IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO: C.L. H- 124 OF 1984

BETWEEN	**ROBERT HENRY AND GEORGE HENRY** (Executors of the Estate of Daniel Henry, Deceased)	**CLAIMANTS**
AND	**NAL TAYLOR**	**DEFENDANT**

Mr. Lawrence Haynes for the Claimant; Mr. Norman Samuels instructed by Carol M. Vassall & Co., for the Defendant

Heard on November 1, 2007 and November 10, 2007 (Visit to locus) and March 2008

ANDERSON J

This is an action by the Claimants, suing in their capacity as executors of the Estate of Daniel Henry, their father, against Nal Taylor, (apparently also referred to as "Reginald Taylor"), seeking recovery of possession of certain lands now allegedly occupied by the said Defendant, and which the Claimants claim to be part of the land of their deceased father.

Perhaps one of the most noteworthy aspects of this case is its vintage. The writ of summons was filed in 1984 and the original statement of claim was settled in June 1984 by the present Attorney General of Jamaica, then an attorney acting on behalf of a law firm Samuel and Samuel, a firm now long since defunct. Indeed, the second claimant himself is also now deceased and the action is being carried on by the surviving claimant. From a perusal of the documents on the Supreme Court file, it is apparent that there have been a number of different aspects to this case which have been variously pursued from time to time, including applications for attachment in the Supreme Court and a summons filed in the Resident Magistrate's Court for St. Andrew.

The Claimants had secured probate of the will of the deceased Daniel Henry in 1978 and a copy of the probate and the will were attached to the Witness Statement of Robert Henry, the first Claimant, (to whom I shall hereinafter refer as "the Claimant").

According to the will, (some parts of which are regrettably illegible), the deceased made certain bequests to his sons George and Robert, including a gift of "six and three-quarter acres of land at Mount Charles".

One of the exhibits attached to the Witness Statement of Robert Henry is an undated survey diagram of what, on the Claimant's case, is the area of land disputed between the Claimant and the Defendant prepared by Commissioned Land Surveyor Silburn Stewart. According to that diagram, which is characterized as "section 1, section 2 and section 3", all three (3) sections are purportedly "claimed and occupied by Nal Taylor". However, in the course of giving his evidence, the Defendant stated that he was not claiming either section 3 or section 1. Indeed, as I understood his evidence, and based upon a visit by the Court to the locus in the presence of the litigants and their counsel, what the Defendant was claiming was a parcel of land on which he had constructed a house and a small area of land around the house, including a section on which he had buried a child and another relative.

Claimant's Case

The case of the Claimant as put forward in the witness statement of Robert Henry and the pleadings before the court is that the Claimant has a right to possession of the property being occupied by the Defendant, Taylor. This is by virtue of the fact that the surviving claimant along with his brother, were the executors of the will of their father, Daniel Henry. In the Statement of Claim, and indeed in the witness statement of Robert Henry, the Claimant avers that his deceased father had had the use, possession and occupation of certain lands amounting to two and one-eighth (2⅛) acres in total. The land was said to be in two adjoining parcels as described in the statement of claim, one parcel being one and one-eighth (1⅛) acres and the other being one (1) acre. It was the Claimant's case that the former parcel had been owned by Daniel Henry for over forty years at the time of his death, while the latter had been had been leased by Daniel Henry in 1961 from one Amy Stewart and subsequently acquired by the deceased, sometime before 1970. It was further averred in the Statement of Claim that Daniel Henry remained in possession of this leased land up until the time of his death. The claimant's witness statement also stated that by 1970, Amy Stewart had conveyed the said one acre to Daniel Henry, and he

"occupied both pieces as one holding". (That these two parcels of land are delineated and referred to in the diagram produced by Silburn Stewart, Commissioned Land Surveyor which was annexed as Exhibit "RH2" to Robert Henry's witness statement). Mr. Henry claims that he has a right, as executor, to occupy the disputed land. However, he avers that the Defendant had, in or about July 1978, entered into possession of the above land, and when accosted by the Claimant, he said "Man Free", the implication being that anyone was free to occupy land. The Defendant first erected a tent and later a dwelling house on the land. Significantly, the Claimant does not claim ever to have been, himself, in possession or occupation of the disputed land prior to its alleged occupation by the Defendant.

The Claimant also avers in his witness statement, that a survey was ordered by now retired Supreme Court Judge, Chester Orr, and when the survey was being done by one "Selvin Stewart", the Defendant pointed out as his own lands, lands belonging to the estate of Daniel Henry. It is assumed that the reference to "Selvin Stewart" is really meant to be "Silburn Stewart" the author of the survey attached to the Claimant's witness statement. I should note in passing, that the court was provided with a copy of the order of Orr J, and it does not appear that the surveyor's diagram addresses the specific orders made by the learned judge.

The Defendant's Case

The Defendant, for his part, claims that he has a right to possess and occupy the land in question on the basis that it was originally owned by his grandfather, Sergius Paul Jackson, who later left it for his descendants. He said that it eventually came into the sole undisputed possession and ownership of his mother, Anita Thompson and had remained in her possession and that of her children including himself for a period in excess of sixty (60) years.

The Defendant's witness statement, speaks of an area of land approximately quarter (¼) of an acre while, as noted above, the Claimant refers to a total area of 2⅛ acres in the district of Burns Hills, Mount Charles in the Parish of St. Andrew. He asserted in his testimony that his entitlement through his grandfather, is borne out by a common law

conveyance which showed the name of his ancestor, Sergius Paul Jackson. I have found this of little use because the original was not produced and the copy is so emaciated as to be unintelligible. He does attempt to locate the land his mother occupied by reference to the Paisley All Age School which is nearby. He said that where he grew up, he was near enough to the school ("about a two minute walk") to have a conversation with the teacher in the school yard from his yard. In that regard, he called as witness, Thelma Gregory, a former teacher and wife of a former principal of the said school, to give evidence of where he lived when he attended school there. Unfortunately, Mrs. Gregory did not know where the disputed property was, and so was of no help in determining the central issue in this case. .

Court's Reasoning

In claims for possession of land, it is trite law that the onus is on the Claimant to establish that he has a better proprietary or possessory title to the disputed land, on a balance of probabilities, than the person whom he wishes to dispossess. It seems to me that if the Claimant is to succeed in his claim for possession, as well as that for mesne profits, he must first demonstrate that the land which he is claiming is in fact part of the estate of Daniel Henry as identified by the will of that testator. Secondly, he must show why he has a better right than the Defendant.

Mr. Samuels for the Defendant submitted that the evidence of the Claimant fell far short of establishing that the land of which the Defendant was in possession was in fact part of the testator's estate. He submitted that if that were not established, the claim for possession must fail. He pointed out that the will of Daniel Henry which purportedly founded the Claimant's claim, made certain specific devises. Among those devises was a gift "to my son George Henry my land at Mount Charles, St Andrew consist of six and three quarter acres". Among the other gifts was a gift to his daughter, Lilian Paranda, of "my land at Burns Hill, bought from Burger George Harper" as well as a gift "to my illegitimate son Osborne half acre of land at Burns Hill Race Course adjoin to Oscar Harper". He also gave "to my step son Samuel Brown and my step daughter Mrs. Ethlin Williams one acre of land at Race Course, Border P.O. St. Andrew adjoin Amy Jackson

land". What appears to be a residuary devise is made to the Claimant of "the remaining portion of land at Heart Burn New Ramble, to my son Robert to be sold and give to my sick daughter Ruth". He also gave to Robert, "my land bought from James Francis", subject to Robert paying off the outstanding balance to Mr. Francis' illegitimate son". It was accordingly submitted that the disputed property represented by the surveyor's diagram was not part of the six and three quarter acres of land at Mount Charles given to George. Further, that there was nothing in the will and devises of Daniel Henry which identified the disputed land as being among the land that he owned at his death. He said there had been no attempt by the Claimant to relate the disputed land to any portion of the land in the will. It was accordingly Mr. Samuels' submission that there was no evidence that the land in dispute was part of any land owned by the deceased. In any event, if the land being disputed was among the devises, there would have been no proprietary or possessory right vesting in the executors. That right would be for the beneficiaries.

Mr. Haynes, for the Claimant on the other hand, submitted that the disputed land was in fact, part of the deceased Daniel Henry's last will and testament, and that the Defendant had entered upon the land and sought assert his right thereto by threats of men who were with him at the time the Claimant sought to assert his rights to the land.

He submitted that the Defendant was not credible and that the court should accept the evidence of the Claimant that the Defendant had defended his right to be on the land by threats of force and intimidation. He said that while the Defendant was not claiming section 3 on the surveyor's diagram, he seemed to have occupied what suited him and had no logical point of reference for his right to occupy. He refuted the Defendant's claim to have succeeded to any land previously owned by his mother, Anita Thompson, or her ancestors. Mr. Haynes submitted that as executor, the Claimant in 1978, when he alleges that the Defendant went onto the land, would have stood in the shoes of the deceased. He therefore submitted that the court should find on a balance of probabilities that at the time of the alleged confrontation between the Claimant and the defendant, the land belonged to the deceased and that the Defendant was a trespasser.

The court certainly benefited from a visit to the locus in quo. It was able to see the land being claimed by the Defendant and it seems to me that in addition to not claiming section 3 on the surveyor's diagram, he is also not claiming the whole of the part described as section 2. Nor was the court provided with evidence of the deceased's right to title or possession of the disputed land. I do not discount the fact of the Claimant's knowledge of the property allegedly owned by his father. But this has to be weighed against all the other available evidence.

Findings

A claimant must prove his case on a balance of probabilities. It is not sufficient to point to weaknesses in the Defendant's case or evidence, in order to supply shortcomings in the claimant's case. The essential issue in the instant case is whether the Claimant has established that he had a better claim to the disputed property than the Defendant. I find that there is nothing in the will of Daniel Henry which can give me confidence, on a balance of probabilities, that the area of disputed land which is the subject of the surveyor's diagram, was in fact owned by the testator and that the Claimant had either legal or beneficial rights to it. He certainly has not shown that he was ever in possession thereof. I am strengthened in that view by the fact of having examined the locus in quo and, the fact that it is now clear that the Defendant was not claiming section 3 on the diagram, and certainly not the whole of section 1, if any of that at all.

In the result, I give judgment for the Defendant with costs to be taxed if not agreed. I do believe that the present position in so far as these unregistered lands are concerned, is untenable and has the potential to create problems well into the future between the descendants of the litigants herein. I would accordingly encourage the attorneys for the parties to seek some resolution by making efforts to delineate the specific portion of land occupied and claimed by the Defendant and pegs be planted. It should be done under the supervision of a Chartered Land Surveyor and the cost of doing this could be borne by the parties equally. I make no order in this regard, but merely strongly urge the parties to try to effect a long term resolution.