[2012] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 4/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN GEORGE MOBRAY APPELLANT

A N D ANDREW JOEL WILLIAMS RESPONDENT

Ronald Paris instructed by Paris & Company for the appellant
Albert Morgan instructed by Albert S Morgan & Company for the respondent

20 October 2011 and 22 June 2012

HARRIS JA

[1] This is an appeal from the decision of Her Honour Miss Karen Hill made in favour of the respondent on 5 March 2010 on his claim for recovery of possession of Lot 5 Ramble Hill in the parish of Saint James. We allowed the appeal, set aside the order of the Resident Magistrate and awarded costs to the appellant in the sum of $15,000.00. We promised to put our reasons in writing. This we now do.

[2] The land which forms the subject matter of the dispute comprises one and a quarter square and is part of lands at Ramble in the parish of Saint James, owned by Rachael Mobray, the appellant's grandmother. Rachael died in 1968 survived by five children, one of whom was Emmanuel Mobray. Emmanuel was predeceased by his siblings but died on 9 November 1996, without spouse or issue. He was survived by his nephews, George Mobray, the appellant, Joshua Mobray and Simeon Housen.

[3] Sometime in 1997, the appellant made an application for a grant of letters of administration in Emmanuel's estate. The Inventory states that Emmanuel died possessed of 11 acres of land, part of Ramble in the parish of Saint James. The 11 acres relate to the land which falls under Rachael's estate. It is apparent that a grant of letters of administration was obtained in Emmanuel's estate. The appellant and Joshua Mobray are currently the registered proprietors of Lot 5 which is recorded at Volume 1324 Folio 711 of the Register Book of Titles. A certificate of title was also secured by them for four hectares five thousand one hundred and seventy four ten thousandths of a hectare of land registered at Volume 1319 Folio 19. They hold as tenants in common in equal shares in both parcels of land.

[4] The respondent's evidence is that he entered on the land as a tenant of Emmanuel, paying rental of $200.00 per month for seven years. Thereafter, he purchased it from Emmanuel for $5000.00. He went on to state that he had leased the land for seven years from Emmanuel. When he bought it, he asserted, Emmanuel took him to the office of Mr Ho Lyn, attorney-at-law and "showed" the attorney "what claims he had to the land" and that the land was in Rachael Mobray's name. He and

Emmanuel were then sent to Mr Ho Lyn's secretary who took the $5,000.00. A receipt, for the money, with a "Government stamp and the lawyer stamp and the witness from the lawyer office and Mr Emmanuel Mobray's signature" was given to him. He stated that about five years after he bought the land Emmanuel died. When he first leased the land he built a board house on it which was for his children and their mother but when they left he began constructing a concrete house on it before Emmanuel's death.

[5] The respondent's witness, Raymond Fletcher, testified that the respondent was once his tenant before leaving sometime in 1994 to reside at Ramble Hill. He had gone to visit him there, at which time he, the respondent, spoke to him about buying a piece of land. The respondent "then entered into business" with Emmanuel Mobray. The witness went on to state that he, the witness, purchased land from Emmanuel.

[6] Simeon Housen also testified on behalf of the respondent. His evidence was, in essence, that he had known the respondent since 1992, that he, the respondent, lives on land bought from his uncle, Emmanuel, and that the appellant had told him that the title would have been obtained in the names of the appellant, Joshua and himself.

[7] A notice to quit, dated 16 February 2000, was served on the respondent on 17 February 2000. On 3 October 2007, the appellant initiated proceedings against the respondent for recovery of possession of the land of which he was in occupation. The claim described the respondent as a tenant-at-will. In a notice of special defence, the respondent stated that he was not a tenant at will but a purchaser for value in

possession of the land since November 1995 and that, he, having acquired an interest therein, the appellant is estopped from obtaining possession.

[8] The learned Resident Magistrate, after hearing from the appellant, the respondent and the latter's witnesses, concluded as follows:

> "The plaintiff George Mobray (standing in the shoe of Emmanuel Mobray) has come to the court saying: I am the owner of land which was once unregistered. About 14 years ago I sold a portion of that land to the defendant and put him in possession of it. I have now brought the land under the provisions of the RTA and want to remove the defendant notwithstanding the previous sale to him. I am asking the court for an order sanctioning eviction:
>
> The Court's response is NO."

[9] The following grounds of appeal were filed:

> "i. The Learned Resident Magistrate erred in fact and in law when she held that the Defendant/Respondent had entered into possession of one and a quarter squares of land situate at Ramble Hill in the Parish of Saint James under a valid contract of sale and purchase with Emmanuel Mobray who was then the owner of the said land.
>
> ii. Accordingly the Learned Resident Magistrate failed to pay any heed to the evidence of the Defendant/Respondent that the board house he lived in on the land belonged to Gwendolyn Walker "his kids dem mother" and that he was still living in that board house on the land when Emmanuel died.
>
> iii. The Defendant/Respondent did not produce any documentary evidence of his leasing the land nor of his subsequent purchase thereof from Emmanuel so that there is no evidential link between the fact of his occupation of the land and his assertion of being a land tenant and then a purchaser in

possession. In other words the Defendant/Respondent did not produce any evidence to establish that his occupation was firstly as the father of Gwendolyn Walker's children then as a land tenant in his own right and later still as a purchaser in possession.

iv. The Learned Resident Magistrate erred when she held that the Defendant/Respondent had entered into possession of the land pursuant to a contract of sale and purchase and that therefore even in the absence of documentary proof that was sufficient evidence of a beneficial or equitable interest in the said land capable of surviving the first registration of title to the land in the Plaintiff/Appellant under the Registration of Titles Act.

v. The Learned Resident Magistrate after the Defendant/Respondent had closed his case and the Plaintiff/Appellant had filed his closing arguments in writing allowed the Defendant/Appellant [sic] to reopen his case in order to tender further documentary evidence arising out of the submissions made in the Plaintiff/Appellant's Closing Address whilst refusing the Plaintiff/Appellant's request to call further evidence and only allowing him to make further submissions on the new evidence presented by the Defendant/Appellant [sic] which was unfair to the Plaintiff/Appellant.

vi. The Learned Resident Magistrate had completed her written judgment before the Plaintiff/Appellant had made further submissions on the new evidence which the Magistrate had allowed the Defendant/Respondent to reopen his case and tender so that the Learned Resident Magistrate had already decided the case without waiting to hear the response of the Plaintiff/Appellant to the new evidence."

[10] Mr Paris submitted that the registration of the land in the appellant's name is a first registration and that he has a fee simple indefeasible interest in it in keeping

with sections, 61, 68 and 70 of the Registration of Titles Act. He cited the cases of ***Charles Gardener and Inez Walker v Edward Lewis***, Privy Council Appeal No 25 of 1997, delivered on 22 June 1998, and ***Frazer v Walker*** [1967] AC 560 in support of his submissions. He argued that Emmanuel did not have the capacity to sell the land in the absence of a grant of letters of administration in Rachael's estate. It was further contended by him that the learned Resident Magistrate failed to appreciate the nature of Emmanuel's interest in the land, in that he could not have passed to the respondent an interest in excess of that which he owned. Therefore, he argued, the respondent could not have acquired an equitable interest capable of surviving the appellant's indefeasible interest. Further, he contended, there is no evidence to support the respondent's allegation that he was a purchaser in possession. Emmanuel was a tenant in common in the undivided share in Rachael's estate and could not have passed fee simple interest to the respondent, he argued. The learned Resident Magistrate, he submitted, failed to take into consideration that there was no documentary evidence in proof of the purported sale, or in absence thereof, of whether there was part performance.

[11] Mr Morgan, in response, submitted that Emmanuel, as a surviving child of Rachael was entitled to an interest to be perfected in the future by way of the grant of letters of administration in Rachael's estate and the requisite conveyance of the land to him by the administrator. Section 5 of the Property (Transfer) Act, he argued, recognizes the right of transfer of future interest in freehold land. Although that part of the land to which Emmanuel was entitled was not identified, his interest in it was a

certainty and he would have had the capacity to enter into the contract for its sale. He further submitted that although the respondent did not plead fraud, the evidence points to dishonesty on the part of the appellant as he did not speak of Simeon who was entitled to join in the application for the land to be brought under the Registration of Titles Act.

[12] Two critical issues arise in this case. The first is whether the appellant, being a registered proprietor of the disputed land, is protected by the Registration of Titles Act. The second is whether the respondent acquired an interest in personam in that parcel of land which he stated that he purchased from Emmanuel.

[13] The learned Resident Magistrate found that the appellant, in various documents in support of the application for a grant of letters of administration, declared himself as owner of the lands and that title to the land could not have passed to the appellant through Emmanuel, unless he, Emmanuel had title. She also found that, as administrator, the appellant holds the land on trust for himself and any other person entitled to share in Emmanuel's estate and also holds on trust, that part of the land which was disposed of by Emmanuel. She then went on to state as follows:

> "If the Plaintiff then proceeds to bring the land under the *Registration of Titles Act* 'the RTA' this does not relieve him of his obligations as a trustee. He cannot by this process depart from his duty as trustee and seek to defeat the claim of the beneficiaries in whose interest he must act.
>
> Therefore, once a registered title is obtained he holds that title on the same trust as he did the unregistered title.
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> Land registration is based not only on a mirror principle whereby the register is supposed to reflect all interests affecting

> the land BUT it involves also a curtain principle allowing for equitable interests existing behind trusts to be kept off the register.
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> The principle is specifically recognized by **RTA, section 60** which excludes registration of interests existing behind trusts and even though the section allows for the Registrar to be notified of such interests by separate documents this is not a requirement.
>
> Arguments advanced by the Plaintiff regarding the indefeasibility of the registered title cannot assist the Plaintiff in this case.
>
> **Section 70 of the RTA** is intended to protect persons dealing with the registered proprietor and not the registered proprietor himself.
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> At the time when the defendant purchased the property neither the Plaintiff nor his predecessor was a registered proprietor and at that time the land was unregistered. The Plaintiff cannot by changing his status from an unregistered to a registered proprietor after disposing of his interest in the land, earn the right to derogate from his grant in reliance upon the statute."

[14] The appellant, after obtaining the grant of letters of administration in Emmanuel's estate, on a joint application with his brother Joshua, obtained the registered title for Lot 5 on 13 July 1999, in which the respondent claims an interest. In light of the findings of the learned Resident Magistrate, it will be appropriate to look at the law with reference to the legal effect of a certificate of title. A registered title is conclusive evidence that the registered proprietor is the owner of the fee simple in the land described therein. Sections 68, 70 and 71 of the Registration of Titles Act speak to the indefeasibilty of a registered title. Section 68 reads:

"68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."

Section 70 provides:

"70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser. …"

Section 71 reads:

"71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or

> ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

[15] In ***Gardener and Anor v Lewis*** , Lord Browne-Wilkinson, in dealing with the effect of the foregoing provisions had this to say at page 4:

> "From these provisions it is clear that as to the legal estate the Certificate of Registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The appellants' legal title can only be challenged on the grounds of fraud or prior registered title or, in certain circumstances, on the grounds that land has been included in the title because of a 'wrong description of parcels or boundaries': section 70."

[16] He went on to state that the provisions are with reference to legal title to land only and that although the title is decisive as to legal interest, this does not preclude personal claims being enforced against the registered proprietor. In this regard, he cited the following extract from ***Frazer v Walker*** where at page 585 Lord Wilberforce said:

> "… their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from

> adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia: see, for example, ***Boyd v. Mayor, Etc., of Wellington*** [1924] N.Z.L.R. 1174, 1223 and ***Tataurangi Tairuakena v. Mua Carr*** [1927] N.Z.L.R. 688, 702."

[17] As can be distilled from the foregoing, a registered title is immune from challenge except on the ground of fraud. Despite the provisions in the Registration of Titles Act relating to indefeasibility, a defendant in an action for recovery of possession may raise an issue as to a claim in personam. However, a defendant may only do so if any of the following factors presents itself:

1. that he has an unregistered equitable interest in the land by virtue of which the claimant is estopped from denying such interest; or

2. that the certificate of title was fraudulently obtained; or

3. that subsequent to the issue of the title he acquired adverse possession of the land.

[18] A claim to an interest in land must be valid. Such claim must be anchored on secure foundation. Where a *bona fide* dispute as to title is advanced, a defendant cannot merely raise the issue. He must go further. There must be adequate evidence in support of his contention to show that the issue as to title raised by him is

sustainable. It follows that an issue as to equitable interest can only be determined after cogent evidence is adduced to satisfy the court that, on the balance of probabilities, the defendant is entitled to such an interest.

[19] The learned Resident Magistrate was clearly in error in dismissing the appellant's claim for two principal reasons. Firstly, she failed to take into consideration the important fact that the appellant's title remained indefeasibly vested in him by virtue of sections 68, 70 and 71 of the Registration of Titles Act. The registration of the land bestows on the appellant an absolute title. His title, being exempt from any form of objection, could not be challenged save and except there is proof of actual fraud: see ***Assets Co Ltd v Mere Roihi*** [1905] AC 176. There is no evidence of actual fraud in this case. The learned Resident Magistrate was wrongly of the view that the respondent had an equitable interest in the land which accorded him a right to an interest which ranks paramount to that of the appellant.

[20] Secondly, a trust was never created in favour of the respondent as the learned Resident Magistrate found. Her reference to section 60 of the Registration of Titles Act which prohibits the entry of the notice of a trust on a certificate of title was to bolster her finding that notwithstanding the fact that the equitable interest by way of trust is not registered, the respondent would have had a right to such an interest. Her finding that he had bought the land prior to its registration, which the appellant holds in trust for him, thus conferring on him an equitable interest, is baseless. Although the respondent stated that he had purchased the land and was given a receipt, that receipt was never tendered into evidence to satisfy the requirements of the Statute of Frauds.

It is obvious that she acted under the misapprehension that the appellant, as the administrator of Emmanuel's estate, holds in trust for the respondent that portion of land which Emmanuel is said to have sold him. Any right to an interest which the respondent seeks to claim would have had to be grounded in Rachael's estate, provided certain conditions are satisfied, principal of which is that there was a grant of administration in her estate. It was without doubt that at the time of the purported sale by Emmanuel, he (Emmanuel) would not have been competent to sell unless he was the administrator of Rachael's estate or that Rachael's estate had been administered and the administrator had by formal assent granted him possession of Lot 5. The appellant, as a trustee of Emmanuel's estate, did not hold in trust for the respondent that portion of the land purportedly purchased by him as the learned Resident Magistrate found. Although the land remained unregistered up to the time of its registration by the appellant, even if the respondent had purchased the property in its unregistered state from Emmanuel who permitted him to remain in possession of it, this would not have afforded him an interest.

[21] I do not find favour with Mr Morgan's contention that Simeon should have been included as an applicant in the obtaining of the certificates of title and that the appellant's failure to make disclosure pertaining to him, points to fraud on his, the appellant's, part. The respondent's defence is that he is a *bona fide* purchaser for value, and that having an unregistered interest in the land, the appellant is estopped from denying such interest. Fraud was never pleaded as a special defence. If the respondent had intended to rely on fraud, he ought to have so pleaded. The

respondent is bound to pay due regard to section 68 of the Registration of Titles Act, which endows the appellant with an indefeasible title despite any irregularity in obtaining same. Admittedly, there was some irregularity in the manner in which the appellant secured the relevant certificate of title, but in light of the statutory provisions, in particular section 68, his title remains unimpeachable.

[22] At the time of the purported sale by Emmanuel, the land occupied by the respondent fell under the umbrella of Rachael's estate. Rachael, having died intestate, without a surviving spouse, her estate would be held upon statutory trust for her five children in accordance with section 4(1) Item 2(a) of the Intestates' Estates and Property Charges Act. This provision imposes a trust for sale of the real and personal estate of a deceased who dies intestate. Statutory trusts, within the purview of the Act, are defined in section 6 as follows:

> "**6**. For the purposes of this Part the residuary estate of the intestate, or any part thereof, directed to be held upon the "statutory trusts" shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

[23] In specifying that the assets of the estate shall be held on trust for sale, the law contemplates that the residue would not come into existence until all liabilities of

the estate, as stipulated by the Act, are satisfied. On the death of an intestate, his estate devolves on and vests in his personal representative upon a grant of letters of administration and remains so vested until the completion of the administration process: see ***Commissioner of Stamp Duties (Queensland) v Livingston*** [1964] 3 All ER 692. So then, what is the nature of the interest of a beneficiary of an estate prior to or during the administration process? There are a number of English authorities, dealing with testate and intestate succession, which show that although a beneficiary is entitled to share in the residuary estate, he/she has no legal or equitable interest therein: see ***Lord Sudeley v Attorney General*** [1897] AC 11; **Re K** (1986) Ch 180; and ***Lall v Lall*** [1965] 1 WLR 1249.

[24] In the Australian case of the ***Commissioner of Stamp Duties (Queensland) v Livingston***, the Privy Council, although dealing with a case of testate succession, firmly established the principle that, in an unadministered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in respect of any matter related to the due administration of the estate. In that case, a widow died prior to the administration of her husband's estate in which she was entitled to the residue. It was held that she had no beneficial interest in the husband's estate.

[25] Viscount Radcliffe, at page 696 placed the principle in the following context:

> "What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever

> they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests; but it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust on property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms."

[26] In **Re Leigh's Will Trust** [1969] 3 All ER 432 Buckley J at 434 opined that in ***Commissioner of Stamp Duties (Queensland) v Livingston*** the following propositions were enunciated:

> "(i) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (ii) no residuary legatee or person entitled on the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (iii) each such legatee or person so entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (iv) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered."

[27] In ***Eastbourne Mutual Building Society v Hastings Corporation*** [1965] 1 WLR 861, the case of ***Commissioner of Stamp Duties (Queensland) v Livingston*** was applied. In ***Eastbourne Mutual Building Society*** , a husband was entitled to the residuary estate of his wife who died intestate. He died prior to any application for a grant of representation was made in the wife's estate. A claim was made under a compulsory purchase order that the husband was entitled to an interest in the wife's house, under the intestacy. It was held that the husband had no interest in the house, the word "interest" being restricted to one of a proprietary nature under the (English) Housing Act.

[28] At the date of the purported sale of the land by Emmanuel, Rachael's estate remained unadministered. Accordingly, until a grant of administration is obtained, the legal estate remains vested in her estate. After a grant of administration is obtained, the assets of her estate vests in the administrator. Emmanuel, although a beneficiary of her estate would not have been entitled to any legal or equitable right therein. He could not have had the right to sell any of the assets of the estate or pass title at the time he is said to have sold the land. He would only have been entitled to a chose in action in the unadministered estate. Such chose in action is a transmissible interest enabling him to receive the benefits which may accrue to him from the estate. The appellant, as the administrator of Emmanuel's estate, would not have been under any obligation or duty to honour any sale carried out by Emmanuel.

[29] Importantly, the respondent could not seek sanctuary under the Property (Transfer) Act, as proposed by Mr Morgan. Although, section 5 of the Act

acknowledges a right of transfer of future interest in land, the proviso expressly prohibits the disposal of an expectancy to which a person is beneficially entitled in the distribution of the assets of an intestate's estate, by way of an assignment. The section reads:

> "**5**. Any person may convey, assign or charge by any deed any contingent or executory interest, right of entry for condition broken, or other future estate or interest as he shall be entitled to, or presumptively entitled to in any freehold or leasehold land or personal property, or, any part of such interest, right, or estate respectively; and every person to whom any such interest, right or estate shall be conveyed or assigned, his heirs, executors, administrators or assigns, according to the nature of the interest, right or estate, shall be entitled to stand in the place of the person by whom the same shall be conveyed or assigned, his heirs, executors, administrators or assigns, and to have the same interest, right or estate, or such part thereof as shall be conveyed or assigned to him, and the same actions, suits, and remedies for the same, as the person originally entitled thereto, his heirs, executors or administrators, would have been entitled to, if no conveyance, assignment, or other disposition thereof had been made."
>
> …
> Provided also that no chose in action shall by this Act be made assignable at law."

[30] From the foregoing, it is clear that, although the Property (Transfer) Act provides for the conveyance of future interest in land, Emmanuel, as a beneficiary of Rachael's estate, was not competent to dispose of the expectancy which he may have had in her estate. He would only be entitled to a chosen action in Rachael's estate which is not assignable. A transfer falls within the meaning of an assignment. In ***Crusoe d. Blencowe v Bugby*** 2 BL W766 the Court stated that, "assign transfer, and set over"

are words of assignment. The appellant, as the administrator of his estate, would not have had the capacity to pass title to the respondent. He would, undoubtedly, have been barred by the proviso of the Act, at any future date to convey the land to the respondent.

[31] Significantly, upon the administration of Rachael's estate, as prescribed by section 6 of the Intestates' Estates and Property Charges Act, her legal personal representative would be required by law to sell the property to meet the liabilities. However, even if it could be said that there would be adequate funds in Rachael's estate to meet the liabilities, as specified in section 6 of the Intestates' Estate and Property Charges Act, and that the administrator of her estate would be at liberty to postpone the sale, and that there would have been a residuary estate to transfer to the beneficiaries, and in particular Emmanuel, this is not enough. The probability that there will be a residue is insufficient to show that Emmanuel had a transmissible interest which he could have alienated at the time of the purported sale. The residuary estate, under which Emmanuel would be likely to have obtained a benefit, must be ascertained. In speaking to this proposition, Viscount Finlay, in ***Dr Barnado's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts*** [1921] 2 AC 1, said at page 11:

> "The legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the property properly administered and applied for his benefit when the administration is complete"

[32] The foregoing also applies in a case of intestacy. Emmanuel's right to share in the property would only arise after the residue had actually been ascertained. Any share in his mother's estate to which he may have been entitled could not be determined with certitude so as to establish that an administrator of his estate could pass title to the respondent. At the time of the purported sale, Emmanuel's interest in the land being a chose in action which was unassignable, it could not have been transmissible to the respondent.

[33] For the foregoing reasons, we allowed the appeal and awarded costs of $15,000.00 to the appellant.