JAMAICA

RESIDENT MAGISTRATES' CIVIL APPEAL 31/2000

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
THE HON MR. JUSTICE WALKER, J.A.
THE HON MR. JUSTICE PANTON, J.A.

SYDNEY ROWE V MICHAEL LEVY

Donald A Gittens for the appellant

Debayo Adedipe for the respondent

February 12, 14, 15 and May 16, 2002

BINGHAM, J.A:

Having read in draft the judgment prepared in this matter by Panton, J.A., I wish to state that I am in agreement with his reasoning and the conclusion reached that the appeal ought to be allowed. As the Court is differing from the learned Resident Magistrate, however, I wish to add a few words of my own.

The claim being one for Recovery of Possession meant that to succeed the plaintiff/respondent had to establish by clear and credible evidence that he had a better title than the defendant/appellant. The evidence on which he sought to establish his root of title to the land in question, by way of purchase, was from someone, who on the

evidence, had no better title than the appellant. Moreover when the land described in the Particulars of Claim is looked at and examined in relation to the lands described in the supporting documentary evidence viz: the Indenture and, the Agreement for Sale, this revealed a maze of conflicting evidence which when weighed and assessed, did not provide any proper basis entitling the learned Magistrate to make the determination to which he came.

That apart, but even of more crucial importance was, the important observation made by Panton, J.A. that "the property has its root of title in the appellant's late grandfather whose estate has not yet been administered". This state of affairs would have removed any semblance of authority in Richard Rowe to transfer the property to the respondent Michael Levy.

WALKER, J.A.

I have read the judgment of my brother Panton, J.A. and, for the reasons he gives, I, too, would allow this appeal in the terms proposed.

PANTON, J.A.

This is an appeal from the judgment of His Honour Mr. John Moodie, Resident Magistrate for the parish of St. Elizabeth, in an action for recovery of possession of land. The trial in this matter commenced on May 21, 1996. Judgment was entered therein three and a half years later in favour of the plaintiff who is the respondent in the proceedings before us. According to the record of the proceedings as made by the learned Resident Magistrate, the trial lasted all of fourteen days. On one of those days, a witness was absent. On four other days, the proceedings were either shortened or cancelled due to the absence of the attorney-at-law for the appellant. It is important that these details are mentioned in order that the delay in completing the trial be placed in its proper perspective. However, this is far too long a period of time for a case of this nature to last before judgment in a Resident Magistrate's Court. It has also not escaped notice that the record of the proceedings did not reach the Court of Appeal until a year and a month after the judgment. Even after such another period of delay, the record did not include the exhibits although the index gives the false impression that they were included. Court clerks ought to be more diligent in matters of this nature. There are too many matters of this nature emanating from the Resident Magistrates' Courts which indicate that Clerks of Courts either do not fully appreciate their role, or do not care how they perform their duty. Section 258 of the Judicature (Resident Magistrates) Act requires the

Clerk of the Courts, upon the filing of an appeal, to **"transmit to the Registrar of the Court of Appeal the .. certified copies of the notes of the Judge and (in original) all the other proceedings in the cause".** Clerks who negligently discharge the duties of their office need to be reminded that they are liable to disciplinary proceedings under section 58 of the said Act, as well as the regulations that govern the behaviour of civil servants.

The order that was endorsed on the plaint summons reads:

> "On 26-11-99,
> Judgment for the plaintiff. Order for possession
>
> On or before 31-1-00. Costs to be agreed or taxed.
> Verbal notice of appeal given.
>
> J.H.Moodie
> R.M.St. Elizabeth."

In making this decision, the learned Resident Magistrate made two major findings. Firstly, he found that the respondent/plaintiff had bought the land in question from someone who had himself bought it from another. Secondly, he found that the appellant/defendant's presence on the land had been the result of having been granted permission by the respondent.

THE GROUNDS OF APPEAL

The appellant, on the 9th December, 1999, filed no less than fourteen grounds of appeal against this judgment. At the commencement of the hearing of the appeal, four of these grounds were abandoned, that is, grounds 9, 12, 13 and 14. Of the remaining ten grounds, seven of them challenged the judgment of the learned Resident Magistrate on the basis that he "failed to appreciate

and/or accept...evidence"; two complained of wrongful admission of evidence, and the other related to erroneous interpretation of evidence.

The main grounds may be summarized thus:

Ground 1: The learned trial judge erred in that he failed to appreciate and/or accept the evidence supporting the expressly stated defence of the defendant/appellant that he did not occupy any land as described by the plaintiff/respondent.

Ground 2: The learned trial judge erred in law in that he failed to appreciate and/or accept that there was no evidence that title to the property claimed by the plaintiff/respondent had passed in any legally recognizable way or at all from Bertis Rowe to Astley Rowe, who therefore could not pass it to Richard Rowe.

Ground 5: The learned trial judge erred in law in admitting into evidence the indenture dated March 17, 1993, even though it was unanswerable that there was no evidential foundation or ground upon which it could have been so admitted, and its admission was reasonably capable of at least subconsciously prejudicing the mind of the learned trial judge, sitting as a tribunal of fact, against the case of the defendant/appellant, even though in his oral judgment he purported not to have relied upon it.

Ground 6: The learned trial judge erred in law in that he failed to appreciate and/or accept that once he found, as he did, that the authenticity of the indenture from Astley Rowe to Richard Rowe was not proven, there was no memorandum sufficient to satisfy the Statute of Frauds that title to the property claimed by the plaintiff/respondent had passed from Astley Rowe to Richard Rowe, who

therefore could not pass title to the plaintiff/respondent.

Ground 7: The learned trial judge erred in law in that he failed to appreciate and/or accept the significance of the undisputed evidence that Astley Rowe owned a one acre parcel of land to the back of the property claimed by the plaintiff/respondent, and that the plaintiff/respondent had failed to show on a balance of probabilities, using relevant tax papers or evidence from the collector of taxes or the surveyor, that it was not only this parcel that Astley Rowe was entitled to sell.

THE CLAIM

The respondent/plaintiff's claim was for recovery of possession of land in respect of which he asserted that he was the lawful owner. This land was described in the particulars of claim dated 3rd October, 1995, as "containing by estimation one (1) acre situate and lying at Ridge District in the parish of Saint Elizabeth butted and bounded as follows:

" NORTH: On a reserved road
SOUTH: Top Hill to Southfield main road
EAST : On lands of Carlton and Muncie Greaves
WEST : On a reserved road "

The particulars of claim alleged that the appellant was occupying the premises as a squatter without any lawful authority; that on the 12th August, 1995, he had been served a notice to quit; and that the respondent/plaintiff was anxious for him (the appellant) to vacate the premises as they were needed for the former's personal use.

THE DEFENCE

At the commencement of the trial, the defence was stated thus:

> "Defendant denies that he occupies any land as described by the plaintiff and says that the land he presently occupies he so occupies as the agent and on behalf of the beneficiaries of the estate of his late father Astley Rowe and of Astley Rowe's predecessor in title Bertis Rowe".

THE ISSUES

On the basis of the particulars of claim and the stated defence, the relevant questions for the learned Resident Magistrate were:

1. Is the respondent/plaintiff the lawful owner of the land described?;

2. Is the appellant in occupation of the said land?; and

3. Does the appellant have any lawful authority to be on the land?

THE EVIDENCE

(1) As presented by the respondent/plaintiff

The respondent testified that on the 13th March, 1995, he bought an acre of land (more or less) situated at Ridge district from one Richard Rowe. On this land were a bar, a grocery, two bedrooms, a tank, a platform for dancing and an outside toilet. Richard Rowe and his grandfather Astley Rowe were present when the sale took place. Thereafter, the respondent engaged the services of Desmond Rowe, a commissioned land surveyor, who surveyed the property. Astley Rowe remained on the property for about three to four months after the

sale, and then died. After the death of Astley, arrangements were made between Richard and the respondent for Richard's father Sydney Rowe (the appellant) to reside as a tenant on the premises until the respondent was ready to commence construction, when he would receive one month's notice. The notice was duly served but the appellant has not vacated the premises.

Richard Rowe grew up with Astley Rowe, his grandfather, on the land in question. Astley was in possession and had built the tank, shop and dance hall floor. Astley made a "common law conveyance" of the property to Richard for a consideration of about $12,000.00.

Exhibit 1 is an indenture signed by Astley Rowe, made on the 17th March, 1993, purportedly between Astley Rowe and Richard Rowe. It conveys to Richard Rowe a parcel of land at Ridge containing by survey "one acre with shop and tank" . The boundaries are stated to be "northerly by lands belonging to Carlton Greaves and Muncie Greaves, southerly by lands belonging to Wilbert Rowe, easterly by the junction to Southfield main road, westerly by lands belonging to Dotsie Rowe".

Exhibit 2 is a surveyor's diagram of land at Ridge surveyed by Desmond Rowe, the commissioned land surveyor referred to earlier, at the instance of the respondent. It relates to the property referred to in exhibit 1.

Exhibit 3 is a document signifying rental of a room by the respondent to Richard Rowe.

Exhibit 5 is an undated agreement for sale between Richard Rowe and the respondent in respect of an acre of land at Ridge with boundaries specified thus: "northerly on reserved road leading from the Top Hill main road to lands of Richard Rowe and on lands of Dotsie Rowe, southerly Top Hill to Southfield main road, easterly on lands of Carlton and Muncie Greaves and westerly reserved road leading from the Top Hill main road to lands of the said Richard Rowe". This exhibit relates to the land referred to in the particulars of claim.

(2) As presented by the appellant

The appellant told the learned Resident Magistrate that he regards the land as owned by the late Stanley Bertie Rowe (referred to in this judgment as Bertis Rowe due to the varied names given to him in the proceedings) and that he (the appellant) had been in occupation for approximately ten years. When Astley (the appellant's father) died, he (the appellant) was then living on the premises. He, his father, and his mother Ernie Rowe had built the shop, and Ernie Rowe used to operate the shop and the bar. The land is bounded on the south by land owned by Wilbert Rowe, and on the north by land owned by Wayne Gordon, and also land owned by the appellant's niece Dotsie Rowe. The latter's land is used as a "burying ground". The appellant denied that he took up residence at the premises as a result of the rental agreement: (exhibit 3). Both Wilbert Rowe and Dotsie Rowe gave evidence on his behalf. The description of the lands contained in exhibits 1 and 2 is identical, and matches the description of the land occupied by the appellant. Wilbert Rowe is the son of Bertis Rowe and the

brother of Astley Rowe, both deceased. Wilbert is therefore the uncle of the appellant. The evidence presented on behalf of the appellant indicates that Bertis Rowe was the owner of the land in question; that he died intestate, and there has been no administration of his estate.

Mr. Gittens submitted that what the respondent contracted to buy is different from that which he sued to recover possession of, and does not correspond with the parcel of land that was surveyed. There is no dispute, he said, that the appellant occupies a portion of land with a tank on it, but there is no title in the respondent to that parcel of land. Hence, the claim is misconceived. The respondent, he said, has not proven his case and the learned Resident Magistrate did not address the issues properly. Mr. Gittens was also of the view that a non-suit would have been inappropriate in the instant situation as the appellant was in possession.

Mr. Adedipe conceded that the written description in the agreement (Ex.5) does not appear in the surveyor's diagram (Ex.2). In answer to the Court, he agreed that it was clear that the evidence was in keeping with Ex. 2, but the particulars of claim were not; however, the particulars of claim were in keeping with exhibit 5 the agreement for sale. The statement of claim, he said, was incorrect. It was the oral evidence given by and on behalf of the respondent that was correct, he said.

THE FINDINGS OF THE LEARNED RESIDENT MAGISTRATE

The Resident Magistrate found as follows:

1. Richard Rowe bought the land in question from Astley Rowe.

2. Richard Rowe sold that land to the respondent.

3. At the time of the sale to the respondent, Astley Rowe was residing on the land, and was present at the transaction for sale.

4. The respondent took possession of the land after he had bought it.

5. The appellant was living elsewhere but came on the land at the time of the death of his father Astley Rowe.

6. The appellant was permitted to remain "in the shop room temporarily".

7. The appellant never occupied the land as the agent of anyone.

The learned Resident Magistrate has provided fuel for Mr. Gittens' submission that he did not address the issues properly. This conclusion is inevitable when it is noted that the reasons for judgment did not attempt to deal with the incongruities that are evident when one looks at the particulars of claim, the agreement for sale, the conveyance, the surveyor's diagram and the actual evidence given by the respondent in his effort to show title to the land. Having not dealt with these evidential problems, it is difficult to see how the learned Resident Magistrate was able to arrive at his findings without some degree of mental discomfort.

There is no doubt that ownership of the land in question originated with Bertis Rowe. There is also no doubt that his estate has not been administered.

Until that has been done, there can be no title in Astley Rowe, Bertis' son, for him to pass to his grandson Richard who purported to pass title to the respondent. This is a fundamental feature of the case which cannot be ignored. Any transfer from Richard Rowe is therefore of no effect.

Quite apart from the inability of Richard Rowe to pass title, there is a serious conflict in respect of the identity of the land itself. **Exhibit 1**, an indenture, on which the learned Resident Magistrate placed no reliance, gives specific boundaries. It is supposed to have been the means by which Richard Rowe, for the consideration of $8,000 took conveyance of the land therein described. It is not necessary to debate the question of the admissibility of this exhibit as it is irrelevant to the proceedings considering that the particulars of claim do not describe property which corresponds in the faintest degree to that identified in the indenture. **Exhibit 2**, a survey diagram, matches exhibit 1, in that it seems to be a plan of the area described in exhibit 1. **Exhibit 5** is the agreement for sale between Richard Rowe and the respondent. It describes the land that is the subject matter of the sale in terms which are different from those in exhibits 1 and 2. However, the particulars of the respondent's claim are identical to exhibit 5, the agreement for sale.

In all this, Mr. Adedipe has submitted that the question is whether having regard to the evidence that was led at the trial and the findings of the learned Resident Magistrate, the particulars of claim can be amended by this Court to correspond with the evidence and the findings of fact. The Resident Magistrate,

he said, could have, at any stage of the trial, granted such an amendment. Although no amendment had been asked for at the trial, this Court, he said, is being asked to grant an amendment to prevent substantial injustice. The question, he said, is who has the better claim to the land occupied by the appellant. The decision of the Resident Magistrate, he said, should not be disturbed because upholding it will not result in any substantial miscarriage of justice. The effect of the judgment of the Court below is to do substantial justice to the parties, he said. By way of contingency and in the alternative, he submitted that if the application for an amendment is refused, the decision of the Resident Magistrate would have to be reversed. He asked though that the respondent be non-suited in such a situation, and a new trial ordered. If the decision is reversed but the respondent is not non-suited, he suggested that a new trial be ordered. The reason, he said, for his submission in respect of a non-suit is that there is no satisfactory proof entitling either party to a judgment. If one looks carefully at the findings of the Resident Magistrate, the appellant would at best be a licensee, he said.

So far as the application for an amendment is concerned, the power of a Resident Magistrate to amend is statutory. Section 190 of the Judicature (Resident Magistrates) Act provides that a:

> **"Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his court, whether there is anything in writing to amend or not ... and all such amendments may be made, with or without costs, and upon such terms as to the**

> **Magistrate may seem fit, and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made."**

The circumstances of this case do not fit within the intendment of section 190 which is of relevance when there are defects or errors in form rather than substance. In the instant situation, the entire case of the respondent is defective. This is not a mere matter of form; it is a matter of substance. The respondent put forward a claim that has not been proven. To amend the particulars of claim by deleting the entire description of the property and its boundaries would be to present the appellant with an entirely new claim. That would not serve the ends of justice.

As for the requirement of the court to do substantial justice between the parties, Mr. Adedipe is to be taken to be referring to the proviso to section 251 of the Judicature (Resident Magistrates) Act which states that no judgment of the court "shall be altered, reversed or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause". With respect, the circumstances of this case do not demonstrate that the effect of the judgment of the learned Resident Magistrate is the doing of substantial justice between the parties. The respondent was awarded judgment although his claim was not substantiated, whereas the appellant, who is not only in possession of, but also has an interest in, the property had judgment entered

against him. Furthermore, the property has its root of title in the appellant's late grandfather whose estate has not yet been administered.

On the question of a non-suit, section 181 of the Judicature (Resident Magistrates) Act provides that a Magistrate shall have power to non-suit the plaintiff where satisfactory proof has not been provided to entitle either the plaintiff or defendant to judgment. However, if this power "is to be exercised when no just cause for it exists and merely because there is a conflict then such an exercise will be a denial of justice and a desertion of duty by the Resident Magistrate". See **Perkins v. McGhan** (1925) S.C.J.B.II p.5 S.C.J. (1917-1932), page 200 per Brown, J. and referred to in the unreported judgment **Clarence Powell v. Amy Caine** (Resident Magistrate's Court Civil Appeal No. 10/98 delivered on March 8, 1999). It is clear in the instant case that there is evidence that entitles one of the parties to the entering of judgment in his favour.

In my judgment, the resolution of this matter requires that it ought to be approached from the known and agreed starting point of the history of the land. That means Bertis Rowe. That he died intestate is not in dispute. The evidence does not disclose whether he had a spouse surviving him. However, he left behind about ten children.

The Intestates' Estates and Property Charges Act provides for the succession of beneficiaries to the real and personal estate of an intestate. **Section 4(1)** thereof provides:

> "The residuary estate of an intestate shall be distributed in the manner or held on the trusts specified in the following Table of Distribution--"

There follows a listing of beneficiaries in the order of succession. The beneficiaries are dealt with under four headings, namely, "The Surviving Spouse", "The Issue", "Parents" and "Other Eligible Relatives". There is a fifth heading "Bona Vacantia" where the residuary estate devolves on the Crown if there is no beneficiary in the earlier listed categories.

All the children of the intestate are entitled to share in the estate of their father. The law of the land requires that there be an application for letters of administration so that there may be an orderly distribution of the assets of the departed loved one. The taking of possession of the property of an intestate without the grant of letters of administration does not confer title on the taker, thereby enabling such a person to pass title to another. A beneficiary who takes possession prior to the completion of the formalities that the law requires, has to be taken, in the ordinary course of things, to be doing so with a view to holding any such property in trust for himself and the other beneficiaries. In the instant situation, Astley Rowe had no title which he could have passed to Richard Rowe. The latter therefore had nothing to pass to the respondent Levy. That being so, the respondent was in no better position than the appellant so far as the **right to possession** is concerned.

Quite apart from the right to possession, there is also the obvious situation that the respondent/ plaintiff has not really proven, on a balance of probabilities, the case set out in his statement of claim. He alleged that the appellant was in possession of a particularly described plot of land, but has failed to prove that basic fact. The particulars of claim do not match the oral evidence that was given. The evidence and the particulars of claim are referring to two separate parcels of land. On that basis alone, the respondent was not entitled to the judgment that was entered in his favour. The uncertain nature of the respondent's claim to possession of the land occupied by the appellant is demonstrated by the fact that exhibit one states that Richard Rowe paid $8,000 to Astley Rowe for the acre of land whereas Richard Rowe testified that he paid "around $12,000.00". This discrepancy is to be viewed against the background that the transaction is supposed to have taken place in 1993, and Richard Rowe gave his evidence a mere three years later.

So, in the circumstances, the appeal succeeds on grounds 1, 2 and 6. The respondent/plaintiff did not adduce any evidence to prove the particulars of claim that he filed. Nor has he shown any right to possession that would enable him to lawfully evict the appellant who has undoubted, though unconsummated, rights to possession of the land in question by virtue of the intestacy of his grandfather.

I would therefore allow the appeal with costs to the appellant

ORDER

BINGHAM, J.A.

Appeal allowed. Judgment below set aside and judgment entered for the appellant. Costs to the appellant fixed at $15,000.