NOTES

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 34/01

BEFORE: THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH, J.A. (Ag)

BETWEEN:	GRANVILLE TAYLOR	DEFENDANT/APPELLANT
AND	ETTA CLARKE	RESPONDENT/PLAINTIFF

Miss Marsha Smith instructed by Messrs E. A. Smith and Company for appellant

Mrs Jennifer Hobson-Hector for respondent

May 29 and July 5, 2002

HARRISON, J.A:

This is an appeal from the judgment of Mr. John Moodie, Resident Magistrate, St Ann, giving judgment for respondent for trespass in the sum of $10,000.00. An injunction was granted as prayed; costs to be taxed or agreed.

We heard the arguments of counsel for the appellant in this appeal. Counsel for the respondent was not called upon. We dismissed the appeal and ordered that the costs of the appeal of $15,000.00 be paid to the respondent. These are our reasons in writing.

The facts are that on 26th October 1994, the respondent went with a surveyor, Mr. Shirley, onto ¼ acre of land at St D'Acre, St Ann, bordering on the main road, for the purpose of surveying the said land. The appellant objected to and prevented the surveying of the said land. Possession of the said land is claimed by the respondent as successor to her father. The land was known by her as her father's for 38 years, having been bought from one Altimont Johnson by her father, Septimus Clarke. Mr. Altimont Johnson had bought the ¼ acre piece of land from Tubal Taylor the father of the appellant. Tubal Taylor owned a larger piece of land of 2 acres, now occupied by the appellant and which borders the respondent's ¼ acre on the south, west and north.

Septimus Clarke had farmed the said land up to 1988, when he died. His son Peter Clarke had also farmed the land during his father's lifetime and up to 1991, until the land "... got soft out".

In July 1994, the respondent told the appellant that she was going to survey the land. The appellant stated that it was known that the land belonged to her. The appellant subsequently obstructed the survey in October 1994.

Peter Clarke, the brother of the respondent, who was 47 years old in 1999, stated that Altimont Johnson had the land before his father died.

The appellant stated that the two acres of land was owned by his father Tubal Taylor from whom he got it. It is bordered on the south by land of John Grant, on the west by Kaiser Co., on the north by land of David Brown, and on the east by the St D'Acre main road. The appellant stated that he had neither

seen the respondent's brother nor father farm the said ¼ acre piece of land nor seen the respondent occupy the land. He had paid the P.C. Bank money owed by his father for a loan, in order to avoid the land being auctioned. Thereafter he paid the taxes on the land for 19 years, up to 1999. He admitted that "Altimont Johnson ... used to pay down on the land with my father. ... He paid a money to my father and was on the land". But, he said, "After the business forfeit he stop coming on the land". He admitted that he had objected to the survey in October 1994, and that he did not know the exact boundaries that Altimont Johnson had occupied. He said that if one weeds the said land in issue there was no sign of yam hills thereon.

The appellant's brother Ives Taylor admitted in evidence that Altimont Johnson worked a piece of the land "before my father died. He went to my father". His father died in 1972. Johnson farmed about a square of land now grown up "in bush", near to "the boundary to the road". Altimont Johnson planted yam. He said also that "Altimont Johnson forfeit the land and give my father".

Miss Marsha Smith for the appellant argued that the respondent did not establish possession of the land entitling her to bring the action, or to complain of a trespass. The evidence, inclusive of the discrepancies did not justify the findings of the Resident Magistrate in favour of the respondent. She submitted also in conclusion that the learned Resident Magistrate erred in finding that

Septimus Clarke bought the said land from Altimont Johnson, in the absence of documentary proof.

The right to possession of land can suffice to justify a plaintiff bringing an action for trespass as against a defendant who seeks to disturb such possession. Trespass is a tort against possession. The author of Cheshire and Burn's Modern Law of Real Property 15th Edition, said, at page 27:

> "All that the plaintiff need do is to prove that he has a better right to possession than the defendant, not the he has a better right than anybody else. If, for instance, he is ejected by the defendant, he will recover by virtue of his prior possession, notwithstanding that a still better right may reside in some third person". (**Asher** v **Whitlock** (1865) L.R. 1 Q.B. 1.)

Possession at common law, although devoid of the indefeasibility of a title under the Registration of Titles Act, suffices to protect such possessor despite the absence of documentary proof by an instrument in writing. The prohibition under the Statute of Frauds, is referable to an attempt to enforce the right of ownership by action. The words "No action may be brought ...", is referable to the absence of documentary proof by an instrument in writing which absence would preclude the bringing of an action. This does not prevent the exercise of a right in a claimant based on possession, simpliciter. Accordingly, real property may be validly bought or sold despite the fact that there is no documentary proof of such transaction. The problem arises, when either party seeks to enforce the

transaction, in the absence of an agreement in writing, as required by the said Statute of Frauds.

Oral declarations against one's proprietary interest in land is evidence capable of disclaiming ownership by the declarant and proving ownership in favour of the person in whose benefit such a declaration is made. The authors of ***Cross on Evidence***, 6th Edition, at page 563, observed:

> "So far as declarations against proprietary interest are concerned, possession is prima facie evidence of ownership. A statement by the possessor to the effect that he is not the owner will therefore amount to a declaration against interest".

Additionally, once ownership is established in a person, and there is no evidence of the existence of a will of such person, his children will be entitled to land owned by him in accordance with the provisions of the Intestates' Estates and Property Charges Act. This Court must take judicial notice of every statute (see section 21 of the Interpretation Act).

In **Asher** v **Whitlock** (supra) the testator who had enclosed waste land, devised it to his daughter in fee simple, subject to a life interest to his wife, until her remarriage. The defendant married the testator's widow and lived on the said land with the widow and daughter. Both widow and daughter died and the defendant continued to reside on the land. The female plaintiff who was the heir-at-law of the testator's daughter, brought an action of ejectment against the defendant, who resisted the claim. It was held that the plaintiff was entitled to

possession. She had the right to possession of the said land. Cockburn, C.J. said at page 5:

> ". . . I take it as clearly established, that possession is good against all the world except the person who can shew a good title; and it would be mischievous to change this established doctrine".

and at page 6:

> "There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner . . .
>
> The devisor might have brought ejectment, his right of possession being passed by will to his daughter, she could have maintained ejectment, and so therefore can her heir, the female plaintiff. . .
>
> On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed".

Mellor, J. said at page 6:

> "The fact of possession is prima facie evidence of seisin in fee. This law gives credit to possession unless explained".

In the instant case, the evidence of the respondent and her witness Peter Clarke, led before the learned Resident Magistrate reveals that the respondent's father Septimus Clarke owned the said ¼ acre of land at St D'Acre, having bought it from one Altimont Johnson. The said Altimont Johnson had bought the said land from Tubal Taylor, the father of the appellant. The appellant and his witness Ives Johnson in their evidence, supported the respondent's case, as to

the occupation by Altimont Johnson of the said land and the latter's purchase from Tubal Taylor. The appellant said:

> "I know Altimont Johnson. Earlier on in 1950 he used to be on the land. When the business forfeit with my father he stop come on the land. He used to pay down on the land with my father. He paid a money to my father and was on the land".
>
> "I don't know the exact boundaries of the land that Altimont Johnson was occupying. The business was that Mr. Altimont Johnson was buying a piece of land from my father - part of the same land".
> (Emphasis added)

Ives Taylor said:

> "I saw Altimont Johnson working a little piece of the land before my father died. . . . The part Altimont Johnson occupied was about a square. It grow up in bush now. All of the land grow up in bush . The part that Altimont Johnson occupied is near to the boundary to the road. . . . I know what transaction go on with the land. My father told me. Altimont Johnson forfeit the land and give my father".

The business transaction of the "... buying a piece of land from my father ..." which the witness Ives Taylor said his father, Tubal Taylor told him about, is a declaration against the proprietary interest of Tubal Taylor, which confirms the evidence of the respondent that the land was bought from Altimont Johnson by the respondent's father. In contrast, the statement "... Johnson forfeit the land ..." , is hearsay and inadmissible. The finding of the learned Resident Magistrate that :

> "1. A portion of the land, about a quarter acre, passed from defendant's father Tubal Taylor to

> Altimont Johnson then to plaintiff's father Septimus Clarke.
>
> 2. Septimus Clarke cultivated that portion of land and after his death possession of it passed to the plaintiff who was entitled to it as his successor.
>
> 3. The plaintiff was in possession of that portion of land when she attempted to have it surveyed".

properly arose on the evidence and cannot be faulted, despite the absence of documentary proof.

In addition, the visit to the locus by the Resident Magistrate and his observation that "... the plaintiff did in fact point out areas where farming was done ...", which contradicted the appellant's evidence that "... there was no evidence of yam hills on the land", strengthened the evidence of the respondent and called into question the credibility of the appellant. The above findings of the said Resident Magistrate are thereby further supported.

The respondent demonstrated her continuing possession by her act of having the said land "chopped out" in July 1994, for the purpose of the survey and, at its lowest, her right to possession as the successor to Septimus Clarke. In the circumstances, I do not agree with the submissions of Miss Smith that the respondent had no locus standi to bring the action of trespass.

The evidence of the appellant that he paid money to the P.C. Bank to avert the sale of the land by auction and his subsequent payment of taxes "... for nineteen years" has no reference to that quarter acre portion that was owned by Septimus Clarke and subsequently fell into the possession of the respondent.

Discrepancies did arise on the evidence before the Resident Magistrate. He did not specifically deal with them in his reasons. However, because of the overwhelming nature of the evidence on which the said Resident Magistrate based his reasons and conclusion, these discrepancies are properly viewed as minor and do not affect the main issues in the case.

The Resident Magistrate found that the said quarter acre of land which "... passed from the appellant's father Tubal Taylor to Altimont Johnson, then to the plaintiff's father Septimus Clarke ..."who cultivated it, was in the possession of the respondent, as Septimus Clarke's successor. The appellant objected to the survey and prevented it in an unlawful manner and thereby committed the tort of trespass. There was ample evidence to oblige the Resident Magistrate to so conclude. We agree with his findings.

For the above reasons we dismissed the appeal with costs.

BINGHAM, J.A.

I agree

SMITH, J.A.

I agree