing by, as he did and doing nothing. To my mind it makes no difference whether there be enclosure or not. Enclosure is the strongest possible evidence of adverse possession, but it is not indispensable. Take the cases put by my Brother Brett, of adjacent lands unhedged; in such a case encroachment and user would, in my opinion, without doubt amount to adverse possession. Therefore, here the lord has been ousted, but only of that part over which acts of ownership have been done. As to the remainder, the property in the soil and minerals remains where it was....."

But although fencing the land of another may be cogent evidence of adverse possession fencing may also be equivocal because, as foreshadowed in other cases to which I have referred, that act may have been done for the purpose of protecting rights

not inconsistent with ownership of the freehold. This was the position in George Wimpey & Co. Ltd v. Sohn /1966/ 1 All E.R. 233. In that case, defendants sought to enforce a possessory title to land at the back of their hotel over which they had 'garden rights'. The defendants bricked up the doorway through which the public had been able to gain access to the gardens and lawns. They also erected and kept locked a gate to a road leading to the gardens and lawns. Thereafter by reason of fences and hedges, access to the gardens and lawns lay only through the defendant's hotel. There was no evidence that the true owner of the 'garden' land had ever sought or been refused access to his land. It was held that the enclosure was equivocal in that it may have been done to protect the gardens and lawns from intrusion by the public and not to dispossess the true owner.

CONCLUSIONS

Applying the relevant law to the undisputed findings of primary fact, certain clear positions may be stated.

1. The defendants produced a registered title for the disputed land, the original possession of which was admittedly in the defendant or its predecessors in title. The onus of proving that the defendant had been effectively dispossessed was therefore on the plaintiff.

2. There is no direct evidence of intention in the original owners to abandon the disputed land and nothing from which such intention could be inferred. The judge found that the land was essentially 'gully land' which would be unusable until proper channels were constructed for draining the gully andthe area behind these channels properly backfilled, and that these channels were not completed and the depresseios backfilled until 1968 by the Ministry of Houseing. Bearing in mind the type of land involved the judge concluded that no case of discontinuance had been made out. This conclusion is impregnable.

3. The judge found that it had not been established by the plaintiffs that such reclamation works as they may even have carried out were done with the intention of excluding the defendant of its rights, and following the principle enunciated in Philpot v. Bath, held, that such works of reclamation were incapable of establishing their claim of adverse possession to the disputed land. This finding is abundantly supported by the evidence and must be upheld.

4. In the light of Jobson's evidence, the northern boundary

as extended in 1953 must either have stopped short of the edge of the gully, or the course which the gully took in 1953 brought it much closer to the buildings than it was in 1970. Whatever the position, the evidence confirms the conclusion of the judge that the wall built by the plaintiffs in 1953 in the north-eastern section of the land was intended to protect the land from the ravages of floods, and was merely ancillary to the use by them of their property and not to claim possession of the land so as to exclude the rights of the defendant.

5. In view of the finding that the disputed land was not cultivated as the male plaintiff alleged, the plaintiffs are not in a position to assert user of the kind which was found to be decisive in favour of the defendant in Seddon v. Smith.

6. The judge was not prepared to rely upon the evidence of the male plaintiff concerning the fencing of the land. Consequently, if that evidence stood by itself it would have been altogether incapable of establishing dispossession of the defendant or its predecessors in title, or adverse possession in the plaintiffs. But the judge accepted Jobson as a witness of truth and the plaintiffs relied upon his evidence that in 1953 he saw the land, including that portion of the disputed area marked "A" fenced all around, for the contention that, like the defendant in Seddon v. Smith whose claim to three-quarters of the disputed land was upheld, their claim to the area marked "A" should also be vindicated. This contention overlooks the crucial question of the purpose for which the fence was erected. It was for the plaintiffs to show unequivocally that their purpose in fencing the land was to preclude the defendant from exploiting it in the manner for which it may have been suitable at any given time. Nowhere in the evidence is such a purpose asserted. On the contrary the evidence suggest a neutral state of mind in the male plaintiff. He said that it was only in 1968 that he first became aware of the fact that he had fenced land which was not in his title and which was owned by someone else. To the question whether 1968 was the first time he made up his mind to claim the disputed land, he answered that he had not made up his mind to

do anything. He took his lawyer's advice. After he had obtained such advice in 1968 he knew that he had to rely on the Statute of Limitations to ground his claim to the disputed land. There is every justification for the view that prior to 1968 the plaintiffs had no amimus possidendi in relation to any of the disputed land.

7. The judge was of the view that fencing is an overt act constituting clear and unmistakable evidence of an intention to occupy the land to the exclusion of all other persons including the registered owner. Having regard to the rationale in George Wimpey & Co. Ltd., this was an overstatement of the effect of fencing the land of another. In that case fencing was regarded as an equivocal act. It could have been done to avert undesirable intrusions by the public. In my view the fencing which the plaintiffs allegedly undertook in this case is also equivocal. Over and above the uncertainty found by the judge as to when, and by whom these fences were erected, and as to whether they remained intact for the full statutory period, on the totality of the evidence accepted by the judge, such fencing as the plaintiffs may have been undertaken was not inconsistent with the form of enjoyment of the 'gully land' available to or intended by the defendant and its predecessors in title prior to 1968, and was consistent with the need for security and the prevention of undesirable intrusions to the plaintiffs' land.

In the light of these considerations, I was of the opinion that the plaintiffs had failed to discharge the onus upon them of proving that the defendant or its predecessors in title had been effectively dispossessed. Accordingly, I was of the view that the appeal should be dismissed and that the respondent should have the costs of this appeal.

HENRIQUES, P.:

I agree.

ROBINSON, J.A. (Ag.)

I agree.