ST. LUCIA:

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO. 4 of 1975

BETWEEN:

JOSEPH ULYSSES - Appellant

Vs.

FANNO ETIENNE - Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Neville Peterkin

Appearances: Victor Lewis for Appellant
Jean Reynolds for Respondent

1976, February, June 14

J U D G M E N T

ST. BERNARD J.A:

This is an appeal against the dismissal of a claim for damages for trespass to land on the ground that the appellant was a tenant in common of the land the subject matter of the trespass, the respondent having entered under the authority of another co-owner. Another reason for the dismissal was that a bona fide question of title arose.

In the declaration the appellant claimed as owner occupier of the land and alleged that the respondent entered and did damage by cutting animal fodder growing thereon. At the trial and before this Court it was admitted that the appellant was a tenant in common with others. The question of title therefore does not arise and the only question for determination is whether or not, in the circumstances of this case, the appellant can sue the

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respondent in trespass.

The appellant stated that he was born on the land and lived there up to the present time but it was only about six months ago that he was responsible for the entire land. In answer to a question by the court his counsel stated that his grand-father, the owner of the land, had recently died and the appellant had paid the death duties.

In respect of the trespass the appellant stated that he saw the respondent cutting grass in the pasture, had taken away wood already cut, and had planted a garden on the land.

The respondent's account was that he worked that portion of the land for the last eight years with the permission of one Luciana Cherie one of the co-owners. He paid her thirty dollars a year for so doing.

Counsel for the appellant submitted that one co-owner could maintain an action of trespass against the other if he committed acts which amounted to an ouster or if he changed the nature of the land. He cited in support the case of Murray v. Hall (1849) 137 E.R. 175. Counsel further submitted that the rental of the land purported to grant a right to exclusive possession of a portion and entering thereupon for such a purpose would be committing a trespass.

Tenants in common have unity of possession and each tenant is as much entitled to possession of any part of the land as the others. Their occupation is undivided and neither party can point to any particular part of the land as his own to the

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exclusion of the others. It seems to follow therefore that one co-owner cannot rent a particular part of the land to the exclusion of the others without their consent, but, he may, in my view, transfer his rights in the common property to another and the transferee stands in his shoes and may do all such things on the land as the co-owner is able to do. This issue was not raised in lower court but the facts are that the respondent was working the land as agricultural land for eight years and the appellant stated he had been on a portion of the land "all his life." It is not unreasonable to find that in the present case Luciana Cherie who placed the respondent on the land, whether as tenant or licensee, did so with the consent of the appellant. In any event the evidence shows it was the appellant who assumed exclusive control over the whole area of land since the death of his grandfather.

The position at common law in respect of an action of trespass by one co-owner against the other is clearly stated in Clerk & Lindsell on Torts, 13th Edition, at paragraph 1328 as follows:-

> "One co-owner of land can only bring an action of trespass against the other if he has been actually ousted or dispossessed of the land. Each co-owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass. If the common property or part of it is destroyed, there is an ouster. So, trespass lies by

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one co-owner against another who digs and carries away the soil. It is not trespass, however, if one co-owner uses the land in the ordinary and natural way, as by cutting grass and making it into hay, or working a coal mine."

According to the case of Thomas v. Thomas (1850) 155 E.R. 13 the common law did not provide a remendy where one co-owner received from the common property a larger share of the profits than that to which he was entitled. This defect in the law was remedied by the statute 4 Anne, C 16 S.27, which enabled one tenant in common to maintain an action of account against the other for receiving more than his due share or proportion. Although this act is now repealed the legal position remains the same. The practice in equity, however, was to make one co-owner who received more than his due liable to account to the others.

In the present case the trespass alleged is that of cutting grass growing on the land and taking away wood already cut. Neither of these acts, in my view, constitutes ouster of the appellant, nor a destructive waste of the common property nor user in such a manner as may give rise to an action of trespass against another co-owner. It may be that the respondent may be proved liable in an action for an account. In the appellant's evidence he stated that the respondent planted a garden of food crops. In my view this is user of the land in the ordinary and natural way and does not amount to an act of trespass.

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In addition to the remedies stated ~~hereinbefore~~, articles 632 to 653 and articles 653A to 653L of the Civil Code, Chapter 242, of the laws of St. Lucia make provision for the severence of undivided ownership in land and the procedure to be followed is set out in Article 748 etc of the Code of Civil Procedure, Chapter 243.

Article 636 reads:

> "If all the heirs be of full age, be present, and agree the partition may be effected in such form and by such act as the parties interested deem proper."

The language of this article is very elastic and it may appear that if the parties agree partition may be effected in any manner. In my view, however, where the common property is land, this act should preferably be by deed or at least the consent of the parties should be evidenced in the form of an agrement in writing signed by all the parties.

For the reasons stated I would dismiss the appeal. No order as to costs.

(E.L. ST. BERNARD)
JUSTICE OF APPEAL

I agree

(H.A. PETERKIN)
JUSTICE OF APPEAL

I also agree

(SIR MAURICE D'VIS)
CHIEF JUSTICE