Step v Crown Land Manager [2011] NTSC 55

PARTIES:	VACLAV STEP
	v
	CROWN LAND MANAGER OF THE DEPARTMENT OF LANDS AND PLANNING OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 57 of 2010 (21021325)
DELIVERED:	15 July 2011
HEARING DATES:	17 & 19 January 2011
JUDGMENT OF:	SOUTHWOOD J
APPEAL FROM:	CAREY SM

CATCHWORDS:

APPEAL AGAINST CONVICTION – Crown land – trespass after direction to leave – adverse possession – claim of interest in land – warning to stay off – jurisdiction of the Court of Summary Jurisdiction – appeal dismissed

Justices Act s 50
Lands Title Act s 198
Limitation Act s 6(4)
Trespass Act s 4, s 7(1), s 8(3), s 9, s 11(2), s 12, s 13, s 13(2)

Barns and Campbell v Edwards and Linden (1993) 69 A Crim R 140; *Braithwaite v Coutoupes* (1918 – 1950) NTJ 294; *Ex parte Coffill* (1894) 10 WN (NSW) 222; *Coutoupes v Braithwaite* (1918 – 1950) NTJ 292; *Refina Pty Ltd v Binnie* [2010] NSWCA 192; *Spark v Meers* [1971] 2 NSWLR 1; *Van den Bosch v Australian Provincial Assurance Association* (1968) 88 WN (Pt 1) (NSW) 357, applied

Allen v Roughley (1955) 94 CLR 98; *Arnold v Morgan* [1911] 2 KB 314; *Asher and Wife v Whitlock* (1865) LR 1 QB 1; *Clissold v Perry* (1904) 1 CLR 363; *Elizabeth Valley Pty Ltd v Fordham and Others* (1970) 16 FLR 459; *Harvey v Williams* [1883] 18 SALR 8; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Mulcahy v Curramore Pty Ltd* [1907] AC 73; *Newington v Windeyer* (1985) 3 NSWLR 555; *Perry v Clissold* [1907] AC 73; *Spark v Whale Three Minute Car Wash (CJ) Pty Ltd* (1970) 92 WN (NSW) 1087; *Wheeler v Baldwin* (1934) 52 CLR 609, referred to

REPRESENTATION:

Counsel:

Appellant:	V Step in person
Respondent:	R Jobson

Solicitors:

Appellant:	Self represented
Respondent:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Step v Crown Land Manager [2010] NTSC 55
No. JA 57 of 2010 (21021325)

BETWEEN:

VACLAV STEP
Appellant:

AND:

CROWN LAND MANAGER OF THE DEPARTMENT OF LANDS AND PLANNING OF THE NORTHERN TERRITORY
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 July 2011)

Introduction

[1] The appellant has appealed against his conviction by the Court of Summary Jurisdiction of the offence of trespass after a direction to leave contrary to s 7(1) of the *Trespass Act*. No penalty was imposed on the appellant following his conviction. However, the trial Magistrate gave the appellant a warning to stay off the land under s 8(3) of the *Trespass Act*.

[2] The grounds of appeal are that the trial Magistrate erred in law when he: (1) held that s 198 of the *Lands Title Act* totally abrogates common law

possessory titles; and (2) ordered the appellant to leave the property under s 8(3) of the *Trespass Act*.

Section 7(1) of the Trespass Act

[3] Section 7(1) of the *Trespass Act* states:

> A person who trespasses on any place and, after being directed to leave that place by an occupier or member of the police force acting at the request of the occupier, fails or refuses to do so forthwith or returns within 24 hours to that place, commits an offence.

[4] Under s 4 of the *Trespass Act*, "Crown land" means all Crown land, including reserved or dedicated land, other than Crown land which has been leased or is occupied under a licence or agreement. "Occupier" in relation to a place, means, where the place is Crown land, a person in charge of the land and includes an employee or other person acting under the authority of the person in charge.

[5] Section 9 of the *Trespass Act* states that a direction to leave under s 7 of the Act shall be given to the individual person concerned either orally or by notice in writing delivered to that person or sent to that person by post. Section 12 of the *Trespass Act* states that in proceedings for an offence against the Act, an averment in a complaint that: (a) the person is, or was at the relevant time the occupier within the meaning of s 4 or a member of the Police Force; or (b) a direction to leave or a warning to stay off was given in accordance with s 9 of the Act, is evidence of the fact averred.

[6] Subsection 11(2) of the *Trespass Act* states that proceedings for offences under this Act shall be taken only on the complaint of an occupier of the place concerned or a member of the Police Force, and shall be disposed of summarily.

Background facts

[7] There was considerable common ground between the parties about the facts. There was no dispute about the following matters. Sections 1659 and 1660 Hundred of Ayres are two unalienated vacant parcels of Crown land. The appellant entered and started living on Section 1660 Hundred of Ayres in August 2001. Since then he has lived there continually without holding a lease or licence or any other permission to be on the land. The appellant has erected dwelling structures, a shed and a water tank on Section 1660 Hundred of Ayers and other structures on Section 1659 Hundred of Ayers. He has also constructed a gate across the entrance to the parcels of land with a sign stating, “No Trespassers”. In all respects the appellant has conducted himself as if he were the occupier of the land. His use of the land disclosed an intention to possess the land against the whole world including the Crown in the Northern Territory.

[8] The following evidence was led from Ms Jacqueline Ann Stanger and Ms Sharon Leslie Hinton. The Northern Territory Department of Lands and Planning is the Government Department that has the responsibility for administering sections 1659 and 1660 Hundred of Ayers. At all relevant

times, Ms Stanger was employed by the Department as an Assistant Director of the Land Administration Service and Ms Hinton was employed as the Acting Manager of Crown Land. Neither Ms Stanger nor Ms Hinton were asked, who was in charge of the two parcels of Crown land, nor were they asked if they had authority from the person in charge of the parcels of Crown land to direct the appellant to leave the land. However, it was not suggested by the appellant that Ms Stanger did not have the necessary authority to direct the appellant to leave the place he was occupying and the appellant led no evidence to rebut the evidentiary presumption created by the averment that Ms Stanger was acting under the authority of the Northern Territory.

[9] During 2009 it came to the attention of employees of the Department of Lands and Planning that the appellant was squatting on Section 1660. On 6 May 2009 Ms Stanger wrote a letter to the appellant. The letter asserted the Crown's possession and control of the land. The letter stated that the Department had become aware that the appellant had been squatting on 1660 Hundred of Ayres which was Crown land without permission. The letter notified the appellant that he must vacate Section 1660 within 24 hours of the date of the letter. It advised him that he would need to remove all of his belongings from the property or the Department would employ contractors to remove anything that was left behind. He was also advised that the matter would be referred to the Department's legal advisers and further action would be taken if the matter was not resolved within the time

specified. The letter was personally served on the appellant by officers of the Department and members of the Police Force.

[10] On 7 May 2009 the appellant telephoned the Department of Lands and Planning and negotiated an extension of time until 27 August 2009 in which to remove all of his belongings. However, he failed to vacate the two parcels of Crown land by the agreed time.

[11] On 29 May 2009 Ms Stanger again wrote to the appellant. The letter stated that the area of land which the appellant had not vacated was part of the proposed town of Weddell and development of the township would start in the very near future. The letter confirmed that the appellant had been granted until 27 August 2009 to vacate section 1660 Hundred of Ayers and it stated that if he did not vacate section 1660 by that date the matter would be referred to the Department of Lands and Planning's legal advisers for further action.

[12] In November 2009, the Department of Lands and Planning received an email from the appellant dated 27 August 2009. In his email the appellant stated that Section 1660 had been his home for more than eight years. He did not wish to live anywhere else and he could not afford to live anywhere else. He was not breaking any law by occupying the parcel of land and he had not been referred to any legislation that prohibited him from occupying Section 1660. He asserted that the Department had no right to interfere with his

property and that he would not vacate Section 1660 unless a court order was obtained.

[13] On 7 May 2010 a further letter was sent to the appellant by Ms Stanger. The letter stated that the appellant had challenged the direction given to him to leave Section 1660. It also stated that further investigation by the Department showed that he had belongings located on the adjoining section of land, Section 1659 Hundred of Ayres. The letter gave the appellant the following direction:

> Pursuant to s 7(1) *Trespass Act*, I, as a person acting under the authority of the "occupier", being the Northern Territory now direct you to cease trespassing upon Sections 1659 and 1660, Hundred of Ayres and to leave Sections 1659 and 1660 Hundred of Ayres and to remove your personal property and effects from both parcels of land.
>
> You are further required to comply with this direction within 30 days from 12 May 2010 being the date this letter was served.
>
> Should you fail or refuse to comply with this direction by the above date prosecution proceedings will be instituted under the *Trespass Act*.

[14] The letter was personally served on the appellant by Senior Constable Michael Whiting at 10.00 am on 12 May 2010. However, the appellant did not vacate the parcels of Crown land and ultimately a complaint was filed in the Court of Summary Jurisdiction on 24 June 2010.

[15] The complaint was signed by Ms Hinton. The complaint charged the appellant with being a trespasser on Sections 1659 and 1660 Hundred of Ayres, being Crown Land, who had been directed by the occupier on 12 May

2010 to leave that place by10 June 2010 and who had failed and refused to do so contrary to s 7(1) of the *Trespass Act*. The complaint also pleads the following averments. (1) At all material times Ms Stanger was a person acting under the authority of the Northern Territory of Australia who was the occupier. (2) The direction to leave the premises was given by a letter dated 7 May 2010 which was served on the appellant on 12 May 2010 in accordance with s 9 of the *Trespass Act*. Ms Hinton made the complaint under s 11(2) of the *Trespass Act* and s 50 of the *Justices Act*.

[16] The complaint was heard by the Court of Summary Jurisdiction on 3 November 2010 and the trial Magistrate found the appellant guilty as charged.

The Reasons for Decision of the Trial Magistrate

[17] The principal issue at the trial was whether the appellant had ceased to be a trespasser because of the length of time he had been in possession of the two parcels of Crown land. The appellant argued he was not a trespasser because he had dispossessed the Crown and had acquired a right to occupy the two parcels of land under a bare inchoate possessory interest which he acquired by adverse possession. In support of this proposition the appellant, who was unrepresented, relied on *Allen v Roughley*[1]. He argued that the decision of the High Court established the principle that a person may acquire an inchoate possessory title even if the limitation period for adverse

[1] (1955) 94 CLR 98.

possession had not expired. He was in an equivalent position to the testator, Mr Cuthbert, whose beneficiaries did not have any documentary evidence to prove the conveyance to the testator. Further, his possession of the parcels of land did not cease simply because a person from the Department of Lands and Planning requested him to leave the land.

[18] The appellant maintained that s 198 of the *Land Title Act* did not abrogate his possessory rights. Section 198 of the *Land Title Act* only applied to land under that Act and by implication he must be taken to have argued that the two parcels of unalienated Crown land was not land under that Act. The appellant also sought to rely on the defence of emergency under s 13(2) of the *Trespass Act*. He stated that an emergency existed because he had nowhere else to live if he was removed from Section 1660 Hundred of Ayers.

[19] Counsel for the complainant argued that by virtue of s 198 of the *Land Title Act* there was no adverse possession against the Crown in the Northern Territory. The appellant was a trespasser and the Crown, as the true owner of the land, had re-entered and reasserted its possession of the parcels of land and under s 7 of the *Trespass Act* had given the appellant a lawful direction to leave the land and the appellant had refused to do so. Further, there was no emergency.

[20] The trial Magistrate gave the following reasons for his decision.

> My ruling in this case is that [the appellant] does not have the benefit of [the doctrine of adverse possession] because there is no doctrine of adverse possession.
>
> I am satisfied that all of the elements of the offence are made out. I am satisfied that you were trespassing on the land as you have in fact admitted and that you still continue to do so. I am satisfied that the Act has been fully complied with so far as the giving and serving of notices is concerned and that you have since refused or failed to leave the land as you continue to admit. And I am satisfied also that you cannot get any benefit from the doctrine of adverse possession because it no longer exists as a law of the Northern Territory.
>
> I am satisfied beyond any doubt that all of the elements of the offence are made out and I am going to record a finding of guilt of the charge against you. I am satisfied that I should record a conviction against you because you satisfy the elements of the *Sentencing Act* for doing so. But given your impecunious position and the situation you are in I am going to discharge you after you have been convicted. You are convicted and discharged. You are not fined.

[21] After the trial Magistrate made the above remarks there was the following exchange.

> HIS HONOUR: I now have to warn you that you have *to leave that property* [emphasis added]. So I am giving you an official warning to satisfy section …
>
> THE APPELLANT: Under what section, your Honour?
>
> HIS HONOUR: I think it is s 8, isn't it?
>
> MR JOBSON: Yes, your Honour, s 8(3).
>
> THE APPELLANT: Stay off from where?
>
> HIS HONOUR: Stay off 1659 and 1660.

THE APPELLANT: When does it take effect?

HIS HONOUR: The warning takes effect immediately. I dare say you will take about as much notice as you did the last one but it will trigger s 10 [of the *Trespass Act*] which means that the Crown's people can go in there and remove you and your belongings.

[22] The trial Magistrate's decision was based on an application of s 198 of the *Land Title Act*. He erred in law in applying that section to this case and during this appeal counsel for the respondent correctly conceded that his Honour erred in his interpretation and application of s 198 of the *Land Title Act*. That section has no application to the unalienated Crown land which is the subject of this appeal as the land is not land under that Act. However, the application of s 6(4) of the *Limitation Act* which is the applicable section leads to the same conclusion as that reached by the trial Magistrate.

[23] His Honour had earlier stated that the appellant did not have a defence under the emergency provisions of s 13 of the *Trespass Act* because the emergencies contemplated by those provisions were emergencies relating to the appellant's property or someone else's property. They were not emergencies relating to whether or not the appellant had somewhere else to live.

Ground 1

[24] The appellant's primary submission about the first ground of appeal may be summarised as follows. An element of the offence created by s 7(1) of the

Trespass Act is that the offender must be a trespasser. That is, in order for the appellant to be found guilty of an offence contrary to s 7(1) of the *Trespass Act,* the complainant must prove that on 12 May 2010, when the appellant was directed to leave the two parcels of unalienated Crown land, he was a trespasser on that land. The appellant submits that he was not a trespasser because he had peacefully and openly acquired and maintained independent exclusive possession of the two parcels of land for more than nine years and in that time no action had been taken by the Crown to recover the land. Consequently, he had acquired a de facto and inchoate possessory interest in the land. As he was in actual possession of the land, the Crown had ceased to be in possession of the land and he had ceased to be a trespasser. Although the Crown could bring appropriate proceedings to eject him, and despite the fact that his possession of the land did not impinge upon or affect the Crown's rights over the land, he was not a trespasser. In support of this submission the appellant relied upon a number of cases[2] in which various courts have ascribed legal significance to mere adverse possession of land for less than the limitation period prescribed by the relevant statute of limitations. He placed particular reliance on the

[2] *Allen v Roughley* (1955) 94 CLR 98; *Asher and Wife v Whitlock* (1865) LR 1 QB 1; *Clissold v Perry* (1904) 1 CLR 363; *Elizabeth Valley Pty Ltd v Fordham and Others* (1970) 16 FLR 459; *Harvey v Williams* [1883] 18 SALR 8; *Mulcahy v Curramore* Pty Ltd [1974] 2 NSWLR 464; *Newington v Windeyer* (1985) 3 NSWLR 555; *Perry v Clissold* [1907] AC 73; *Spark v Meers* [1971] 2 NSWLR 1; *Spark v Whale Three Minute Car Wash (CJ) Pty Ltd* (1970) 92 WN (NSW) 1087; *Wheeler v Baldwin* (1934) 52 CLR 609.

judgments of Dixon J in *Wheeler v Baldwin*[3], Slattery J in *Spark v Whale Three Minute Car Wash*[4], and McHugh JA in *Newington v Windeyer*[5].

[25] In *Wheeler v Baldwin* Dixon J stated[6]:

> For mere possession under a person entitled gives no interest in the land. But does exclusive or adverse possession give such an interest? The answer to this question depends upon a principle of our law of property which at the present day we are apt to overlook, as a survival of legal doctrines which no longer obtain. This doctrine is stated by *Mr. Joshua Williams* in his lectures on the *Seisin of the Freehold* (1878), at p. 7, as follows:—
>
> > The rule of law still is, and it is a rule of great importance, that the mere *possession of land is prima facie evidence of seisin in fee*. I say prima facie evidence, for the presumption may be rebutted by evidence, showing that the possessor has in fact a less estate. But, in the absence of any such evidence, the person found in possession will, to the present day, be presumed to be seised in his demesne as of fee.
> >
> > There is another rule still in existence, founded apparently on the same principles, and that rule is, that an estate gained by wrong is always an estate in fee simple. If a person wrongfully gets possession of the land of another, he becomes wrongfully entitled to an estate in fee simple, and to no less an estate in that land; thus, if a squatter wrongfully encloses a bit of waste land, and builds a hut on it and lives there, he acquires an estate in fee simple by his own wrong in the land which he has enclosed. He is seised, and the owner of waste is disseised. It is true that until, by length of time, the Statute of Limitations shall have confirmed his title, he may be turned out by legal process. But as long as he remains, he is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs. The rightful owner, meantime, has but a right of entry, a right in many respects equivalent to seisin; but

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3 *Wheeler v Baldwin* (1934) 52 CLR 609.
4 (1970) 92 WN (NSW) 1087.
5 (1985) 3 NSWLR 555 at 563-564.
6 *Wheeler v Baldwin* (1934) 52 CLR 609 at 631 – 632.

> he is not actually seised, for if one person is seised, another person cannot be so.

In *Maitland's* essay upon *The Mystery of Seisin, Collected Papers* (1911), vol. I., p. 370, he states what formerly was the law governing the position of the disseisor:— "He who is seised, though he has no title to the seisin, can alienate the land; he can make a feoffment and he can make a will (for he who *has* land is enabled to devise it by statute), and his heir shall inherit, shall inherit from him, for he is a stock of descent; and there shall be dower and there shall be curtesy, and the lord shall have an escheat and the king a forfeiture, for such a one has land "to give and to forfeit." This may make seisin look very much like ownership, and in truth our old law seems this (and has it ever been changed?) that seisin does give ownership good against all save those who have better because older title. Nevertheless we err if we begin to think of seisin as ownership or any modification of ownership; after all it is but possession."

A full account of the development of the law will be found in *Holdsworth's History of English Law*, 3rd ed. (1925), vol. VII., pp 23 to 81. He answers at pp. 59, 60, the question of *Maitland*, namely, "Has it ever been changed?" He says: "Thus the medieval principle that possession is ownership as against all the world except as against those who can show a better title, having been maintained in law of this period, remains part of our modern law."

But does this amount to an estate or interest in the land? That it is properly described by these words is shown by *Perry v. Clissold*. The question in that case was whether a person occupying land as an adverse possessor or "squatter" had an estate or interest within the meaning of the compensation provisions of an enactment for the compulsory acquisition of land. Although some attention was paid by the Privy Council to the purposes of the Act, it does not appear that any special meaning was given to the words estate and interest. In giving an affirmative answer to the question, the Privy Council appears to have acted upon the doctrine discussed above, which Lord *Macnaghten* expressed as follows:— "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title".

> For these reasons I think that a person in possession claiming inconsistently with the title of the owner of the first estate in possession has a *locus standi* to caveat, and that he is entitled to an issue as to the validity or sufficiency of the applicant's title. Whether an issue in general terms should be settled, or whether the caveator should be required to state his objections to the title in some specific way, is a matter within the discretion of the Court, which should be exercised upon a consideration of the nature of the title produced by the applicant, the opportunities of the caveator to examine it, and his knowledge of the facts. In the present case, the caveatrix asks for issues specifically directed to an attack upon the validity of particular conveyances on stated grounds. In my opinion the issues she seeks should be directed.

[26] In *Newington v Windeyer*[7] McHugh JA stated:

> The respondents are not the owners of the registered title of the Grove, but that fact does not prevent them maintaining an action of trespass against the appellant. The modern law of real property continues to invoke the medieval doctrine that possession is prima facie evidence of seisin in fee and that an estate gained by wrong is nevertheless an estate in fee simple: *Wheeler v Baldwin* (1934) 52 CLR 609 at 632; *Allen v Roughley* (1955) 94 CLR 98 at 108. Seisin gives ownership good against everyone except a person who has a better, because older, title: *Wheeler v Baldwin* (at 632–633); *Perry v Clissold* [1907] AC 73 at 79. A person who is in possession of land adverse to the true owner has a legal interest in the land even though the twelve year limitation period has not expired: *Perry v Clissold*. As long as a person does not abandon his possession, possession for less than twelve years enables him to exclude from the land any person who does not have a better title: *Allen v Roughley* (at 109–110, 115, 131, 135, 143). The above cases and principles relate to Old System title. But in *Spark v Whale Three Minute Car Wash (Cremorne Junction) Pty Ltd* (1970) 92 WN (NSW) 1087, Slattery J held that those principles are equally applicable to land held under the provisions of the Real Property Act 1900. Counsel for the parties accepted that the common law principles concerning adverse possession apply to land under the Torrens System. In my opinion the agreement of counsel was correct. *Spark v Whale Three Minute Car Wash* was correctly decided. Indeed, since 1979 it has become possible for adverse possession of land for twelve years to bring about the extinguishment of the title of the registered proprietor: *Real Property Act 1900*, s 45D.

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[7] (1985) 3 NSWLR 555 at 563-564.

[27] The appellant also relied on Toohey J's analysis of possessory estates in *Mabo v Queensland (No 2)*[8].

[28] In my opinion the appellant's argument cannot be sustained for a number of fundamental reasons. First, the acquisition of any interest in land through adverse possession is based on de facto possession which arises as a result of a continuing trespass and the effluxion of sufficient time to extinguish the original owner's title to the land. The appellant is essentially a squatter on Crown land. The appellant was a trespasser when he entered on the two parcels of Crown land to establish his dwelling and other structures and he has continued to be a trespasser so long as he has remained on the land[9]. He entered and took possession of the two parcels of land without any colour of right.

[29] Secondly, s 6(4) of the *Limitation Act* states:

> Notwithstanding any law or enactment now or formerly in force in the Territory, the right, title or interest of the Crown to or in land shall not be and shall be deemed not to have been *in any way affected by reason of the possession of such land adverse to the Crown for any period* [emphasis added].

[30] Unlike s 198 of the *Land Title Act*, s 6(4) of the *Limitation Act* applies to unalienated Crown land. It applies to both Sections 1659 and 1660 Hundred of Ayers. Subsection 6(4) of the *Limitation Act* prevents the appellant from acquiring any estate or interest in the two parcels of land adverse to or in derogation of the Crown's estate or interest. The recognition of some

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8 (1992) 175 CLR 1 at 208 – 214.
9 *McPhail v Persons Unknown* [1973] 1 Ch 447 at 456 per Denning MR.

inchoate estate in the appellant which would restrict the full enjoyment of the Crown's estate or interest would be contrary to s 6(4) of the *Limitation Act*[10]. The Crown remains fully protected. Any possessory interest that the appellant may have in the two parcels of land cannot defeat of even suspend the interests of the Crown and the appellant remains a trespasser. He remains a trespasser even though he may have a possessory interest which is good against any person other than the Crown and none of the judgments relied on by the appellant contradict this fact.

[31] The distinction between the position of the title holder and others as against someone in adverse possession was clearly made by Hope J in *Spark v Meers*[11] :

> "… Thus if A was the registered proprietor of an estate in fee simple in land, and X remained in possession for twenty years, X would not obtain effective title as against A, but he would obtain a title against all the world Save A and those claiming through him. If Y dispossessed him, I should have thought that X would be entitled to bring an action of ejectment against him; and indeed, A could do this whether he had been in possession for twenty years or for some lesser period. It was for this reason that the present plaintiff was successful in the ejectment action against *Whale Three Minute Car Wash (Cremorne Junction) Pty Ltd*. However what s 45 does do is to prevent the extinction of the title of the registered proprietor by any adverse possession. …"

[32] So that while the trial Magistrate's reliance on s 198 of the *Land Title Act* was an error of law as that section has no application to unalienated Crown land, his Honour nonetheless came to the correct conclusion. There has

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[10] *Refina Pty Ltd v Binnie* [2010] NSWCA 192 at par [9] per Allsop P; *Spark v Meers* [1971] 2 NSWLR 1 at 13 per Hope J; *Van den Bosch v Australian Provincial Assurance Association* (1968) 88 WN (Pt 1) (NSW) 357 at 364 per Else-Mitchell J.

[11] [1971] 2 NSWLR 1 at 13.

been no miscarriage of justice as, on the whole of the facts and the correct application of the law, the trial Magistrate would still have come to the same result. Further, the appellant's case would have been the same. He has lost no chance which was fairly open to him of being acquitted.

Ground 2

[33] As to both grounds one and two, the appellant argued that the Court of Summary Jurisdiction had no jurisdiction to hear the complaint against him because his defence was based on a bona fide assertion of an interest in land and his assertion had a reasonable foundation on substantial grounds. In this regard the appellant relied on the well established principle of law that, if a bona fide claim of title to land having a reasonable foundation on substantial grounds is set up, Courts of Summary Jurisdiction may not proceed further with the hearing if the claim is known to and not impossible at law unless the Court of Summary Jurisdiction is specifically and clearly empowered to do so by statute[12].

[34] This submission cannot be sustained. There is nothing in the defence raised by the appellant. He clearly was a trespasser and he had no interest in the land which abrogated or diminished or even suspended the Crown's estate and interest in the land.

[12] *Braithwaite v Coutoupes* (1918-1950) NTJ 294; *Coutoupes v Braithwaite* (1918-1950) NTJ 292; *Arnold v Morgan* [1911] 2 KB 314; *Ex parte Coffill* (1894) 10 WN (NSW) 222; *Barns and Campbell v Edwards and Linden* (1993) 69 A Crim R 140.

[35] As to the second ground of appeal, the appellant also submitted that the trial Magistrate warned him to leave the land rather than warn him to stay off the land. Such an order was beyond the power granted to the trial Magistrate under s 8(3) of the *Trespass Act*. This submission cannot be sustained either. Although it is true that prior to giving the appellant a warning pursuant to s 8(3) of the Act, the trial Magistrate did say "I now have to warn you that you have to leave that property", he then went on to give the appellant a formal warning in accordance with s 8(3) of the Act. The appellant was referred to s 8(3) of the Act and the trial Magistrate in substance gave him an "official warning" under s 8(3) of the Act to stay off Sections 1659 and 1660 Hundred of Ayers.

Orders

[36] Notwithstanding that the trial Magistrate erred in law in his reliance of s 198 of the *Land Title Act,* no substantial miscarriage of justice has actually occurred and the appeal should be dismissed[13]. The appeal is dismissed and I affirm the warning under s 8(3) of the *Trespass Act* that the appellant is to stay off Sections 1659 and 1660 Hundred of Ayres.

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[13] s 177(2) of the *Justice Act*.