

22 of 1977

22/77

IN THE PRIVY COUNCIL

No. 24 of 1975

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

MR. AND MRS. BENJAMIN PATRICK

Appellants

- and -

1. BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED

2. XDOL MIGNOTT

Respondents

RECORD OF PROCEEDINGS

A.L. BRYDEN & WILLIAMS,
20 Old Queen Street,
LONDON SW1H 9HU.
Solicitors for the
Appellants.

JAMES & CHARLES DODD,
18, Tranquil Vale,
LONDON SE3 OAZ.
Solicitors for the
Respondents.

i.

IN THE PRIVY COUNCIL

No. 24 of 1975

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

(1) C.A. 36 of 72

BETWEEN BENJAMIN PATRICK ET UX APPELLANTS
(Defendants)

AND BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED RESPONDENTS
(Plaintiffs)

C.A. 21 of 74

BETWEEN BENJAMIN PATRICK ET UX APPELLANTS
(Plaintiffs)

AND BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED
and
XDOL MIGNOTT RESPONDENTS
(Defendants)

RECORD OF PROCEEDINGS

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1.

IN THE PRIVY COUNCIL

No. 24 of 1975

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

(1) C.A. 36 of 72

B E T W E E N :

BENJAMIN PATRICK ET UX

Appellants
(Defendants)

- and -

BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED

Respondents
(Plaintiffs)

(2) C.A. 21 of 74

B E T W E E N :

BENJAMIN PATRICK ET UX

Appellants
(Plaintiffs)

- and -

BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED and XDOL MIGNOTT

Respondents
(Defendants)

RECORD OF PROCEEDINGS

No. 1

Endorsement

In the
Supreme Court

No. 1

Endorsement

The Plaintiff's claim is for:

1. The possession of ALL THAT piece or parcel of land part of May Pen in the parish of Clarendon containing by survey Five Acres, One Rood and Six Perches and butting and bounding and being of the shape as appears by the plan thereof and being the land comprised in Certificate of Title registered at Volume 30 Folio 58 of the Register Book of Titles

23rd March
1972

In the
Supreme Court

No. 1
Endorsement
23rd March
1972
(continued)

and now known as No.15 Sunnyside Avenue, May Pen,
in the parish of Clarendon.

- 2. An injunction restraining the Defendants by themselves or their tenants or agents or otherwise from erecting on the said land any further buildings of any type whatsoever.
- 3. A Mandatory order that the Defendants do forthwith pull down, dismantle and demolish building already erected on the said land.

Dated the 23rd day of March 1972.

10

SILVERA & SILVERA

(Sgd.) ?

Attorneys-at-Law for the
Plaintiff

Place of Trial: Kingston.

THIS WRIT was issued by Silvera & Silvera of Nos.42-44 East Street, Kingston, Attorneys-at-Law for the Plaintiff Beverley Gardens Development Company Limited whose address is Nos.42-44 East Street, Kingston and whose address for service is that of its said Attorneys.

20

No. 2
Summons
23rd March
1972

No. 2
Summons

Suit No. CL371 of 1972

In the Supreme Court of Judicature of Jamaica

In Common Law

BETWEEN BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED PLAINTIFF

A N D MR. & MRS. BENJAMIN
PATRICK DEFENDANTS

LET ALL PARTIES CONCERNED attend a Judge in
Chambers at the Supreme Court, Public Buildings,
King Street, Kingston on Wednesday the 20th day
of April, 1972 at 10.00 o'clock in the forenoon

30

on the hearing of an application on the part of the abovenamed Plaintiff for an Order that the Defendants by themselves, their servants or agents and each and everyone of them BE RESTRAINED from erecting or causing or permitting to be erected on the said land any further buildings of any type whatsoever.

In the Supreme Court

No. 2

Summons

23rd March 1972

(continued)

Dated the 23rd day of March, 1972.

10

TO: The abovenamed Defendants,
Mr. & Mrs. Benjamin Patrick,
15, Sunnyside Avenue,
May Pen,
Clarendon.

FILED by Silvera & Silvera of Nos.42-44 East Street, Kingston, Attorneys-at-Law for and on behalf of the Plaintiff.

No. 3

Affidavit in Support of Summons

Suit No. CL.371 of 1972

20

In the Supreme Court of Judicature of Jamaica

In Common Law

BETWEEN BEVERLEY GARDENS DEVELOPMENT COMPANY LIMITED PLAINTIFF

A N D MR. & MRS. BENJAMIN PATRICK DEFENDANTS

I, CHARLES WELLS MCDONALD being duly sworn make oath and say as follows:

30

1. That I reside and have my true place of abode at No.4 McDonald Drive in the parish of St.Andrew, my postal address is Kingston 8, and I am a Director of Beverley Gardens Development Company Limited, the Plaintiff herein.

2. That Beverley Gardens Development Company Limited is the registered proprietor of all that parcel of land known as No.15 Sunnyside Avenue in the parish of Clarendon and being the land registered at Volume 30 Folio 58 of the Register Book of Titles.

In the
Supreme Court

No. 3

Affidavit in
Support of
Summons

22nd March
1972
(continued)

3. That on the 6th day of December, 1962, in the Resident Magistrate's Court holden at May Pen in the parish of Clarendon, the previous owner of the aforesaid parcel of land, Fredericka Walker, obtained an Order for recovery of possession against one of the abovenamed Defendants, Benjamin Patrick.

4. That subsequently, the said Benjamin Patrick filed a Suit in this Honourable Court, viz., Suit No. E 11 of 1963 in which the Writ of Summons was for inter alia, a declaration that he was entitled in fee simple to the aforesaid parcel of land and Order setting aside the Order mentioned in paragraph 3. Judgment was entered for the Defendant the said Fredericka Walker.

10

5. That an Appeal was then filed viz. C.A.5 of 1967 which was dismissed with costs to the Respondent Fredericka Walker.

6. That the Defendants have refused to vacate the aforementioned premises despite repeated requests.

20

7. That the Defendants have erected a number of buildings of both wood and concrete, on the said premises and I am informed and verily believe, from the building material recently deposited there, that there is an intention to undertake further construction.

8. That unless restrained the Defendants will continue to exercise such acts of ownership, i.e. the erection of buildings on the said land with the obvious intention of usurping the legal rights of the Plaintiff.

30

(sgd.) C.W. McDonald

SWORN to at 74½ Hanover Street in the parish of Kingston on the 22nd day of March 1972 before me:-

(sgd.) Hector Gibson

JUSTICE OF THE PEACE

FILED by Silvera & Silvera of Nos.42-44 East Street, Kingston, Attorneys-at-Law for and on behalf of the Plaintiff.

No. 4

Affidavit of Benjamin Patrick

SUIT NO. C.L. 371 of 1972

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HIGH COURT OF JUSTICE
IN COMMON LAW

In the
Supreme Court

No. 4

Affidavit of
Benjamin
Patrick

24th April
1972

BETWEEN BEVERLEY GARDENS DEVELOPMENT
CO. LTD. PLAINTIFF

AND MR. & MRS. BENJAMIN DEFENDANTS
PATRICK

10

I. BENJAMIN PATRICK, whose true place of Abode is No.15 Sunnyside Avenue, in the parish of Clarendon, and whose postal address is May Pen Post Office, Farmer, Make oath and say as follows:

1. That I am one of the Defendants in this action.

*[sic]
20

2. That on the 6th day of December, 1962, Fredericka Walker was not "the previous owner" of the parcel of land at Volume 30, Folio 58 of the Registrar's book of titles as has been alleged in the Affidavit of Mr. Charles Wells McDonald sworn to on the 22nd day of March 1972.

3. That at the trial of this action I shall refer to the said Certificate of Title for its full force and effect, to show that the said parcel of land was bought under the operation of the Registration of Titles Law on the 11th day of July, 1904, in the name of "Ann Brown" as proprietor.

30

4. That it is not correct to state, as has been alleged in the said Affidavit that an Order for possession of the said parcel was made against me on the 6th day of December 1962.

40

5. That the litigation between Fredericka Walker, and myself, referred to in the said Affidavit, is irrelevant to the present action, as in that litigation I was claiming as Plaintiff, to be entitled to the said parcel of land, which Rebecca Lyons, the mother of Fredericka Walker, had purported to sell me for the sum of £250.0.0. In the present action, my Defence will be based on adverse possession of the said parcel of land.

In the
Supreme Court

—
No. 4

Affidavit of
Benjamin
Patrick

24th April
1972

(continued)

6. That as a short summary of the said litigation might assist this Honourable Court, I set out the same hereunder.

7. That in July, 1942, I leased the said parcel of land from Rebecca Lyons for five years at a yearly rental of £6, payable in advance, with an option to purchase at any time upon giving six months' notice of intention to purchase or paying six months' rent in lieu of Notice.

8. That in July, 1944, I exercised my option to purchase, paid a half year's rent in lieu of Notice, and paid £125.0.0. as part-payment of the purchase price. 10

9. That thereafter, I remained on the said parcel of land as owner, and paid the balance of the purchase price in instalments of £100.0.0. in August, 1945, and £25.0.0. in January, 1946, this last instalment being paid to Fredericka Walker, to be handed to her mother.

10. That I received receipts for the said payments from Rebecca Lyons. 20

11. That after I had purchased the said parcel of land, I built a house on it, in which my wife and I reside.

12. That in 1951, my house was blown down in the hurricane of that year, and all my receipts showing the purchase of the said parcel of land, as well as other papers, were lost or destroyed.

13. That I informed Fredericka Walker that I had lost all my receipts and asked her to let me have my title. 30

14. That immediately after the destruction of my house, I proceeded to build a new and more substantial house on the said parcel of land, without the slightest objection from Fredericka Walker (Rebecca Lyons had died some time before) and my wife asked Fredericka Walker to let us have the title to the land. Fredericka Walker promised to look about the matter.

15. That apart from the receipts I had obtained from Rebecca Lyons, I had no other documents to prove my ownership of the said parcel of land. 40

16. That after my new house was completed in 1957, Fredericka Walker came to the house and asked for fees to help to obtain the title to the said parcel of land for me, and my wife paid her £12.0.0. She gave no receipts for this amount, saying it was for legal costs and was not hers.

In the
Supreme Court

—
No. 4

Affidavit of
Benjamin
Patrick

24th April
1972

(continued)

10

17. That in January, 1958, I received a letter from Mr. C.B.M. Lopez, who wrote as Solicitor for Fredericka Walker, stating that the land I had purchased from Rebecca Lyons would have to be "bought over".

20

18. That to the best of my knowledge, information and belief, Fredericka Walker, knew that her mother, Rebecca Lyons, had no power or authority to sell the said parcel of land to me, and that she (Fredericka Walker) was not a successor in title to Rebecca Lyons (whose name does not appear on the said Certificate of Title), and because Fredericka Walker could not make title to the land, and because she knew I had lost my said receipts, she instituted proceedings against me in the Resident Magistrate's Court at May Pen, in the parish of Clarendon, claiming recovery of possession from me, and alleging that I was a tenant of hers.

19. That I never at any time been a tenant of Fredericka Walker, and have never at any time paid her rent.

30

20. That at the hearing of the summons in the said proceedings on the 6th day of December, 1962, the 20th day of December, 1962, and the 10th February, 1963, Fredericka Walker, gave untruthful evidence and self-serving evidence that I had paid her rent in 1954, 1955 and up to 1957.

21. The issue that was tried in the said Resident Magistrate's Court was whether or not I had purchased the said parcel of land from Rebecca Lyons.

40

22. That the issue in the action that I filed subsequently (Suit No.E.11 of 1963) was the same as that in the Resident Magistrate's Court, with the additional grounds of (a) nullity of the Resident Magistrate's Court's proceedings, and (b) lack of jurisdiction of the Resident Magistrate's Court.

In the
Supreme Court

—
No. 4

Affidavit of
Benjamin
Patrick

24th April
1972
(continued)

23. That the Statement of claim in the said action was struck out on the Application of Fredericka Walker on the ground that the matter was already decided in the Resident Magistrate's Court, so that the merits of the case and the additional issue, were never considered by the Supreme Court.

24. That the Interlocutory Appeal (C.A.33 of 1963, and not 5 of 1967 as alleged in the said Affidavit) which was filed by me went off on technicality i.e., That the Appeal had been filed before leave had been granted by the Court of Appeal. Again there was no hearing on the merits.

10

25. That leave to appeal had in fact been granted by the very trial Judge who had ordered the Statement of claim to be struck out, the said Judge stating in granting leave that the matter was a fit and proper case for appeal. This Order of the trial Judge granting leave was held by the Court of Appeal to have been invalid.

20

26. That I have been in exclusive, undisturbed and unmolested possession of the said parcel of land from July, 1944 to the present time, paying rent to no one.

27. That the evidence of Fredericka Walker in the said Resident Magistrate's proceedings was that since 1957, I have been in possession of the said parcel of land, paying no rent to her.

28. That I have been advised by my legal representatives, and I verily believe that any legal right or remedy which was vested in the previous owner of the said parcel of land is now extinguished, and that I have a good Defence to the present action.

30

29. That I have been advised by my Legal representatives and verily believe that, IN THE ALTERNATIVE, I have a good claim at law and in equity in the present action.

30. That the value of the house which I have built on the said parcel of land is now over £6,000.00 and I am about to improve it by the addition of five rooms, bathrooms and a kitchen. The building materials for this purpose are

40

already on the spot, and the contractor has been engaged to do the work. I have also built a Cowshed on the land costing \$500.00, and a new toilet costing \$220.00.

In the
Supreme Court

No. 4

Affidavit of
Benjamin
Patrick

24th April
1972

(continued)

31. That the land has been planted and is now well fruited with permanent crops for the past 28 years, and its present market value is \$26,000.00.

10 Sworn to at Kingston in the parish)
on the 24th day of April, 1972, }
before me (after the same was }
carefully read over and explained }
to him, when he expressed as fully }?.....
understanding the same). }

?
.....
JUSTICE OF THE PEACE

20 FILED by WILLIAMS & WILLIAMS of No.64 East Street,
Kingston, Attorneys for and on behalf of the
Defendant herein, whose address for service is
that of his said Attorneys.

COPY RECEIVED
Silvera & Silvera
(Sgd) (?)
Time: 3.00 Date: 24/4/72

No. 5

No. 5

Order

Order

Suit No. C.L.371 of 1972

26th April
1972

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

30 BETWEEN BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED PLAINTIFF
AND MR. & MRS. BENJAMIN
PATRICK DEFENDANTS

IN CHAMBERS
The 26th day of April, 1972
Before Mr. Justice Parnell

In the
Supreme Court
—
No. 5
Order
26th April
1972
(continued)

UPON THE SUMMONS for an Order that the Defendants by themselves, their servants or agents and each and everyone of them BE RESTRAINED from erecting or causing or permitting to be erected on the said land any further buildings of any type whatsoever coming on for hearing this day AND UPON HEARING Mr. W.K. Chin See instructed by Mr. Thomas Oswald Ramsay of the firm of Silvera & Silvera and Mr. E.C.L. Parkinson of Queen's Counsel instructed by Mr. Michael Williams of the firm of Williams & Williams IT IS HEREBY ORDERED:-

10

1. That pursuant to Section 236 of Cap.177 that the question whether the ownership of the land claimed by the Plaintiff and the Defendants or as between the Plaintiff predecessor in title and the Defendants, be set down for hearing and in the meantime the hearing of this Summons or the

2. That the Defendants be restrained by themselves or their agents from carrying on any further building on the land until May 29th 1972 or an oral undertaking being given by Mr. W.K. Chin See, Attorney-at-Law for the Plaintiff to pay any loss or damage sustained by the Defendants if the Plaintiff should fail to prove the issue being reserved.

20

3. Costs of today to be costs in the cause.

BY THE COURT

(?) (Sgd.) E. A. Sinclair

Acting REGISTRAR.

30

FILED by Silvera & Silvera of Nos.42-44 East Street, Kingston, Attorneys-at-Law for and on behalf of the Plaintiff.

No. 6

Statement of Claim

Suit No. C.L. 371 of 1972

In the Supreme Court of Judicature of Jamaica

In Common Law

In the
Supreme Court

No. 6

Statement
of Claim

4th May 1972

BETWEEN BEVERLEY GARDENS DEVELOPMENT
 COMPANY LIMITED PLAINTIFF

A N D MR. & MRS. BENJAMIN
 PATRICK DEFENDANTS

- 10 1. The Plaintiff is a limited liability Company registered under the Companies Act of Jamaica and from the 12th day of August, 1969 is the proprietor of an estate in fee simple in lands comprised in Certificate of Title registered at Volume 30 Folio 58 of the Register Book of Titles now known as No.15 Sunnyside Avenue, May Pen in the Parish of Clarendon.
- 20 2. On or about the 10th day of January, 1963, the Plaintiff's predecessors in title obtained against the Defendant Benjamin Patrick in the Resident Magistrate's Court for the parish of Clarendon an Order for Recovery of Possession of the said Land referred to in paragraph 1 above but the Defendants have nevertheless wrongfully remained in possession thereof.
- 30 3. In or about the month of September, 1971, the Plaintiff placed on the said land a notice of its intention to commence construction of roads on the said land in furtherance of a sub-division.
- 4. By a letter dated 11th October, 1971, the Defendants through their Attorneys-at-Law wrote to Mr. Exdol Mignott a servant of the Plaintiff informing him that the Plaintiff had committed a trespass and warning him that a suit would be brought for further trespass on the land.
- 5. The Defendants now intend to construct or have commenced construction of a building on the said land.

AND THE PLAINTIFF CLAIMS:-

In the
Supreme Court

No. 6

Statement
of Claim

4th May 1972
(continued)

1. Possession of the said land;
2. Mesne profits at a rate of \$60.00 per month
3. An injunction to restrain the Defendants from constructing any building on the said land;
4. Further and/or alternatively, an Order that the Defendant do forthwith pull down, dismantle and demolish any building erected on the said land.

10

Dated the 4th day of May, 1972.

SETTLED

W. K. CHIN SEE

SILVERA & SILVERA

Per: (sgd) ??

Attorneys-at-Law for the Plaintiff.

COPY RECEIVED
WILLIAMS & WILLIAMS
PER: H. Douglas (?)
Date: 4/5/72
Time: 3.44 p.m.

20

FILED AND DELIVERED on the ? day of May, 1972
by Silvera & Silvera, of Nos.42-44 East Street,
Kingston, Attorneys-at-Law for and on behalf of
the Plaintiff.

No. 7

Defence and
Counterclaim

15th May
1972

No. 7

Defence and Counterclaim

Suit No. CL. 371 of 1972

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

30

BETWEEN BEVERLEY GARDENS DEVELOPMENT
CO. LTD. PLAINTIFF

A N D MR. & MRS. BENJAMIN DEFENDANTS
PATRICK

DEFENCEIn the
Supreme Court

No. 7

Defence and
Counterclaim

15th May

1972

(continued)

1. In reply to paragraph 1 of the Statement of Claim, the Defendants deny the right of the Plaintiff Company to be registered as the proprietor of an estate in fee simple in the land comprised in Certificate of Title registered at Volume 30 Folio 58 of the Register Book of Titles, now known as No.15 Sunnyside Avenue, May Pen, in the Parish of Clarendon.
- 10 2. The defendants are in possession of the said land, and have been in possession from July, 1944.
3. The right of the Plaintiff Company to the said land is barred and its title extinguished by virtue of Sections 3 and 30 of the Limitation of Actions Law, Chapter 222 of the Revised Edition of the Laws of Jamaica.
4. In reply to paragraph 2 of the Statement of Claim, the Defendants say that on the 10th day of February, 1963, one Fredericka Walker, who is not
20 a predecessor in title to the Plaintiff Company, wrongfully obtained in the Resident Magistrate's Court at May Pen in the Parish of Clarendon an order against the Defendant Benjamin Patrick for possession, which order was based on a Vesting Order that was a complete nullity and of no effect.
5. The Defendants admit, with reference to paragraphs 3 and 4 of the Statement of Claim, that
30 their legal adviser wrote a letter on their behalf to Mr. Exdol in the terms alleged.

COUNTERCLAIM

6. The Defendants repeat paragraphs 1 to 4 hereof, inclusive. The Defendants say that the Certificate of Title registered at Volume 30 Folio 58 of the Register Book of Titles should be rectified as they have acquired an indefensible title to the said land and should be registered as the proprietors of an estate in fee simple in the same.
- 40 7. In the Alternative, the Defendants say that in equity, and by virtue of Section 69 of the Registration of Titles Law, Chapter 340 of the Revised Edition of the Laws of Jamaica, they are

In the
Supreme Court

No. 7

Defence and
Counterclaim

15th May 1972
(continued)

entitled to compensation in the sum of \$26,700.00
for improvements to the said land.

And the Defendants counterclaim:

(1) Rectification of the Certificate of
Title registered at Volume 30 Folio 58
of the Register Book of Titles, by the
registration of the Defendants as pro-
prietors of an estate in fee simple in
the said land.

(2) IN THE ALTERNATIVE, compensation in the 10
sum of \$26,700.00 for improvement to
the said land.

(3) Further or other relief.

(4) Costs.

Dated the 15th day of May, 1972.

(sgd.) Eugene C.L. Parkinson

Settled: Eugene C.L. Parkinson, Q.C.

WILLIAMS & WILLIAMS

Per: (sgd.) ? Williams

TO: The abovenamed Plaintiff, c/o its Solicitors, 20
Messrs. Silvera & Silvera, 42-44 East Street,
Kingston.

FILED and DELIVERED the 18th day of May, 1972, by
WILLIAMS & WILLIAMS, Attorneys-at-Law of No.64 East
Street, Kingston, for the Defendants herein.

No. 8

Affidavit of
Trevor Weston

24th May 1972

No. 8

Affidavit of Trevor Weston

SUIT No. C.L. 371 of 1972

In the Supreme Court of Judicature of Jamaica
In Common Law

30

BETWEEN BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED PLAINTIFF

A N D MR. & MRS. BENJAMIN DEFENDANTS
PATRICK

I, TREVOR WESTON, being duly sworn make oath and say as follows:

In the
Supreme Court

No. 8

Affidavit of
Trevor Weston

24th May 1972
(continued)

1. That I reside at 3 Michigan Close in the parish of Saint Andrew - my postal address is Kingston 8 and I am a Director of Beverley Gardens Development Co. Ltd.

2. That I have read the affidavit of defendant Benjamin Patrick dated the 24th day of April, 1972.

10 3. That on the 11th day of July, 1904 the land the subject matter of this action was registered at Volume 30 Folio 58 of the Register Book of Titles in the name of Ann Brown the grandmother of Frederica Walker.

20 4. That on 1st December, 1960 an order was made by the Resident Magistrate for the parish of Clarendon in Equity Suit No. E897 of 1960 vesting the said land in Frederica Goode, the daughter of the said Ann Brown and such order of the Court was endorsed on the Certificate of Title, the 12th day of December 1960 and numbered miscellaneous No. 21656.

5. That in April, 1946 Frederica Walker became the agent for Frederica Goode who had been residing in the U.S.A. since 1908, in respect of the said land of which one of the Defendants, Benjamin Patrick, became a tenant in 1942.

30 6. That in 1962 Frederica Walker laid an information No.4479/62 in the Resident Magistrate's Court for the Parish of Clarendon claiming recovery of possession of the said land from the said Benjamin Patrick.

7. That after a trial on the 6th and 20th December, 1962, the learned Resident Magistrate found that the evidence of the Defendant Benjamin Patrick was "a mere fictitious pretense of title" and on the 10th day of February, 1963 ordered Warrant of Possession to issue.

40 8. That the Defendant subsequently issued a Writ of Summons against Frederica Walker in Suit No.E11 of 1963 claiming inter alia a declaration that he was entitled in fee simple to the said land and a declaration that Frederica Walker had no right, title, estate or interest in the said land.

In the
Supreme Court

No. 8

Affidavit of
Trevor Weston
24th May 1972
(continued)

9. That a summons taken out by Frederica Walker asking for an order that the Statement of Claim in the Suit No. E11 of 1965 be struck out was heard before Mr. Justice Fox.

10. That on the 29th day of October, 1961 Mr. Justice Fox delivered judgment in favour of Frederica Walker and I exhibit herewith marked "A" a certified copy of the written judgment marked Exhibit.

11. That I also exhibit marked "B" a certified copy of the affidavit of Frederica Walker exhibiting the notes of evidence taken by the Resident Magistrate for Clarendon on the trial of information 4479/62 aforementioned which formed a part of the evidence in the Suit No. E11 of 1963.

10

12. That Frederica Goode died on the 5th day of April, 1967 and I exhibit herewith marked "C" certified copy of the Letters of Administration with Will annexed No. P 582 of 1968 dated 10th December, 1968 which was granted by this Honourable Court in which Frederica Josephs was constituted as her Executrix.

20

13. That on 12th day of August, 1969 Frederica Josephs was entered on the Certificate of Title as the registered proprietor of the said land by Transmission Application No. 5549.

14. On the said 12th day of August, 1969 Beverley Gardens Development Company Ltd., was registered as the proprietor in fee simple of the said land by Transfer No. 253332 and I exhibit hereto marked "D" a copy of this Certificate of Title entered on the Register Book of Titles. That at the hearing of this issue Certificate of Title will be produced for inspection by the Court.

30

15. That my Company wishes to subdivide the said land and the building which the Defendants intend to construct would be of no use to the Company.

SWORN to by the said TREVOR WESTON)
at 17 Surbiton Road in the parish) (sgd.)
of St. Andrew this th day of MAY) Trevor Weston
1972 before me:)

40

(sgd.) ?
JUSTICE OF THE PEACE

COPY RECEIVED
WILLIAMS & WILLIAMS
PER: (sgd.) O. Thomas
Date: 24/5/72
Time: 1.05

In the
Supreme Court
No. 8
Affidavit of
Trevor Weston
24th May 1972
(continued)

Filed by Silvera & Silvera of Nos.42-44 East Street,
Kingston - Attorneys-at-Law for and on behalf of
the abovenamed Plaintiff.

"A"

10 This is the Judgement mentioned and referred to in
the Affidavit of Trevor Weston paragraph 10, dated
the 24th day of May, 1972 in the presence of:

Exhibit A of
the Affidavit
of Trevor
Weston

(Signed) ??

(Signed) Trevor Weston
TREVOR WESTON

Justice of the Peace for
St. Andrew

(Two Supreme Ct.Franks)

"A"

Officially
Stamped \$1.50

CERTIFIED COPY

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

20 IN HIGH COURT OF JUSTICE

IN EQUITY

Suit No. E 11 of 1963

BETWEEN BENJAMIN PATRICK PLAINTIFF
AND FREDERICKA WALKER DEFENDANT

J U D G M E N T

30 In this Summons the Defendant asks for an
Order that the Statement of Claim be struck out on
the ground that the Pleading disclosed no reason-
able cause of action, was obviously frivolous and
vexatious and sought to raise anew a question which
had already been decided between the same parties
by a Court of competent Jurisdiction.

In the
Supreme Court

No. 8

Exhibit A to
Affidavit of
Trevor Weston

24th May 1972
(continued)

The Plaintiff's claim as endorsed on the
Writ of Summons filed herein on 29th January,
1963, was for:-

1. A Declaration that the Plaintiff is entitled in fee simple to the parcel of land situate at Sunnyside, May Pen in the Parish of Clarendon, consisting of $5\frac{1}{4}$ acres, now in the possession of the Plaintiff;
2. A Declaration that the Defendant has no right, title, estate or interest in the said land; 10
3. An Injunction restraining the Defendant, her servants and agents, from taking possession of the said land, or interfering with the possession of the Plaintiff in any way;
4. An Order setting aside the order of the Resident Magistrate's Court for the Parish of Clarendon on the 10th day of October, 1962 that the Defendant is entitled to possession of the said land and also the order of the said Court on the 10th day of January, 1963, for a Warrant of Possession to issue against the Plaintiff; 20
5. Damages
6. Costs
7. Further and/or other relief.

The Plaintiff repeated these claims in his
Statement of Claim and also alleged:-

1. The Plaintiff was and is possessed of a certain parcel of land situate at Sunnyside, May Pen, in the Parish of Clarendon, consisting of $5\frac{1}{4}$ acres, purchased by the Plaintiff in July, 1944 from the late Rebecca Lyons, mother of the Defendant herein, for the sum of £250.0.0. 30
2. In July, 1942, the Plaintiff leased the said land from the said Rebecca Lyons for five years at a yearly rental of £6, payable in advance, with an option to purchase at any time, upon giving six months notice of 40

intention to purchase or paying six months rent in lieu of notice;

3. In July, 1944, the Plaintiff duly exercised his option to purchase, paid a half year's rent of £3. in lieu of notice and paid £125, as part-payment of the purchase price;
4. In July, 1945, the Plaintiff made a further payment of £100. to the said Rebecca Lyons on account of the purchase price;
- 10 5. In January, 1946, the Plaintiff paid the balance of £25. to complete payment of the purchase price. The said amount was received by the Defendant herein, in the temporary absence of the said Rebecca Lyons, and the Plaintiff subsequently received a receipt for the said amount of £25. from the said Rebecca Lyons;
- 20 6. There was no formal conveyance of the said parcel of land by the said Rebecca Lyons to the Plaintiff, but the Plaintiff had his receipts for the said amounts paid to the said Rebecca Lyons, viz. £125, £100 and £25, respectively, which receipts he kept in his possession until August, 1951, when he lost them in the destruction of his house in the hurricane of that year;
- 30 7. The Plaintiff has for the period from July, 1944, to the present been in exclusive, uninterrupted, and undisturbed possession for the said parcel of land as owner, and Plaintiff claims the right to the fee simple absolute in possession thereof;
- 40 8. In 1961, one Fredericka Goode sued the Plaintiff for possession for the said parcel of land and the case was tried behind the Plaintiff's back and judgment given against him on the 10th October, 1962. The Plaintiff knew of no one called Fredericka Goode, and has never had any transaction with such a person. The said suit was brought at the instance of the Defendant herein, who gave evidence that he was the agent of Fredericka Goode;
9. On the 10th day of January, 1963, the

In the
Supreme Court

No. 8

Exhibit "A" to
Affidavit of
Trevor Weston

24th May 1972
(continued)

In the
 Supreme Court
 No. 8
 Exhibit "A" to
 Affidavit of
 Trevor Weston
 24th May 1972
 (continued)

Defendant obtained an Order in the Resident Magistrate's Court at May Pen in the parish of Clarendon for a warrant of possession to issue against the Plaintiff not earlier than 21 days and not later than 28 days from the said date.

On 30th January 1963, the Plaintiff filed a motion applying for an Interlocutory Injunction to restrain the Defendant from taking possession of the land, the subject of the action. This motion was dismissed on 1st February, 1963, by Shelley, J. on the ground as I have been assured by both parties, that the affidavit in support thereof did not disclose sufficient facts. On 2nd February, 1963, the Plaintiff filed a fresh motion for an Interlocutory Injunction and this was fixed for hearing before me on 13th February, 1963. 10

The Defendant entered appearance to the Writ on 11th February 1963, and took out this Summons on the following day. This Summons and the Motion came before me in Chambers on 13th February 1963. I adjourned both matters for hearing in Open Court, and ruled that first I would hear and determine the Summons to strike out. Thereafter I listened to submissions by Mr. Alberga and Mr. Norman Hill for the Defendant, and by Mr. Parkinson for the Plaintiff, and I adjourned the matter to enable the parties to file further affidavits if they so desired. 20 30

The Summons came before me again on 26th September, 1963, when further affidavits were referred to, and additional submissions were made to me by Mr. Hill and Mr. Parkinson. I reserved my decision and promised the parties to deliver the same in writing at a later date and this I now proceed to do.

As I understand the matter, this Summons is essentially an appeal to the inherent jurisdiction of the Court to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process, and to enter the proper judgment which is a natural consequence of such a stay of proceedings. In the course of their submissions, both Mr. Alberga and Mr. Hill made this clear. Mr. Parkinson, by the active engagement which he took in the investigation of all the 40

relevant facts, by his acquiescence in the use of affidavits as to these facts by the Defendant, and by the use which he himself made of such affidavits cannot of course be heard to say otherwise.

In the
Supreme Court

No. 8
Exhibit "A" to
Affidavit of
Trevor Weston

The facts may be summarised as follows:-

24th May 1972
(continued)

- 10 (a) The land which is the subject matter of the action was registered on 11th July, 1904, at Vol.30, Folio 58 under the Registration of Titles Law in the name of Ann Brown, the grandmother of the Defendant;
- (b) Fredericka Goode, the daughter of Ann Brown became entitled to the ownership of the land many years before the Plaintiff came to be concerned in any way therewith;
- 20 (c) Fredericka Goode has been living in the United States of America since 1908. Fredericka Lyons (the sister of Fredericka Goode and the mother of the Defendant) acted as the Attorney and the Agent of Fredericka Goode in respect of the land, up to the date of Fredericka Lyons' death on 11th April 1946. After her death, the Defendant acted as such attorney and agent;
- (d) The Plaintiff became a tenant of the land, according to him, in 1942, according to the Defendant in 1944. This tenancy agreement was made by Fredericka Lyons;
- 30 (e) On 1st December, 1960, an order was made by the Resident Magistrate's Court for the parish of Clarendon in Equity Suit No.E 897 of 1960, vesting the land in Fredericka Goode. The Plaintiff was served with copies of the Summons and Affidavits filed in the Resident Magistrate's Court in connection with the application for the Order, and was represented by Counsel when the matter first came before the Court. The Defendant made no effective opposition to this application.
- 40 (f) In 1962, the Defendant laid an information in the Resident Magistrate's Court, Clarendon, claiming recovery of possession of the land from the Plaintiff. This information was heard by the Resident Magistrate for Clarendon in December, 1962, when the Plaintiff was

In the
Supreme Court
No. 8
Exhibit "A" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

represented by Counsel and the Defendant by her Solicitor. The Judgment of the Court, ordering the issue of a warrant of possession, was delivered on 10th February, 1963;

- (g) The notes of evidence of this trial by the Resident Magistrate were exhibited during the course of Counsel's submissions to me. From these notes, it is clear that a most determined attempt was made in that Court to establish the allegations stated in paragraphs 1 - 7 of the Plaintiff's Statement of Claim. For this purpose the Plaintiff gave evidence, called a witness, and his Counsel made submissions. The Defendant and her Solicitor also gave evidence, and in accepting this evidence, the Court stated that it regarded that of the Plaintiff as being a more fictitious pretence of title. 10

Mr. Parkinson submitted that there were several matters of fact fit to be investigated - which he detailed as follows:- 20

- (i) Whether the Plaintiff has been in exclusive, undisturbed possession of the land as owner from July, 1944 to the present time, and has thereby obtained a prescribed title to the land;
- (ii) Whether the Plaintiff paid £250. to Rebecca Lyons, in instalments as alleged;
- (iii) Whether Plaintiff has paid rent after July, 1944; 30
- (iv) Whether there was illegality or irregularity in obtaining the Vesting Order;

It is clear that the first three matters of fact were investigated in the Resident Magistrate's Court, and that the Plaintiff's present action in this Court, in an attempt to retry questions of fact which have already been conclusively decided against him by a Court of competent jurisdiction. Nevertheless, Mr. Parkinson submitted further that the plea of Res Judicata did not apply in an action for recovery of possession of land. However acceptable this proposition may be in appropriate circumstances, where the essential issue decided in the first action was the question 40

of the ownership of the land (which is the situation here), it seems elementary that the plea would apply in a second action which sought to canvass this question again on substantially the same evidence as that in the first action.

In the
Supreme Court
No. 8
Exhibit "A" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

10 In connection with the fourth matter of fact detailed by Mr. Parkinson, it is important to note firstly, that the Plaintiff did not oppose the making of the Vesting Order and secondly that in the trial of the Recovery of Possession case in 1962, he did not challenge this Order on the ground that it was obtained by Fraud or any irregularity. In the light of these two circumstances, and of the fact that the affidavits filed in this Summons contain no evidence of such fraud or irregularity, there does not seem to be any merit in this submission.

20 In my view the case of Reichel v. McGrath, 14 App. Cas 665 is a directly relevant authority for the granting of the Order asked for by the Summons. I therefore order accordingly, and I order further that judgment be entered for the Defendant with costs to be taxed or agreed.

Dated this 29th day of October 1963.

Signed: Louis Fox
JUDGE (Acting)

Examined:

Initialled (?)
Initialled (?)

30

"B"

This is certified copy of Affidavit of Frederica Walker with Exhibit annexed, mentioned and referred to in the Affidavit of Trevor Weston, paragraph 11, dated the 24th day of May 1972 in the presence of:

Exhibit "B" to
Affidavit of
Trevor Weston

Signed: TREVOR WESTON
TREVOR WESTON

Signed: (?)
JUSTICE OF THE PEACE
for St. Andrew

In the
Supreme Court
No. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

"B"

(Supreme Court) also (2/6 stamps & \$1.25 stamps)
(Official Franks)

CERTIFIED COPY

AFFIDAVIT OF FREDERICA WALKER - SUIT No.E.11 of
1963

In the Supreme Court of Judicature of Jamaica

In the High Court of Justice

IN EQUITY

BETWEEN BENJAMIN PATRICK PLAINTIFF
AND FREDERICA WALKER DEFENDANT

10

I FREDERICA WALKER being duly sworn make
oath:-

1. That my true place of abode is at 11 Cheriton
Road, Kingston 2, I am the wife of Lafeta Walker
of the same address and I am the Defendant in the
above action.

2. That I was born Frederica Lyons, I am the
daughter of Rebecca Lyons and the niece of her
sister Mrs. Frederica Goode is the registered
proprietor of the lands comprised in certificate
of Title registered at Volume 30 Folio 58 of the
Registration of Titles.

20

3. That I laid an Information in the Resident
Magistrate's Court for the parish of Clarendon
which is numbered 447 of 1962 against Benjamin
Patrick the Plaintiff in this action claiming
recovery of the possession of the land comprised
in the above Certificate of Title on behalf of
my Aunt.

4. That I exhibit herewith marked with the
letter "A" a copy of the Notes of Evidence taken
by the Learned Resident Magistrate on that
Information.

30

5. That the Learned Resident Magistrate ordered
a Warrant of possession to issue not earlier than
21 days after he had returned a verdict in my
favour on the said Information.

6. That I have seen the Statement of Claim filed by the Plaintiff in this suit. That the Pleadings as to facts contained in the Statement of Claim were made by the Plaintiff in his defence of the Information above-mentioned as appears from the Notes of Evidence and exhibited herewith.

Signed: Frederica Walker

SWORN to at Kingston in the parish of Kingston this 11th day of March 1963.

10

Signed: J. W. Russell
JUSTICE OF THE PEACE
St. Andrew

THIS AFFIDAVIT is filed by A.E. Brandon & Co. of 45 Duke Street, Kingston, Solicitors for the Defendant.

"A"

20

This is the copy Notes of Evidence mentioned and referred to as marked with the letter "A" in the Affidavit of Frederica Walker sworn the 11th day of March 1963 before me:

(Signed: Frederica Walker Signed: J. ?. Russell
Justice of the Peace
St. Andrew

COPY

May Pen
6th December, 1962

Information No. 4479/62

Frederica Walker v Benjamin Patrick

Recovery of Tenement

30

Mr. Lopez for Complainant.
Mr. Eccleston for Defendant.

FREDERICA WALKER (sworn):

I live at 11 Cheriton Road, Kingston 2, Steno-
grapher. My maiden name was Frederica Lyons. I am
niece of Frederica Goode. I am her agent in Jamaica.

In the
Supreme Court
No. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

In the
Supreme Court
No. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

I hold Power of Attorney from her. This is it - Exhibit 1. Mrs. Goode owns 15 Sunnyside Avenue, May Pen, in Clarendon. Land registered at Vol.30 Fol.58 in Register Book of Titles. This is duplicate Certificate of Title Exhibit 2. Defendant is tenant on the land. My Aunt has lived in New York, U.S.A. ever since I was born. Before I became my aunt's attorney my mother, Mrs. Rebecca Lyons was my aunt's agent. I know there was agreement between my mother and Defendant about the lands. These 2 documents are the agreement - Exhibit 3. Defendant has been paying me rent in respect of land. Rental is £6. per year. Defendant last paid rent in April 1960. Defendant also paid me rent in 1952 and 1955. I have never seen Defendant write. I got these letters through post office at May Pen. They purport to come from Defendant. One letter dated 1961 purports to come from Mrs. A. Patrick. She is wife of Defendant. Defendant has paid me moneys for rent beside sending monies through post. (Mr. Lopez tenders the 3 letters in evidence). Mr. Eccleston objects - there is no proof of handwriting of defendant). 10 20

(Witness has received letters through the post purporting to be from Defendant).

Court rules letters inadmissible at this stage as no nexus between Defendant and letters).

When Defendant pays me money I give him a receipt from a receipt book and I keep counterfoil of receipt given. This is book from which I gave Defendant receipts - Exhibit 4. First counterfoil is dated 18.5.54 and is for £12. for 2 years rent. Second counterfoil is for £6. for rent from February '54 to January '55. The third is for £3. from February '55 to July '55. Defendant now owes rent from 1957 up to the present. In April 1960 I got from Defendant £12. That was for rent due up to 1957. Since April 1960 Defendant has paid me no more monies. I gave my Solicitors instructions re termination of Defendant's tenancy. This is copy of notice my Solicitors sent. Defendant is still on the lands. I am asking that Defendant deliver possession to me as my aunt's agent. 30 40

XXD:-In the
Supreme CourtNo. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

10 I don't own lands. I am agent of landlord.
I don't remember year I started keeping Exhibit 4.
There are maybe one or two other persons I have
given receipts from Exhibit 4. I kept book in a
drawer of wardrobe at my home. I have always had
control of it. It has never left my possession.
I did not give Defendant receipt for payments made
in 1960 because he wouldn't pay rent as he should
and I had written to him suggesting that rental
would be increased to £12. per year and that I
would have to get word from my Solicitors. I
wrote my Solicitors. I got word from them. I
still haven't given defendant a receipt. In 1944
I was living in Spanish Town. My mother was living
in May Pen. In 1944 I was 18. I was then going to
school. I know of no transaction between Defendant
and my mother for sale of land. My mother leased
lands to Defendant in 1944. I don't know that
20 Defendant paid my mother £125 as part payment for
lands in July 1944. I don't know of payment of
£100 to my mother by Defendant in 1945, July. In
January 1946 I never saw Defendant at my mother's
home. Defendant didn't hand me balance of £25 to
hand to my mother. Defendant has paid me rent
since 1945. Defendant erected a house on the land.
1951 hurricane blew away that house. Defendant
built another house. He still lives in that house
and still occupies land. Defendant has paid me
30 rent.

To Court: My mother died in 1946.CECIL LOPEZ (sworn):-

Solicitor of Supreme Court in Jamaica. I am
partner in firm of A.E. Brandon & Co., at 45 Duke
Street, Kingston, Solicitors for Mrs. Frederica
V. Goode of New York, U.S.A. whose agent in Jamaica
is Complainant. In January, 1962, I had instruc-
tions from Mrs. Goode through her agent to give
Defendant notice to quit land at May Pen. I
40 prepared typewritten notice. (Mr. Eccleston
objects to all above evidence, witness must prove
his instructions explicitly).
Court rules evidence admissible.

(Defendant produces original notice). This is
original notice. I sent Exhibit 5. My firm has

In the
Supreme Court

No. 8
Exhibit "B" to
Affidavit of
Trevor Weston

24th May 1972
(continued)

acted for Mrs. Goode since 1955. On 21st October 1955 my firm addressed a letter to Mr. Benjamin Patrick, Sunnyside, May Pen P.O. In January, 1956, we received a letter from Delapenha & Iver who were then acting for Defendant. This is letter from Delapenha & Iver (Mr. Eccleston objects).

Delapenha & Iver don't appear for Defendant.

Court rules letter admissible.

Letter - Exhibit 6. In 1960 acting on behalf of Mrs. Goode I made application to R.M. Court for Clarendon for vesting order to vest the lands in question in Mrs. Goode. I personally appeared at May Pen on first day summons came on for hearing. Defendant also attended and was then represented by Mr. Pershadsingh of Counsel. In presence of Defendant I showed Mr. Pershadsingh Exhibit 3.

10

XXD:-

I don't remember exact date Vesting Order first came before Court. It might have been in November 1960. I know the handwriting of Mr. H.J. Shelley who was then R.M. for Clarendon. (Witness looks at document). In Mr. Shelley's handwriting is 3.11.60., Mr. R.S. Pershadsingh appears for Benjamin Patrick. At the request of Mr. Pershadsingh adj. to 1.12.60. Then it continues 1.12.60. Benjamin Patrick does not appear. Initialled H.S. Nothing on the record that Defendant personally attended. I don't come to May Pen often. I had no other business in May Pen on 3.11.60. I spoke to Defendant in presence of Mr. Pershadsingh. I have been Solicitor for 20 years 2 days ago. I don't know if Defendant's wife came to Court on 3.11.60. I had instructions to serve notice. The Complainant gave me instructions to serve notice. I got instructions from Mrs. Goode. On 11.1.62. This is letter - Exhibit 7. Firm didn't get retainer along with Ex.7. I appreciate that Defendant is tenant of Mrs. Goode's land from 1944. Defendant was first under long lease for 5 years. Defendant has held over as tenant from year to year since expiration of the lease. I first learned that Defendant was claiming he purchased lands from Mrs. Lyons on the return day of this summons. I didn't hear that on 3.11.60. On 3.11.60 I understood from talk between

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Defendant and Mr. Pershadsingh that Defendant was claiming land by adverse possession. The return day of this summons was on 15.11.62. Mr. Wynter of Counsel was then appearing for Defendant. It surprised me that Defendant is claiming that he purchased the lands. Except for general power in paragraph 9 of Exhibit 1, there is nothing in Exhibit 1 about giving notice. Paragraph 2 of Exhibit 1 gives Complainant power to bring proceedings. (Defendant produced original notice to quit).

In the
Supreme Court
No. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

CASE

BENJAMIN PATRICK (sworn):

Cultivator living at 15 Sunnyside in Clarendon. I leased 5 acres of land from Rebecca Lyons from August 1942. I was supposed to pay £6 per year rent. 1942 I paid Lyons £6. rent. This is receipt I got. Receipt Exhibit 8. In 1943 I paid Mrs. Lyons £6. In 1944 I paid Mrs. Lyons £3. She gave me land under lease and sale. I agreed to buy the land in 1944. Mrs. Lyons was selling me land at £50. per acre. £250. for 5 acres. I paid Mrs. Lyons £125. on 8.6.44. She gave me receipt. I paid in August 1945 £100. to Mrs. Lyons. I got a receipt. Balance of £25 left. I went to Mrs. Lyons' home in January 1946 to pay balance. I saw Complainant who asked me what I wanted. I told her I would like to see Mrs. Lyons as I had brought some money to pay her. Complainant told me she was Mrs. Lyons' daughter. I paid Complainant the £25. and she gave me a small piece of receipt. I got a receipt from Mrs. Lyons for the £25. Mrs. Lyons died. I built house from the first I got it. I plant coconuts, orange and other fruit trees. From I paid last £25. I never paid any rent. I never posted rent to Complainant. I never paid her any rent for lands. I never gave Complainant any monies. I have been in possession of lands cultivating it. In 1960 I got a registered letter from post office. I went to Court House and got Mr. Pershadsingh. That was in October 1960. When I got notice to leave in this case was first I saw Mr. Lopez. Mr. Lopez and I had no talking about the land. I have always maintained that land is land I bought. I got notice to quit the land and then a summons. I remember 1951 hurricane. My house and clothes and everything was blown away. On account of that I can't produce receipts. I have never paid any rent since I bought lands.

In the
Supreme Court

No. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

XXD:

I had all receipts together when hurricane blew them away. I don't know how Exhibit 8 escaped being blown away. The agreement between Mrs. Lyons and I was reduced to writing. I didn't sign agreement as I can't read or write. I don't know Felix Haughton. I have never written to A.E. Brandon & Co. I have never consulted Messrs. Delapenha & Iver about these lands. I can't write. My wife can write. If I saw something that my wife wrote I would recognize it. (Witness shown a letter). 10

Ques. Can you say if it is your wife's handwriting?

Ans. I can't recognise the handwriting.

In 1960 when I went to Court I never saw Exhibit 3. I never acknowledged to Mr. Pershadsingh that signature "Benjamin Patrick" on Exhibit 3 was mine. Mr. Pershadsingh didn't tell me that I couldn't fight the case because I had acknowledged signature on lease. I have never got any letter from A.E. Brandon & Co. about the lands. No one ever told me that I shouldn't build the house on the land. I didn't write letter to Brandon & Bolton in 1955 enquiring the price of these lands. I never got letter from Brandon & Bolton telling me cost of land and then I consulted Delapenha & Iver. I didn't write to Brandon & Bolton on 5.2.56 asking for personal appointment. Never got anyone to write letters to Brandon & Bolton for me. This was first notice I got to quit land. I didn't get one in 1956. I don't know if Brandon & Bolton wrote to Delapenha & Iver about house I was building on the land. I didn't write letter and send money £12. to Complainant on 14.5.52. On 19.3.55 I didn't send money £6. and letter to Complainant. I have not been paying rent all along and up to 1957. The land belonged to Rebecca Lyons. I didn't know it belonged to Mrs. Goode, Mrs. Lyons' sister. Complainant never told me that land belonged to her aunt. The first receipt I got was blown away. Exhibit 8 is not first receipt I got. I got a lease paper in 1942. Not 1944. I did pay Mrs. Lyons and Complainant money for sale of land. 20 30 40

Adjourned to 20.12.62.

IVAN LAWRENCE (sworn):

In the
Supreme Court

No. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

Farmer living at Rock River in Clarendon. I know Defendant. I know one Mrs. Lyons who used to live at Chapleton Road. In 1944 I went with Defendant to Mrs. Lyons' home. It was July. Defendant paid Mrs. Lyons £125. Mrs. Lyons gave Defendant a receipt. In 1945, July, Defendant and I went to Mrs. Lyons' home. Defendant paid her £100 and got receipt. Defendant paying money for piece of land at Sunnyside.

10

XXD:

I know Defendant from 1943. Defendant used to live at Reid's home at Hazard in May Pen. Defendant moved to Sunnyside the same year I knew him. Defendant paid first money in July, 1944. I can't read or write. I can only sign my name. I can't say how long after Defendant moved to Sunnyside I went with him to Mrs. Lyons. First payment was in paper or silver. Don't remember exactly but I know it was £125. The £100. was in paper money. I know '51 hurricane blew away Defendant's house. Paper that Defendant got from Mrs. Lyons was a blue paper like what is bought at post office. Paper had on stamped receipt. Defendant touched the pen. When Mrs. Lyons wrote the paper I believe the Defendant signed his name. I never heard Defendant say that he had place on lease. Defendant and I are not friends. When Defendant asked me to go to Mrs. Lyons I was living at Hazard and Defendant at Sunnyside. I went back with Defendant in July 1945. Defendant got a blue receipt, a post office paper on second occasion. I don't know that Defendant had the lands on lease. I am quite sure it was in July 1944. Receipt Defendant got didn't look like Exhibit 8. Defendant signed his name on the second occasion. I don't remember if Defendant touched pen or signed his name as it was such a long time ago. I am not telling parcel of lies. I went only twice to Mrs. Lyons. It was only the two of us who went to Mrs. Lyons. Hazard about 1 mile from May Pen Square. I call Hazard May Pen. Defendant didn't pay £3 in August '44 for lease.

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In the
Supreme Court

No. 8
Exhibit "B" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

CASE

Mr. Eccleston:- Bailey v Hookway (1945) L.J.114 at 318. Court has to decide whether notice properly served and whether Solicitor properly instructed to serve notice. Singleton J at 320 - So long as there are conflicting rights as regards lands jurisdiction of Justices ousted as JJ not required to determine the rights of the parties. Mahfood v Hanna 5 J.L.R. 99 at 102 and 3.

2. In any event if Defendant a tenant of Mrs. R. Lyons he was never attorned tenant to Complainant. 10

3. Solicitors have served notice which they say they have instructions to do but action brought by Complainant. Action is misconceived under this statute, but should have been in civil court.

Mr. Lopez:- Letter from registered proprietor of lands in evidence instructing Solicitors to give notice. Complaint is made by Complainant who is attorney and agent of registered owner. 20

If it is open to tenant to come and say he has bought lands that alone cannot oust jurisdiction after vesting order made. Defendant paid rent to Complainant. Defendant cannot deny notice of proceedings by vesting order as he was represented by Counsel.

Lease in evidence in two parts. Not open now to Defendant to deny landlord's title as lease is dated 1.8.44. Mahfood v Hanna does not apply to facts of this case. 30

Asks for possession.

Postponed to 10.2.63 for Judgment.

On 10.2.63 Court rules Ex.6 wrongly admitted and expunged. Court accepts evidence of Complainant and witnesses as truthful and regards that of Defendant as being a mere fictitious pretense of title.

Warrant of Possession to issue not earlier than 21 days and not later than 28 days.

Defendant ordered to pay costs £5.5/- to be recovered by distress.

In default, 30 days imprisonment.

Examined:

Intd. (?)

Intd. (?)

In the Supreme Court Exhibit "B" to Affidavit of Trevor Weston 24th May 1972 (continued)

"C"

10

This is the certified copy of the Letters of Administration with Will annexed, mentioned and referred to in the affidavit of Trevor Weston, paragraph 12, dated the 24th day of May 1972 in the presence of:-

Exhibit "C" to Affidavit of Trevor Weston

Signed: TREVOR WESTON
TREVOR WESTON

Signed: (?)
JUSTICE OF THE PEACE
for St. Andrew

(5 Official Supreme Court Franks)

"C" (also Stamps for £2 & \$1.25)

CERTIFIED COPY

LETTERS OF ADMINISTRATION WITH WILL ANNEXED

20

P. No. 582 of 1968

In the Supreme Court of Judicature of Jamaica

IN PROBATE AND ADMINISTRATION

IN THE ESTATE of
FREDERICA VICTORIA GOODE late of Sag Harbor in the County of Suffolk and State of New York in the United States of America, Widow, deceased

30

BE IT KNOWN that the abovenamed deceased who died on or about the 5th day of April One Thousand Nine Hundred and Sixty-Seven in the State of New York aforesaid made and duly executed her last Will and Testament and did therein name FREDERICA JOSEPH to be executrix thereof. The said Will was duly proved and is of record in the Surrogate's Court of the County of Suffolk in the State of New York

In the
Supreme Court
No. 8
Exhibit "C" to
Affidavit of
Trevor Weston
24th May 1972
(continued)

in the United States of America and Letters of Administration were granted by the said Court to FREDERICA JOSEPH aforesaid.

BE IT FURTHER KNOWN THAT on the 6th day of December, One Thousand Nine Hundred and Sixty-Eight Letters of Administration with the said Will annexed (a true copy whereof is hereunto annexed) of all the estate in Jamaica which by Law devolves on and vests in the personal representative of the said deceased were granted by the said Court to FREDERICA JOSEPH of Sat Harbor in the County of Suffolk in the State of New York in the United States of America and now temporarily residing at Lot 13, Forest Hills, in the Parish of Saint Andrew, Housewife, one of the beneficiaries named in the said Will, she having been previously sworn well and faithfully to administer the same by paying the just debts of the deceased and the legacies contained in her Will and to distribute the residue of her estate according to Law and to exhibit a true and perfect Inventory of all and singular the said estate and effects of the deceased in Jamaica and to render just and true account thereof whenever required by Law so to do.

10

20

Signed: B. (?) Monteith
AG. REGISTRAR

Exd.
(Intd) ??

FILED by A.E. BRANDON & CO. of 45 Duke Street,
Kingston, Solicitors for the Administratrix.

30

Examined: Intd. (?)

Form 522 Will - Short Form
TUTBLANX Registered U S PAT Office
Tuttle Law Print Publishers,
Rutland, VI

LAST WILL AND TESTAMENT

I FREDERICA V. GOODE of the Village of Sag Harbor in the County of Suffolk and State of New York being of sound mind and memory, do make, publish and declare this my last WILL AND TESTAMENT, in manner following, that is to say:

40

FIRST, I direct that all of my just debts and funeral expenses be paid as soon after my death as may be practicable.

In the Supreme Court

SECOND, I give, devise and bequeath to my daughter, FREDERICA JOSEPH, my real property situate at May Pen, in the Parish of Clarendon, Jamaica, British West Indies.

No. 8
Exhibit "C" to Affidavit of Trevor Weston
24th May 1972
(continued)

10 THIRD, All the rest, residue and remainder of my property, both real and personal and wheresoever situate, of which I shall die seised or possessed, or to which I shall be entitled, I give, devise and bequeath to my daughter, FREDERICA JOSEPH and my grandson, RICHARD A. MILLER, in equal shares, per stirpes.

20 LASTLY, I hereby appoint FREDERICA JOSEPH executrix of this, my last Will and Testament; hereby revoking all former Wills by me made. I direct that she shall not be required to furnish any bond or other security for the faithful performance of her duties in any jurisdiction.

IN WITNESS WHEREOF, I have hereunto subscribed my name the 21st day of March in the year Nineteen Hundred and Sixty-Seven.

FREDERICA V. GOODE

Intd. L.S.

30 We, whose names are hereto subscribed, DO CERTIFY that on the 21st day of March 1967 the testatrix above named, subscribed her name to this instrument in our presence and in the presence of each of us, and at the same time, in our presence and hearing declared the same to be her last WILL AND TESTAMENT, and requested us, and each of us, to sign our names thereto as witnesses to the execution thereof, which we hereby do in the presence of the testatrix and of each other, on the day of the date of the said Will and write opposite our names our respective places of residence.

*THOMASINE B. SMITH residing at RICHARD DR., SAG HARBOR, N.Y.

40 *GERALD JOHNSON residing at RICHARD DR., SAG HARBOR HARBOR, N.Y.

*Two Witnesses required.

W I L L
OF
FREDERICA V. GOODE

_____ DATED March 19 _____

ROBERT C. OSBORNE,
ESQ.
135A Main Street,
East Hampton,
New York 11937

In the
Supreme Court

No. 8
Exhibit "D" to
Affidavit of
Trevor Weston
24th May 1972

"D"

This is the copy of the Certificate of Title mentioned and referred to in paragraph 14 of the Affidavit of Trevor Weston dated the 24th day of MAY, 1972 - in the presence of:

(sgd.) Trevor Weston
TREVOR WESTON

(sgd.) ?
JUSTICE OF THE PEACE
for St. Andrew

In the
Supreme Court

No. 8

Exhibit D to
Affidavit of
Trevor Weston
24th May 1972
(continued)

D

REGISTER BOOK,

VOL. 30 FOL. 58

J A M A I C A.

Certificate of Title under The Registration of Titles Law, 1958

Ann Brown

of
the parish of Clarendon

is
now the

proprietor of an estate

in
fee simple

sub-

ject to the incumbrances noted hereunder in all that piece or parcel of land part of Myself's estate

in the parish of Clarendon containing by survey five acres, one rood and six
^{perches}
roods and better and bounding and being of the estate of the late John

in thereof herein annexed subject to the right of the Crown
^{to}
make
the roads free of charge through the said land

Dated
the eleventh day of July
and four

Incorporation registered for

one thousand nine hundred

By J. P. Parnell

Register of Titles

In the
Supreme Court
No. 8
Exhibit D to
Affidavit of
Trevor Weston
24th May 1972
(continued)

Miscellaneous No. 21661 In the sident Magistrate's Court for the Parish of Clarendon
In Equity Suit No. ER97 of 1960 on the 1st day of December 1960. It was ordered and declared
that the land comprised in this Certificate be vested in Frederica Goode of 164, Broadway
Avenue, New York City, United States of America in fee simple. Entered hereon on the 12th
day of December 1960.



Registrar of Titles A.S.

Transmission Application No. 5549 The Estate and Interest of the abovenamed Frederica
Goode in the land comprised in this Certificate were acquired by Transmission on the
6th of December, 1969 Frederica Joseph of Sag Harbour, New York, United
States of America. Entered hereon on the 12th of August 1969.



Registrar of Titles.

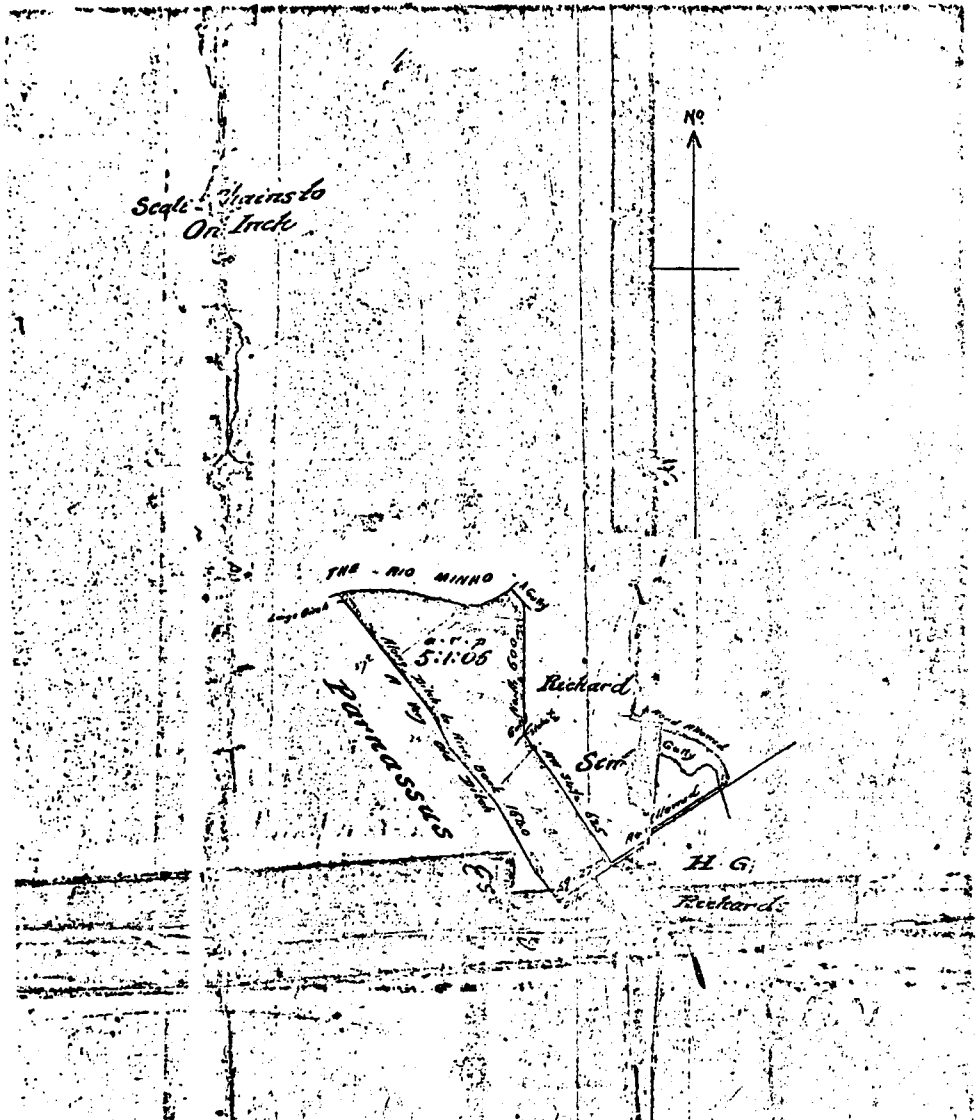
Transfer No. 25332 was the 30th of May and registered on the 12th of August, 1969
from the abovenamed Frederica Joseph of all her estate in the land comprised in this
Certificate to BEVERLY GARDENS DEVELOPMENT COMPANY LIMITED of 39 1/2 Johns Lane, Kingston.
Consideration money Two Thousand-Five Hundred Pounds.



Registrar of Titles.

*To be executed
at the instance of
Trevor Weston*

In the
Supreme Court
No. 8
Exhibit D to
Affidavit of
Trevor Weston
24th May 1972
(continued)



The above figure shaded in represents the form of *FIVE ACRES ONE ROD and six perches*
of land part of *Mt. PER* in the parish of *Clarendon*. It is built and bounded as above,
described, and this (the) plan or diagram referred to in the annexed Certificate of Title
issued in the name of *ANN BRONN* of the parish of *Clarendon*.

Myt. Per. got
 Registrar of Titles

In the
Supreme Court

No. 9

Notice of
hearing of
Preliminary
Issue

6th June 1972

No. 9

Notice of Hearing of Preliminary Issue

Suit No. C.L. 371 of 1972

In the Supreme Court of Judicature of Jamaica

In Common Law

BETWEEN	BEVERLEY GARDENS DEVELOPMENT COMPANY LIMITED	Plaintiff
A N D	MR. & MRS. BENJAMIN PATRICK	Defendant

TAKE NOTICE of the hearing of a preliminary issue before a Judge alone at the Supreme Court, Public Buildings, King Street on Thursday the 12th day of October, 1972 at 10.00 o'clock in the forenoon to wit, that pursuant to Section 236 of Cap. 177 of the Revised Laws of Jamaica as amended by Rule 72 of the Civil Procedure Code (Amendment) Rules 1960 and the Order of Mr. Justice Parnell made on the 26th day of April, 1972, the question of whether the ownership of the land the subject-matter of this action has been finally decided as between the Plaintiffs' predecessor in Title and the Defendant in the following actions, viz:

1. Information No.4479/62 in the Resident Magistrate's Court holden at May Pen in the parish of Clarendon.
2. Suit No. E 11 of 1963 in this Honourable Court.

AND FURTHER TAKE NOTICE that in support of this it is intended to read the Affidavit of TREVOR WESTON sworn on the 24th day of May, 1972.

Dated the 6th day of JUNE 1972.

SILVERA & SILVERA

Per: (sgd.) ??

Attorneys-at-Law for the Plaintiff.

TO: The Registrar,
Supreme Court
Kingston

In the
Supreme Court

No. 9

AND

Notice of
hearing of
Preliminary
Issue

TO: The abovenamed Defendants
or
Their Attorneys-at-Law,
Messrs. Williams & Williams,
64, East Street,
Kingston.

6th June 1972
(continued)

10

COPY RECEIVED

WILLIAMS & WILLIAMS

Per: H.DOUGLAS (SGD.)

DATE: 18/9/72

TIME: 2.26 p.m.

FILED by Silvera & Silvera of Nos.42-44 East Street,
Kingston, Attorneys-at-Law for and on behalf of the
Plaintiff.

No. 10

No.10

20

Reply and Defence to Counterclaim

Reply and
Defence to
Counterclaim

Suit No. C.L. 371 of 1972

12th June
1972

In the Supreme Court of Judicature of Jamaica

In Common Law

BETWEEN	BEVERLEY GARDENS DEVELOPMENT CO. LTD.	PLAINTIFF
A N D	MR. & MRS. BENJAMIN PATRICK	DEFENDANT

1. The Plaintiff joins issue with the Defendants
on their Defence.

30

2. As to paragraph 4 of the Defence the Plaintiff
says that Fredericka Walker was the agent of the pre-
decessor in Title to the Plaintiff Company and
Defendants are estopped from asserting that an order
for possession was wrongfully obtained against the
Defendants in the Resident Magistrate's Court for
the parish of Clarendon.

In the
Supreme Court

—
No.10

Reply and
Defence to
Counter claim

12th June
1972

(continued)

P A R T I C U L A R S

- (a) On the 29th day of January, 1963 the Defendant Benjamin Patrick commenced an action in this Honourable Court against Fredericka Walker - Suit No. E.11 of 1963 claiming inter alia:-
- (1) A Declaration that the Plaintiff is entitled in fee simple to the parcel of land situate at Sunnyside, May Pen in the Parish of Clarendon consisting of $5\frac{1}{4}$ acres, 10 now in the possession of the Plaintiff.
 - (2) A Declaration that the Defendant has no right, title, estate or interest in the said land.
 - (3) An Injunction restraining the Defendant, her servants and agents, from taking possession of the said land, or interfering with the possession of the Plaintiff in any way.
 - (4) An Order setting aside the order of the Resident Magistrate's Court for the Parish of Clarendon on the 10th day of October, 1962 that the Defendant is entitled to possession of the said land and also the order of the said Court on the 10th day of January 1963 for a Warrant of Possession to issue against the Plaintiff. 20
- (b) Fredericka Walker took out a Summons asking for an Order that the Statement of Claim be struck out on the grounds that Benjamin Patrick's claim was frivolous and vexatious and sought to raise anew a question which had already been decided between the same parties by a Court of competent jurisdiction. 30
- (c) In a written Judgment this Honourable Court granted the Order asked for by the Summons. The Plaintiff Company will at the trial of this action refer to and rely upon the records of this Honourable Court in Suit No. E. 11 of 1963 and the Judgment of Mr. Justice Fox therein. 40

DEFENCE TO COUNTER-CLAIM

In the
Supreme Court

—
No.10

Reply and
Defence to
Counterclaim

12th June
1972

(continued)

- 3. As to paragraph 6 of the Defence and Counter-claim the Plaintiff repeats paragraph 2 of the Statement of Claim and paragraph 2 above;
- 4. Furthermore the Plaintiff states that as holder of a registered Title under the Registration of Titles Law, his title is indefeasible on the matters alleged in the Defence and Counter-claim or at all.
- 10 5. Paragraph 7 of the Defence and Counter-claim is denied and the Plaintiff states that Defendants have not created any improvements on the land which is of any benefit to the Plaintiff;
- [sic]6. Save as is herebefore admitted every allegation in the Defence and Counterclaim is denied as if set out separately and traversed seriatim.
- 20 7. In the premises the Plaintiff denies the entitlement of the Defendant to the remedies claimed in the Counter-claim or to any remedy at all.

Dated the 12th day of June 1972

SETTLED

W.K. CHIN SEE

SILVERA & SILVERA

Per: (?)

Attorneys-at-Law for the Plaintiff.

30 TO: THE ABOVENAMED DEFENDANTS
or
Their Attorneys-at-Law,
Messrs. Williams & Williams,
64 East Street,
Kingston.

FILED by Silvera & Silvera of Nos.42-44 East Street, Kingston, Attorneys-at-Law for and on behalf of the Plaintiff.

(2 Official Supreme Court Franks and 1 Stamp for 25 cents)

In the
Supreme Court

No.11

Affidavit of
Michael
Williams

13th November
1972

No. 11

Affidavit of Michael Adrian Williams

SUIT NO. C.L. 371 of 1972

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

IN COMMON LAW

BETWEEN BEVERLEY GARDENS DEVELOPMENT
CO. LTD. PLAINTIFF

AND MR. & MRS. BENJAMIN DEFENDANTS
PATRICK

I, MICHAEL ADRIAN WILLIAMS being duly sworn 10
MAKE OATH AND SAY as follows:

1. I reside and have my true place of abode at
6 Hall Crescent, in the parish of Saint Andrew;
my postal address is 64, East Street, Kingston
Post Office and I am an Attorney-At-Law and
partner in the Firm of Williams & Williams, the
Attorneys-At-Law on the records for the
Defendants herein.

2. I exhibit to this Affidavit the following:

SUMMONS - Sec. 3 Law 18 of 1912. 20
(Recovery of Small Tenements) marked with
the Letter "A" for identity.

Letter from the Administrator General to
Mr. Benjamin Patrick dated 5th October
1962 marked with the letter "B" for identity.

Copy letter from E.C.L. Parkinson to the
Administrator General dated 31st October
1972 marked with the letter "C" for identity.

Copy letter from E.C.L. Parkinson to the
Administrator General dated 7th November, 30
1972, marked with the letter "D" for
identity.

Letter from the Administrator General for
Jamaica to Eugene C.L. Parkinson dated
7th November, 1972, marked with the
letter "E" for identity.

SWORN to at 59 East Street in)
the parish of Kingston this)
13th day of November 1972,)
before me:)

(Sgd.) M.A.Williams

In the
Supreme Court

No.11

(Sgd.) (?) J. B. (?)

Affidavit of
Michael
Williams

JUSTICE OF THE PEACE, St. Andrew

13th November
1972

(continued)

FILED by WILLIAMS & WILLIAMS of No.64 East Street,
Kingston, Attorneys-At-Law for and on behalf of the
Defendants herein, whose address for service is
that of his said Attorneys.

10

"A"

This is the Summons - Sec. 3 Law 18 of 1912 -
(Recovery of Small Tenements) mentioned and
referred to at Paragraph 2 in the Affidavit of
Michael Adrian Williams SWORN TO this 13th day of
November 1972, before me:

Exhibit "A"to
the Affidavit
of Michael
Williams

(Sgd.) M. A. Williams (Sgd.) (?) J.B. (?)

JUSTICE OF THE PEACE
St. Andrew

In the
Supreme Court

No. 11
Exhibit A to
Affidavit of
Michael
Williams
13th November
1972

Form of Summons, Sec. 3 Law 18 of 1912 (Recovery of Small Tenements)

JAMAICA SS.

Parish of *Clarendon*

To *Benjamin Patrick*
of *15 Sturges Ave May Pen* *3* of the said parish

WHEREAS complaint hath this day been made before the undersigned one of Her Majesty's Justices of the Peace in and for the said parish of *(Clarendon)*

by *Frederica Walker* *Frederica Walker* who saith that the said *Frederica Walker* did let to you a tenement consisting

of *piece of land* for a *hered unlimited undivided* under the rent of *L6 per month* and that the said tenancy expired (or was determined by notice to quit given by the said *Compt*

as the case may be) on the *31st* day

July 19 *62* and that you refused (or neglected)

to deliver up possession of the said tenement and still detain the same

THESE ARE THEREFORE TO COMMAND YOU in Her Majesty's name to be and appear on

the *15th* day of *November* 19 *62* at 10 o'clock in the forenoon at the Court House at *May Pen*

before the Resident Magistrate for the said parish or before such Justices of the Peace for the said parish as may then be there to answer to the said complaint and to show cause why you should not deliver up possession of the said premises.

Given under my hand this *10th* day of *October* in the year of Our Lord one thousand nine hundred and *62* at the parish aforesaid.

0-11-11-11-11-11

W. A. L. Allen
10/10/62

In the
Supreme Court

No. 11

Exhibit A to
Affidavit of
Michael
Williams

13th November
1972
(continued)

15th November 1962.

T. 6/12/62
at 11/12/62
107/1/63
W. J. K. J.
at 11/12/62
at 11/12/62

VS.

Berthoin (OCT)

Handwritten notes:
Order Warrant of Proclamation
to return and deliver
the vessel to the charterparty
made on 11/12/62.
107/1/63
M. J. D. Edwards
64 Esplanade
11/14/63

Recd from
at 11/12/62
D. C. TAVARES

48.

In the
Supreme Court

No.11
Exhibit "B" to
Affidavit of
Michael
Williams

13th November
1972

"B"

This is the Letter from the Administrator General to Mr. Benjamin Patrick dated 5th October 1972 mentioned and referred to at Paragraph 2 in the Affidavit of Michael Adrian Williams SWORN to this 13th day of November 1972 before me:

(Sgd.) M. A. Williams (Sgd.) (?)

JUSTICE OF THE PEACE
St. Andrew

ADMINISTRATOR GENERAL'S OFFICE,
P.O. BOX 458,
KINGSTON, JAMAICA, W.I.

10

No.622/56

5 October 1962

Mr. Benjamin Patrick,
Sunnyside Avenue,
May Pen.

Dear Sir,

Re Rebecca Matilda Lyon,
deceased

I am in receipt of your letter of the 18th August and note that you are not in possession of any receipts evidencing the sale to you of 5¼ acres of land which belonged to the abovenamed deceased, but that you have been in sole, continuous and undisputed possession of the land for a period exceeding 12 years to date.

20

I am investigating this estate with a view to raising administration therein and in due course further correspondence will be addressed to you.

Yours truly,

30

(Sgd.) R. M. KENTISH

for Administrator General.

MC/bl.

"C"

In the
Supreme Court

This is the Copy Letter from E.C.L. Parkinson to the Administrator General dated 31st October 1972 mentioned and referred to at Paragraph 2 in the Affidavit of Michael Adrian Williams SWORN to this 13th day of November 1972, before me:

No.11
Exhibit "C" to
Affidavit of
Michael
Williams

(Sgd.) M. A. Williams (Sgd.) (?) (J.B.)(?)
JUSTICE OF THE PEACE
St. Andrew

13th November
1972

10

Chambers:
19 Church Street,
Kingston, Jamaica, W.I.

31st October, 1972.

Administrator General,
Administrator General's Dept.,
139 Harbour St.,
Kingston.

Dear Sir,

20

Re: Parcel of Land contained in
Certificate of Title at Vol.30 Fol.58

By a Vesting Order of the Resident Magistrate's Court, May Pen, on the 1st December, 1960, the above-mentioned parcel of land, the value of which did not exceed £100.0.0. was vested in Fredericka Goode.

Please be good enough to inform me whether your consent was obtained, and whether the necessary fees were paid by Fredericka Goode.

30

Thanking you in anticipation of your early reply.

Yours faithfully,

(Sgd.) EUGENE C. L. PARKINSON

Eugene C. L. Parkinson

In the
Supreme Court

No.11
Exhibit "D" to
Affidavit of
Michael
Williams

13th November
1972

"D"

This is the Copy Letter from E.C.L. Parkinson to the Administrator General dated 7th November, 1972, mentioned and referred to at Paragraph 2 in the Affidavit of Michael Adrian Williams SWORN to this 13th day of November 1972, before me:

(Sgd.) M.A. Williams (Sgd.) (?) (J.B.)

JUSTICE OF THE PEACE
St. Andrew

Chambers:
19 Church Street,
Kingston, Jamaica, W.I.

10

7th November, 1972.

Administrator General,
Administrator General's Department,
139 Harbour St.,
Kingston.

Dear Sir,

Re: Land in C.O.T., Vol.30, F.58

In reply to your letter of the 31st October, and further to my letter of the same date, which I am returning herewith, I am to say that:

20

(1) The name of the deceased person who was the previous owner of the land was Ann Brown. The land was registered with Ann Brown as proprietor on the 11th July, 1904.

(2) I have in my possession a letter with Reference Number 622/56, dated the 5th October, 1962, and signed "R.M. Kentish" for Administrator General, which is a reply to Benjamin Patrick, Sunnyside Avenue, May Pen, who had written to the Administrator General on the 18th August, 1962, and who had allegedly purchased the said land from Rebecca Matilda Lyon, who was then deceased.

30

The letter stated that the Administrator General was investigating the estate with a view to raising administration therein.

Yours faithfully,

Eugene C. L. Parkinson.

"E"

In the
Supreme Court

No. 11
Exhibit "E" to
Affidavit of
Michael
Williams

13th November
1972

This is the Letter from the Administrator General for Jamaica to Eugene C.L. Parkinson dated 7th November 1972, mentioned and referred to at Paragraph 2 in the Affidavit of Michael Adrian Williams SWORN to this 13th day of November 1972 before me:

(Sgd.) M. A. Williams

(Sgd.) (?) J.B. Andrew?
JUSTICE OF THE PEACE
St. Andrew

10

622/56

ADMINISTRATOR GENERAL'S OFFICE
P.O. BOX 458,
KINGSTON, JAMAICA.

By Bearer

7th November, 1972.

Eugene C.L. Parkinson, Esq.,
Attorney-at-Law,
19, Church Street,
Kingston.

Dear Sir,

re: Rebecca Matilda Lyon, dec'd.

20

I acknowledge receipt of your letters dated 31st October, 1972 and 7th November, 1972 in connection with the above and have to advise that this is not a matter in which I had acted.

From the information contained in my files, I observe that Rebecca Matilda Lyon died intestate survived by her mother, Rebecca Morris Lyon the sole beneficiary of her estate.

30

Rebecca Morris Lyon died subsequently testate and Probate of her Will was granted on 15th October, 1947 in the Supreme Court to her Executors, Mr. John Nelson of May Pen P.O. and Mr. Stephen Foster of Mile Gully P.O.

On the 4th January, 1963 I informed Messrs. A.E. Brandon & Company, Attorneys-at-Law that I would be prepared to issue my Formal Consent to the application for a grant of Letters of Administration (in the estate of Rebecca Matilda Lyon, deceased) of the Executors of the estate of Rebecca Morris Lyon, deceased.

In the
Supreme Court

No.11
Exhibit "E" to
Affidavit of
Michael
Williams

13th November
1972
(continued)

I can, however, trace no reply to this
letter.

Yours truly,

(Sgd.) ?

for Administrator General.

MBW:bg

No.12

Notes of
Evidence of
Chambers J.

12th October
1972

No. 12

Notes of Evidence
of Chambers, J.

In the Supreme Court of the Judicature of Jamaica 10

In the High Court of Justice

In Common Law 371/72

BEVERLY GARDENS DEVELOPMENT COMPANY
LIMITED

Vs.

MR. BENJAMIN PATRICK & MRS. BENJAMIN
PATRICK

Determination of whether Defendants
are estopped from pleading title.

Mr. C. Rattray Q.C., with Mr. W. Chen See instruc- 20
ted by Messrs. Silvera & Silvera for Plaintiff
Company.

Mr. E.C.L. Parkinson Q.C., instructed by Messrs.
Williams & Williams for Defendant.

Mr. Parkinson

I am taking a preliminary objection to the
hearing of this. The preliminary point as to
estopped for the simple reason that they brought
us here today by virtue of an order made by Mr.
Justice Parnell on 26/4/72. It is necessary for
me to say what happened on 26/4/72. Prior to
20/4/72 Plaintiff brought an action in Supreme
Court, an action against the two defendants.
Writ issued on 23/3/72.

On the same day they took out a summons for an interlocutory injunction to restrain the defendants from building certain buildings on the land in question.

In the
Supreme Court

—
No.12

Notes of
Evidence of
Chambers J.

12th October
1972

(continued)

10 Mr. Chen See appeared for the Plaintiff Company and made his asking for an interlocutory order. I commenced my reply to those submissions and in the midst of my submissions I was stopped by the learned trial judge who advised himself by referring to Paragraph 236 of the Civil procedure code of Cap.177, as amended and ruling that a point of law has arisen on the pleadings and because a point of law had arisen on the pleadings he stayed further hearing of the summons for an interlocutory injunction and ordered that pursuant to see 236 of Cap. 177, that the question whether the ownership of the land claimed by the Plaintiff and the Defendants or as between the Plaintiff's predecessors in title and Defendants be set down for hearing and in the meantime time the hearing of the summons on the merits be stayed

20

After that order was made on 26/4/72 the defendants immediately sought leave to appeal from the order. The application had to be made before Mr. Justice Parnell.

30 The application was made and refused. He agree to hear the application only if the other side was served with the notice of leave to appeal. They were served but did not appear on 28/4/72 when the application was heard. I told the judge it was served. They did not appear to oppose the application. Next the defendants applied to Court of Appeal for leave to appeal against Mr. Parnell's order. The application to Court of Appeal has to be Ex party. So the other side was not served.

40 Mr. Chen See was however sitting in Court and then knew the matter was before the Court. The matter was adjourned in the Court of Appeal to see the actual order made by Mr. Parnell on 26/4/72. That was done, and the matter came before the Court of Appeal again Ex party on 20/7/72. Even before 20/7/72 the other side took out a summons which came before Mr. Justice Melville and Mr. Melville was told that the matter was then before the Court of Appeal and an adjournment was granted.

In the
Supreme Court

—
No.12

Notes of
Evidence of
Chambers J.

12th October
1972

(continued)

On 21/6/72 they brought us back before the Court before Mr. Justice Henry, I informed the Court of the position and that there was an application before the Court of Appeal to set aside Mr. Justice Parnell's order.

Today is the 3rd time they have brought us here, knowing that there is an application before the Court of Appeal to set aside Mr. Parnell's order that they base their present application. On 20/7/72 the Court of Appeal adjourned the matter sine die to enable the Plaintiff to be served with the notice of motion. The notice of motion has not been served. On 21.6.72 when I told Mr. Henry that the matter was before the Court of Appeal Mr. Henry sent to the Court of Appeal to find out when was the earliest the matter could be heard. He was told week beginning 17/7/72 and it was heard 20/7/72 and they decided matter should be adjourned sine die for other side to be heard.

10

20

The Court of Appeal Rules 1962 22(1) read.

Even if we did not go before the Court of Appeal - Mr. Justice Parnell's order is void.

Mr. Rattray objects to trying to turn this Court into a Court of Appeal from Justice Parnell's order.

Court rules - cannot rule on the validity or invalidity of Mr. Justice Parnell's order.

Mr. Parkinson continues:-

30

The matter before Court of Appeal will, I hope, shortly be heard.

Mr. Rattray:

Before the Court is a preliminary issue to be tried. This Court is not concerned that steps are being taken to place the matter before the Court of Appeal.

The Court of Appeal has not yet granted leave to appeal so there is no matter before Court of Appeal.

40

The Court of Appeal told them to serve the other side and they have not yet done so.

The application for leave to appeal has not been perfected. The order is in full force and effect and not set aside. One is not an appeal until one is granted leave.

Mr. Parkinson replies:

10 It is not a correct statement of fact that matter is not before the Court of Appeal. An application for leave is before the Court of Appeal.

See 22(3) of Court of Appeal Rules.

We are questioning the validity of the order of Mr. Parnell - the only way we can do it is to go to the Court of Appeal.

The judicature Appellate Jurisdiction Law 1962 section 9 and 10 read.

20 The Court of Appeal adjourned the application for leave to appeal in July 1972 for summons to be served and for records to be filed. The Plaintiffs are not responsible for this delay in service, at least between 17th September and today 12/10/72.

In addition why shouldn't a preliminary point which is vital to the entire original suit be heard. Court will hear the application. Mr. Parkinson, now applying for leave to appeal against your order dismissing my preliminary objection to your hearing the case, as there is before the Court of Appeal an application to set aside Mr. Justice Parnell's order. The reason:-

30 (1) If Court of Appeal grants the order setting aside Mr. Justice Parnell's order your order would be a waste of time.

(2) Court has never heard of an application which in effect amounts to an application for leave to appeal against a ruling by a Judge that he will hear the matter.

Leave of Appeal refused.

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Mr. Rattray opens

This is an action brought by the Plaintiff Company claiming possession of a piece or parcel of land situated in May Pen in Clarendon, containing by survey 5a. 1r. 6 perches and is comprised in Certificate of Title Registered Vol. 30 Folio 58 of registered Book of titles and is now known as 15 Sunnyside Avenue May Pen Clarendon consequent upon that claim is a request for an injunction restrain the defendants by their servant or agents from erecting or causing to be erected structures of any type whatsoever on the land. 10

An order is also asked for that defendants demolish buildings which they have constructed on the same property. Evidence will be heard. The registered Title will be produced showing the land originally belonged to one Ann Brown and that on 1/12/60 an order was made by the R.M. for Clarendon in Equity suit E.897/60 vesting the said land is Fredericka Goode the daughter of the said Ann Brown. The title will also show the order of the Court endorsed upon the title. 20

You will also hear that in 1962 in Plaintiff No.4479/62 in R.M. Court Clarendon one Fredericka Walker acting as agent and Attorney of Fredericka Goode brought an action in R.M. Court Clarendon claiming recovery of possession of the said land from Benjamin Patrick the Defendant. On 10/2/63 he obtained an order for a warrant of possession to issue against the said Benjamin Patrick. 30

Evidence will also brought that the said Benjamin Patrick subsequently issued a writ of summons E 11/63 claiming a declaration that he was entitled in fee simple to the said land and that Fredericka Walker had no right, title, estate or interest in the said land.

You will hear - from the records that Frederica Walker took out a summons asking that the statement of claim be struck out as the matter has already been returned in the R.M. Court Clarendon in which she had obtained Judgement against Benjamin Patrick. 40

On 29/10/63 Mr. Justice Fox delivered in E 11/63 and found in Judgement favour of Frederica Walker and the important point in Mr. Justice Fox

Judgment which will be produced, certain findings of facts were summarised.

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(1) Land Registered on 11/7/1904, Vol 30 F. 58 under Registration of Titles Law in the name of Anne Brown. Frederica Goode the daughter of Anne Brown became entitled to the ownership of the land many years before Benjamin Patrick the Plaintiff came to be concerned with it in any way.

10 Frederica Goode was living in U.S.A. since 1908 as found at page 4 of Mr. Fox's judgement.

After summarising the fact which death with submissions of Mr. Parkinson who appeared for Mr. Patrick.

Mr. Parkinson detailed the facts as follows:-

(1) Exclusive and undisturbed possession of Mr. Patrick from July 1944 to 1963, and whether he acquired a title by prescription.

20 (2) Whether Patrick paid £250 to Rebecca Lyons in instalments or whether Patrick paid rent after July 1944.

Mr. Fox, J. Stated it is clear that the 1st three matters of fact were investigated in the R.M. Court and that the Plaintiff's present action in this Court is an attempt to retry questions of fact which have been conclusively decided against him by a Court of competent jurisdiction. His Lordship held that Res Jurisdiction would apply.

30 You are being asked to retry those facts which Mr. Fox said he could not retry. The Defendant is raising questions of fact which has already been decided. In 1963 the registered owner was Frederica Goode the action was bought by Fredericka Walker her Attorney in R.M. Court. In 12/8/69 Fredericka Josephs the executor of Fredericka Goode successor in title to Fredericka Goode.

40 On 12/8/69 the present Plaintiff Beverly Gardens Development Company Limited are the successors to Fredericka Josephs. It is now for Court to decide that it is the same land and that the present Plaintiff's are the successors to the land.

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An action in relation to title to land is an action in rem and the benefit of a judicial determination of title to land passes on to the successors in title.

Therefore from statement of claim it can be seen a recital of the order of the R.M. Defendant is saying that they are in possession of the said land so there is no dispute as to the identity of the land.

Mr. Fox J., was saying that between 1944 and 1963 there was a judgement of the Court which bound him. That there was a judgement of the Court which vested the land in Patrick. Since from 1963 to 1972 can confer possessory title, so we can forget about 1963 to 1972. Paragraph 3 of Defence refers to the statute of limitations. Defendant is estopped by the judgement of the Court. Paragraph 4 of Defence. Fredericka Walker was a successor in title in 1963 as Attorney or Agent and this Court cannot upset the order of the R.M. A vesting order is on the title vesting title in Fredericka Goode. See page 5 of Fox J.'s judgement. 10 20

The counter claim is asking for rectification of the vesting. Not one single issue raised in the defence which not raised in previous litigation. I will tender in evidence the Supreme Court file E. 11/63. Patricia Barnett Clerk Supreme Court tenders file E. 11/63 as Exhibit 1. The only other document I will put in is the title. In regard to the Law. If an issue has been litigated between parties or person who are predecessors entitled to or parties or there previes then a determination by a Court of competent jurisdiction on the particular issue creates an estoppel so that that particular issue cannot again be litigated. If a determination is one in a personam there will arise problems as to who the parties are or whether they are the same parties or their previes, but whenever the determination is one in rem, what is important is the subject matter of the dispute and the nature of the dispute. It is well established that a determination of title to land is a determination in rem. There is no dispute as to the identity of the land so we have to determine what sort of action did Fredericka Walker, now Josephs, acting as agent and Attorney for Fredericka Goode 30 40

brings Agent Benjamin Patrick the husband defendant in 1962 in Clarendon.

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10 For the Court to determine in a case are the issues determined in a case, the Court has a right as duty to look at the Court records. In his judgement in E.11/63 delivered on 29/10/63 Fox J. did just that Mr. Justice Fox was able to summarise the facts and at fact No.F at page 4 of his judgement which is in evidence Exhibit 1. also J. paragraphs 1. to 7 of statement of claim in E.11/63 was a claim that Plaintiff Benjamin Patrick was possessed of the land and that he had purchased it from one Rebecca Lyons in 1944, having exercised an option to purchased which was a part of a lease from Rebecca Lyons in 1942 and he remained in possession from July 1944 to 1963 see Exhibit 1. It is therefore clear, as Fox J. found, that it was title to land which was being determined between Fredricka Goode though her Agent & Attorney Fredericka Walker & Benjamin Patrick the defendant husband in this case. Title to land is a decision in rem, Outram v3. Morewood and others 1802 3 East Reports at page 245 at 352 same case.

20

30 A case of recovery of possession of land is a question of title. Was the action in Clarendon an action as to title. Is it the same issues Lord Halsbury in Reichel V Magrath (1889) 14 A.C. page 665 at page 668. Wood vs. Luscombe (1964) 3 All E.R. 972. Issue Estoppel. Marginsm Vs Blackbourne Borough Council (1939) 1 All. E.R. at page 273 and 160 T.L.R. 234.

13/7/72

Charles Wells McDonald sworn I am a Real Estate Agent and a Director of Plaintiff Company and I reside at 4 McDonald Drive Kingston 8.

I produce the title to the property subject of this action. Title in evidence Ex.2. Registered at Vol. 30 folio 58 of Register Book of title.

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C A S E

Mr. Parkinson

The position so far as we are concerned I shall put forward 7 broad propositions. The History of this case:- Certain propositions on facts and specific propositions in Law.

First broad proposition. The Plaintiff's Company must succeed, if it succeeds at all, by the strength of its own title not by the weakness or apparent weakness of the defendant's case. 10

2. The maxim: "Possession is 9 points of law" is a fundamental plan in the common law and is particularly and peculiarly relevant in this case.

3. The maxim: Vigilantibus non dominantibus jus subvenit is relevant in the instant case.

4. The position of the defendants in the instant case is not stronger than that of the Plaintiff Benjamin Patrick in the previous case E.11/63.

5. The issue of adverse possession was not dealt with any previous litigation and therefore the principle of Res Judicata does not arise in the present case. 20

6. There is a new demension in the instant case as regards adverse possession which was absent from the previous litigation and which is established out of the mouth of Fredricka Walker herself who was the Plaintiff in the case in the R.M. Court before Mr. Shelly.

7. In addition to the superior legal position of the Defendants in the instant case to Benjamin Patrick's position in the previous litigation, the Defendants are in an impregnable position in the instant case. 30

I refer Court to affidavits of Benjamin Patrick Sworn to on 24/4/72. Affidavit of C.W. McDonald sworn to on 22/3/72 read. Notes of evidence in Inf 4479/62 referred to.

Evidence of Fredricka Walker and other evidence read and commented on. There has been a determination in this case not to have the facts gone into. 40

I now refered the Statement of Claim in this case all we are asking for is justice according to Law.

Statement of Claim read.

Statement of Defence read.

Adj. for a date to be arrange with the Registrar.

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10 Mr. C. Rattray Q.C., with Mr. W. Chen See Attorney at Law instructed by Messrs Silvera & Silvera for Plaintiff Company Mr. E.C.L. Parkinson Q.C., instructed by Messrs Williams & Williams Attorney at Law for Defendants.

20 Mr. Parkinson I will continue to deal with the pleadings. (P.15 to 17) Reply and Defence to Counter Claim read. Wording of order dated 26/4/72 read pages 12 to 13. The order in paragraph No. 1. is an unfinished sentence and makes no sense (original order has "merits be stayed". The paragraph as completed still makes no sense the "whether" in line "2" seem as though it should be "or". Your Lordship will see that in reply that Mr. Justice Fox's Judgment in suit 11/63 is referred to. That does not take the case any further as it was merely a commentary of what took place in the R.M. Court some years ago. This Judgment does not help Plaintiff at all. It never went into the merits of the case at all. What we are concerned with in some hearing of some facts as disclosed in the records of what took place in the R.M. Court in May Pen in 1963. That is what will decide whether the legal, or title to this land was decided or not. If it appears from the record that this litigation before you in the instant case is any different in the issues raised from the case before the R.M. there is no question about the ownership or title being decided in the previous litigation. I refer to the following cases:-

40 (1) Hunter V Stewart (1861) 4 Deg. F. & J. reports Vol. 4 at p.168. Marginal note read. Res Judicata at p. 169. The Lord Chancellor said "...." p. 177 particularly referred to.

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The rejection of the first does necessarily involve a rejection of the 2nd case. One of the criteria is whether the same evidence would support both. I intend to show there is no Judgment in R.M. Court on the question of adverse possession in the Defendant. For Res Judicata to succeed, the same evidence must support both cases. The issue found in R.M. Court was whether the defendant Benjamin Patrick had purchased the land in question from one Rebecca Lyons. That was the issue decided upon in the R.M. Court. There was no issue decided on adverse possession. In other words Benjamin Patrick was saying he purchased the land from Rebecca Lyons. That was the case.

10

Pagana Reena Savinathan etal V Panalana Palaniaffa (1914) AC P.168. Section 34 of Ceylon Civil Procedure Code 1889 re Res Judicata second action maintainable. Although the claims in the 2 actions arose out of the same transactions Res Judicata did not apply.

20

Mr. Justice Parnell's order was misconceived.

At page 623 Lord Moulton's Judgement (Section 34 deals with Jurisdiction as to quantum) One is a claim on a promissory note and the other is a separate claim for the amount due and are not the same cause of action. I would say that in the instant case a man claiming land on the basis of his having purchased the land and the same man claiming land on the basis that he had been in possession for 28 years are completely different causes of action. Defendant is not therefore barred Affidavit of Frederica Walker p.34 referred to and attached to notes of evidence in Rl M. information 4479/62. Notes of evidence referred to Frederica Gooden became owner of land by virtue of a vesting order on 1/12/60.

30

Plaintiffs are depending on the Record. Fredericka Walker's evidence shows omissions and impossibilities.

40

The issue before Mr. Shelley was that Benjamin Patrick one of the defendant's purchased the land from Fredericka Walker. No other issue.

Defendant is all along saying at R.M. Court that he purchased the land. That issue was adjudicated upon. That is whether he purchased land.

The question to be decided is whether Res Judicata applies. The defence page 11. again read. Defendants are in an inpregnable position. They are in possession.

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Whereas the issue in the R.M. Court was whether the defendant Patrick has purchased the land from Rebecca Lyons or not.

10 The issue here in the present case is whether the defendant by adverse possession is now entitled under the limitation Law to the legal title of the land. This order of Mr. Justice Parnell on 26/4/72 was made before he knew the issues in this case.

I submit that the vesting order obtained by Fredericka Goode obtained 1/12/60 is a nullity. The Plaintiff must show that the vesting order, their root of title is valid. Re Exhibit 1.

20 What is based on a nullity is itself a nullity. The vesting order is a nullity. A nullity is a nullity and of no efficacy at all. The company are Plaintiffs, and must succeed if at all by the strength of their own title, not in any apparent weakness of the defendants.

A Registered title will not prevent a possessory title materializing.

Asher V. Whit Lock's case.

Hall V. Chisholm.

The person who takes the benefit from a nullity gets no benefit at all. The vesting order made by the R.M. is a nullity.

30 2.20 p.m.

Mr. Parkinson Continues -

This is not a case in which arguments on the preliminary point of law can decide the issue. There are no preliminary points that arise in this case. Section 236 of Chapter 177 which is the section under which Mr. Parnell's order was made.

The order means that you are being asked to say the title to this land has already been decided as far as the issue in the present case is concerned.

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In other words whether there is res judicata applying in the instant case. I invite you to say that it has not arisen in the instant case and no court could decide on res judicata because this case must stand or fall on the evidence at the trial.

There is an attempt to short circuit the case. Section 236 chapter 177 read.

Mr. Rattray My learn friend cannot challenge Mr. Justice Parnell's order. What this Court is to decide is the question of his res judicata.

10

Mr. Parkinson replies:-

I am not attempting to use this Court as an appellate Court from Mr. Justice Parnell's order, all I am doing is to show that Mr. Parnell cannot make an order purporting to be based on Section 236 without my referring to it.

All I am pointing out is that you have been set an impossible task to decide.

The case Asher V Whitlock (1865-66 1 Q.B. Cases Page 1. Coburn C.J. page 5.

20

A person in possession of land obtains title against the world except the true owner.

Chisholm V Hall 1958/1959 1 W. 1. 413 No Certificate of title is ipso facto title.

Section 3 of Cap.222 Limitations of Action Law.

Section 30 of Cap.222 Extinguishment of Right. I refer now to Chap. 177. Section 218 read. The present defendant was the Plaintiff in the previous case Equity 11/63.

30

This, the clearest possible case in where evidence must be heard and case cannot be decided on a preliminary point.

This case is completely different and inconsistent with the case before the Resident Magistrate so Res Judicata does not arise. Selwyns (Nisi Prius) Volume 2. 10th edition page 763 referred to. Many ejectments can be brought in respect of the said land.

That is an exception to general rule as to Res Judicata. Defendant is in a much stronger position now than when Equity 11/63 was decided.

If Benjamin Patrick had brought another action an injunction could be taken to restrain him.

Mr. Justice Fox must have misunderstood the case or he could not have struck it out.

Reichell V McGrath (1889) 14 A.C. 665 that case was cited by Mr. Rattray.

10 It is a horse of a different colour. It has nothing to do with the present case.

Finally for today

Windsor Refrigerator Company Limited et al V. Branch Nominees Limited, and other (1961) 1 All E.R. at page 277. Adjourned to 14/xl/72 10 a.m.

20 Mr. Parkinson Papers were filed yesterday as referred to in an Affidavit by Michael A. Williams Attorney-at-Law. Service of Affidavit and documents was done at 2.54 p.m. yesterday on Messrs Silvera & Silvera Attorneys-at-Law.

Mr. Rattray objects to these documents being used on grounds:

(1) Quite apart from the fact they are being filed in the middle of the argument which by itself is a valid ground, the documents exhibited apart from the summons in my respectful submission have no relevance in these proceedings. These proceedings are to determine whether the ownership of the land is Res Judicata.

30 The exhibits attached - one is of a letter dated 5/10/62 from the Administrator General to Benjamin Patrick re Rebecca Lyons dec'd and has no bearing on the question of Res Judicata.

The other is a letter dated 31/10/72 from Mr. Parkinson to the Administrator General making certain enquiries relating to the vesting order.

The third is a letter dated 7/11/72 from Mr. Parkinson to Administrator General on the same subject. The final one is a letter dated 7/11/72

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from the Administrator General to Mr. Parkinson
on the same matter.

The subject of the vesting order has nothing
to do with Res. Judicata.

If you refer to Mr. Justice Fox's judgement
at page five of the judgement in Equity 11/63 you
will note that the 4th submission made by Mr.
Parkinson in that matter concerned, quote "whether
there was an illegality or irregularity in
obtaining the vesting order" Mr. Justice Fox said: 10
"In connection with the 4th matter of fact
detailed by Mr. Parkinson it is
important to notice that the Plaintiff did not
oppose the making of the vesting order and
secondly that in the trial of the recovering of
possession case in 1962 he did not challenge this
order on the ground that it was obtained by fraud
or any irregularity there does not seem to be any
merit in the submission".

These proceedings cannot be used as a means 20
of relitigating issues already determined in
another Court a purpose for which Mr. Parkinson
seems determined to use it.

He made these submissions in 1963 and they
were rejected. He cannot relitigate that issue
again today.

Mr. Parkinson replies

This case continues to be remarkable. I
was about to refer to certain documents and I
assume I should have told the Court about these 30
documents.

I lent my copy to Mr. Rattray as he said he
had not yet seen the documents.

He objected before I had made any submissions
that is running true to form. Wrong, procedure.
What Mr. Fox said in 1963 has nothing to do with
this case.

Exhibit 1. is a copy of a document not the
original.

The record that should be put in this Court 40
is the original not a copy.

Now that I have discovered that the original document is not before you I can hardly see how we continue.

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In Res Judicata the original must be before the Court. I would ask that this matter be adjourned here and now for the original to be produced and that cost be awarded to Defendant for the adjournment.

10 In regard to the documents I filed yesterday I thought no one would object to them. No witnesses were being called they were filed for the purpose of argument.

Section 54 of Cap.206. of the Revised Edition of the Laws of Jamaica referred to. That was the section under which the original litigation began on 15th November 1962.

20 What I am saying is, that surely this Court in dealing with Res Judicata should see the original. The original is not here and we cannot go any further.

I am asking for an adjournment with costs.

The original record of R.M. Court should be produced. The original notes, the power of Attorney and other exhibits.

The documents I am producing today is relevant to this issue of Res Judicata as it is relevant to the issue of ownership of the land in question.

30 Letter 5/7/62 from R.M. Kentish Administrator General to Benjamin Patrick refer to undisturbed possession in Benjamin Patrick for over 12 years. This is relevant to the issue.

I submitted to you that the vesting order is nullity.

The letter of 5/10/62 came into my possession and I wrote to the Administrator General on 31/10/72.

All I am doing here is to put before you all matters that are relevant for you determine whether there was Res Judicata.

The land was Registered in 1942 in the name of

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Anne Brown - what has happened to the land in the meantime.

Fredericka Gooden committed perjury when giving evidence as to agency.

Rebecca Lyons dies in 1946 and it is said that before her death she was the agent of Fredericka Gooden.

The vesting order vesting the land on Fredericka Gooden was on 1/12/60 and she is saying that after her mother died she became agent. 10

Letter from Administrator General to Mr. Parkinson dated 7/11/72 referred to.

The R.M. ought to inform himself or he ought to have inferred that the proper steps were not taken and he should not make a vesting order. The documents have been filed and I haven't got to call a witness to produce it.

These documents deal with the identical subject matter under discussion especially possession and it is relevant. 20

The Administrator General did not act in the matter nor give his consent to the vesting of the land.

I ask that the documents filed yesterday be considered at the appropriate time.

The record that ought to be before the Court is not before the Court. Mr. Justice Fox judgement is only a commentary but it is not the original record of case heard at May Pen. 30

When Mr. Fox said that the matter was already decided in the Court below it was completely erroneous.

Your job is to decide whether ownership of the land on the issue before the Court has already been decided.

Adverse possession was never decided in the Court below and you are entitled to decide that question now. This case was never decided on the merits. 40

In the absence of the original Record we cannot go on, and the matter should be adjourned for their production with costs against Plaintiff.

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10 Court does not wish to hear Mr. Rattray on this point. It is not necessary to produce the original record of a Court of subordinate jurisdiction to the Supreme Court, for this Court to decide whether matter was Res Judicata or not. It might be necessary to produce such documents before a Court hearing an appeal, and I am sure that everyone here agrees that this Court is not hearing an appeal. Original Documents of R.M. Court hearing need not be produced on the hearing of this issue.

Mr. Parkinson continues

20 Re case Piercy V Young (1880) 15 Ch. D. at page 475. A case dealing with a counter claim relevant part in page 478. This is a case where the defendant is entitled to have his counter claim tried at the same time as the claim.

The instant case cannot be decided on a preliminary point of law. Brooms legal maxim 10th edition at page 486. The general rule is that possession is a good title against all those who haven't got a better title. Possession by effluxion of time can acquire an indefeasible title.

30 Defendant is in possession and has a better title than Plaintiff. Plaintiff in order to succeed must establish a better title.

I submit that defendant occupies a stronger position that when he filed his action equity 11/63 which was destroyed by Mr. Fox.

At page 219 of Brooms Re same cause of action.

I ask what was happening to the land between 1944 and 1960 a period of 16 years. This is what you are being asked to adjudicate on. No. vesting order in 1960 could destroy possession that has accured.

40 In Megarry and Wade on Real property 1st edition page 890 "Adverse possession". read. Page 901 read. Either from 1944 - 1960 or from

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1957 - 1972 Defendant has obtained adverse possession.

Pullock and Wright on Possession pages 94 and 95. Bailey and Hookway (1945) 1 K.B.D. page 266 Dealing with Agency. In the instant case the Court hasn't got the instrument to show agency. The local case is The King and Mahfood V Hanna 5 Jamaica Law Report page 99 - re agency must be specially authorised to act in the particular matter.

10

The action before the R.M. should have been an action for recovery of land. All these things are germane to the matter you have to decide. This present Plaintiff can't have any case at all. No evidence that Fredericka Walker was duly authorised within sec. 45 of chapter 206 to act in the way she did.

I would add, that the onus on this Plaintiff in this case is very high. The case cannot be decided in a mere preliminary point. The evidence of Fredericka Walker who had no authority at all. It is abundantly clear that Fredericka Walker had no authority to act for Fredericka Gooden. Prior to 1960 Defendant must have acquired a possessory indefeasible title.

20

This is shown by the records. I ask, in fact I would say it is your duty to say I cannot try this case on a preliminary point.

Again the issue in this case is completely different to that before the R.M. in spite of Mr. Fox's judgment.

30

Fredericka's evidence amounts to perjury as she could not be agent. So much has emerged from this case that it would be unsafe to decide the case on a preliminary point of law.

The equitable aspect of the matter - The Defence: Counter Claim. We are entitled to compensation for what was put on the land. In Order to arrive at the quantum, one must have some evidence. Re Outram V Morewood (1902) 3 E.R. page 345 (Deals with estoppel by judgement).

40

However this was a case of trespass and can have nothing to do with the present case.

Richen V McGrath (1889) 14 A. C. at 665 was relied on by Mr. Fox J.

In the instant case it is not the same as the case in the R.M. Court.

So the case of Richen V McGrath is no case on which my learned friend can rely.

I rely on the fact that defendant has been in possession for over 12 years and the title of the Plaintiff is extinguished.

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10 15/11/72 Mr. Parkinson Continues

15th/11/72

Before going to the other limb of the case I shall round off my submission on the law.

I submit that from what is before this Court it clearly appears that the land in question is the same land which was investigated by the Administrator General in 1962 or thereabout and according to the Administrator General belongs to Rebecca Matilda Lyons.

20 Mr. Chen See Objects Attempts were made yesterday by Mr. Parkinson to introduce certain documents those documents found no part of this trial. I therefore object to any mention or submission based on the investigation by the Administrator General.

Mr. Parkinson replies

It is quite clear that the affidavit filed yesterday along with the exhibits form part of the case. They were filed and served. Most that can be asked is that they be not considered. This is an argument on law.

30 The documents are properly filed. I intend to make an important legal proposition on this matter.

Court rules:-

That any investigations by the Administrator General as to title and his decision as to ownership, unless confirmed by a Court is not proof of ownership or title.

In any event the issue before the Court is

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Notes of
Evidence of
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(continued)

not a decision on title but a question whether Res Judicata applies in the action before the Court as to possession.

Submission based on the Administrator General's letter and contents not allowed.

Court still allows submissions as to the question of Res Judicata.

Mr. Parkinson submits

It clearly appears from the material before this Court that the doctrine of Jus Tertii applies to this case and is tied in with the principle of Res Judicata which is the issue here. 10

I refer to Einfeld on Tort. Windfield and Jolowiez on Tort 9th Edition at page 321 deals with Justertii. Jus Tertii is a defence in ejection.

If there is material before the Court to suggest that the legal title is in some third person, this would be proof that the title of the Plaintiff company in the instant case is bad, as being based on a bad root of title. 20

The evidence of Fredericka Walker before the R.M. Court. She says she was agent and her mother before her was the agent of Fredericka Gooden. The information heard before the R.M. was an information for possession.

I showed to the Court yesterday that that evidence was palpable false.

Fredericka Gooden could not have given Fredericka Walker any authority as agent of the land between 1944 to 1960 and it is obvious from Fredericka Walker's own evidence as disclosed in the records that it was impossible for Fredericka Walker or Rebecca Lyons to be the agent of Fredericka Gooden between 1944 to 1960. 30

From the records it is also clear that the defendants in this case was in exclusive and undisturbed possession of that land.

It is equally clear from the evidence of Fredericka Walker that she received the rent for 40

the land on behalf of Fredericka Gooden is palpable false.

Mr. Chen See objects: This is not? That evidence has already been given and not appealed from.

He cannot question that decision on that evidence.

Mr. Parkinson

10 It is obvious that I am analyzing the records to say whether there is Res Judicata or not. The records disclose obvious fraud.

See Halsbury's Laws of England 3rd edition Vol. 15 page 203. Re Fraud. The instant case cannot be tried on preliminary point.

Again in the same volume 15 of Halsburys 3rd edition page 184 par. 357.

Meaning of Res Judicata. It has not been pleaded in the instant case.

20 In Res Judicata the same point must have been previously decided.

The question in instant case is that the question of adverse possession was not put forward in the previous case and was never in issue.

Paragraph 359 Halsbury 3rd edition Vol. 15.

If Mr. Justice Fox had analysed the evidence properly he would have been seen that perjury was committed.

All these matters that I am submitting to you must be taken into account in deciding Res Judicata.

30 Chowood Limited Vs Loyal (1930) 2 CH. D. C. at page 156 shows that when the registered title was transferred to Fredericka Gooden included this land in dispute it was subject to the indefeasible possessory title of the defendants who were in possession for 16 years.

Halsbury 3rd edition vol 15 paragraph 387 not sufficient that the issue was decided by implication.

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Supreme Court

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(continued)

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Chambers J.

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1972

(continued)

See also paragraph 388. The previous judgment itself must be looked at, also the pleadings if any. Also the record. No evidence is admissible to contradict that record.

We ask in our Counter Claim for rectification of Register and we must be heard and the case cannot be decided on a preliminary point of law.

The Equitable Aspect Defendants are entitled to compensation for the improvements.

Plimmer V. Wellington Corporation (1884) 9 A.C.699. 10

Assuming that they have proved title in the previous litigation and res judicata established, the defendant would be entitled to have their equitable rights protected.

Defendants been living on land and built a house in full view of the predecessors of Plaintiff. The Court will apply equitable principles and 69 of Registration of titles Law and the Court will order compensation for improvement. 20

Kerby V Cowderoy (1912) A.C. 599 refered to and read.

We strongly deny that we have no title. Birmingham Canal Company V Lloyd (1845) 18 Vessey's Reports Vol 18 at page 514.

Mr. Chen See If my learned friend continues on this line of argument which is irrelevant at the hearing of the preliminary point I will have to ask that he be deprived of costs.

I now cite Perry V. Clisold (1907) A.C. page 73 P.C. Right to compensation all this should be considered in determing whether there is Res Judicata or not. 30

2.15 Mr. Parkinson continues

To summarise what I have been saying Vol.14 Halsburys Laws of England Paragraph 1178. Acquiescence and Estopped by Acquiescence.

I submit that Plaintiff is estopped from claiming mesne profits against defendant. 40

This submission is made so you can take it into account in this preliminary matter of Res Judicata.

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Because of Plaintiff's laches they must pay the Defendant. At paragraph 1185 of same volume 14 Halsbury's with reference to my learned friend's submissions, but before doing so I must refer.

Notes of
Evidence of
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Asoka Kumar Davis V Narnm Abdul Kadar (1963)
3 all E.R. page 579 at page 582.

15th November
1972
(continued)

10 Mr. Justice Fox's summary is not an accurate summary or analysis of the case.

This statement about case being tried again is completely wrong.

The same land, yes but different cause of action.

Mr. Justice Fox had come to the decision that there was no adverse possession, on what evidence I do not know.

No evidence was given and no decision given in the R.M. Court as to adverse possession.

20 Mr. Rattray is completely wrong in submitting that not a single issue raised here was not raised before the R.M. Court.

I submit Outram V Mould was a trespass case and cannot be an authority in an action for recovery of land in a matter of Res Judicata.

Title to land was not determined in 1963. The Reichel V McGrath case has no application to this case. We have been in possession for 28 long years.

30 Finally to summarise everything.

(a) In the instant case there is no evidence to establish that the principle of Res Judicata arises to estop the defendants from defending the case brought against them by Plaintiff company.

(b) This is not a case that can be concluded by arguments on a preliminary point of law.

In support of those two fundamental

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(continued)

propositions I put forward the following.

(1) The sole issue decided by the R.M. Mr.Shelley on 10/2/63 was whether defendant Benjamin Patrick had purchased the land in question - in a reading of the copy of the record before this court clearly shows this.

(2) The sole issue in the instant case as regard legal title to the said land is adverse possession. This issue was not litigated in the R.M. Court Clarendon nor decided upon there. Passing refer- 10
ence in the evidence contained in the record in that case as to the time when defendants were in possession does not show that the issue of adverse possession was before the R.M. or considered and decided by him. The principle of Res Judicata there - fore has no application in the instant case, even if the principles in the instant case could apply.

(3) The R.M. Court is the only Court in which the merits of the previous litigation have been considered in some way as is shown by the record. 20

The judgment of Fox J. in Suit 11/63 is not a judgment on the merits nor issues or issues of the case but merely a commentary on the record of the R.M. Court's case.

(4) Mr. Fox J's judgment shows a fundamental misunderstanding of what issues were decided in R.M. Court and a failure to draw the inescapable inference from the evidence of Fredericka Walker.

Namely: That she was a perjured witness and was obviously guilty of fraud in swearing that both her mother Rebecca Lyons and herself were agents of Fredericka Gooden between 1944 and 1960. When in fact Fredericka Gooden obtained a vesting in 1960. 30

(5) The fraud of Fredericka Walker is a further established by her evidence that she received rent from Benjamin Patrick for 1952, 1954 and 1957. She gives no explanation of why she did not receive rents for other years between 1944 to 1960 nor of why she has picked out the said years for mention. 40

The evidence of Fredericka Walker was established on self serving evidence and fraud.

(6) It is obvious that Fredericka Walker could not have received rent from Benjamin Patrick between 1946 when her mother Lyons died and 1960 when Fredericka Gooden first came into the picture and it is equally obvious that she did not receive any rent but put forward self serving evidence which was unfortunately accepted by the R.M. as true.

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(7) It is clear that the judgment obtained by Fredericka Walker in R.M. Court was obtained by fraud.

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(continued)

(8) Even assuming that defendants were tenants of Fredericka Gooden before 1960 (which is impossible) the evidence of Fredericka Walker is that defendants paid no rent since 1957.

On the assumption that this evidence is true (which is not) any legal title in the Plaintiff Company is now extinguished by second period of limitation the first being 1944 to 1960 and the second 1957 to the present.

(9) The defendants are entitled in the instant case to put forward any legal defence whether it was put forward or not in the R.M. Court. A case of recovery of land is an exception to the Res Judicata principle unless there is a perpetual injunction precluding them from litigating and there is no such injunction in the instant case.

(10) The only ventilation of sorts of the facts in the instant case was in the R.M. Court and it commenced in R.M. Court by complaint under Chapter 206. This was not only wrong but fraudulent so as to avoid the necessity of recovering land by the strength of the title of the alleged owner.

(11) The vesting order was obtained in the absence of the defendant Benjamin Patrick and Mr. Fox J's statement in his judgment "that the said defendant did not oppose the making of the vesting order" gives an entirely erroneous impression of what in fact occurred.

(12) The vesting order is a nullity it having been obtained contrary to Section 12 of Chapter 166 and has no legal validity or efficacy.

(13) The warrant for possession based as it is on the said vesting order can be set aside.

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(continued)

(14) The instant case cannot be disposed of by arguments on a preliminary point of law as evidence touching the defendant's possession must be heard.

(15) The Plaintiff Company in the instant case must succeed by the strength of its own title which is no better nor stronger than his predecessors' and the root of title of the predecessors is a nullity.

(16) The defendants are entitled to have their defence and Counter Claim tried together with Plaintiff's Claim and this cannot be done at the hearing of preliminary point of law. 10

(17) The letter of Administrator General is on files before this Court. Jus tertii arises.

Because of what has emerged in this Court the principle of Jus tertii arises.

(18) Assuming that the Plaintiff Company is entitled to the legal estate in the land, which is denied, the defendant is entitled to adequate compensation for the improvements on the land. 20

Adjourned to 16/11/72

16th November
1972

16/11/72 Mr. Rattray Q.C. Replies:-

My learned friend submitted that the sole issue decided by the Resident Magistrate Mr. Shelley on 10/2/63 was whether Patrick had purchased the land.

My reply to that is. In an ejectment case in which that was the main issue was whether Patrick was or was not a tenant. He would not be a tenant if he purchased the land neither would he be a tenant if he was in undisturbed possession for over 12 years. 30

The clear finding was that he was a tenant and the order was made accordingly for him to give up possession of the property.

It is well established that time cannot run against a land lord and in favour of a tenant.

Therefore in 1963 when he was a tenant 12

years have not elapsed since the determination of that tennancy for him to have any possessory title.

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Supreme Court

The pleadings show that the Plaintiff Mr. Fox J's decision in Equity 11/63 to prevent the defendant from saying that he has title.

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Mr. Fox's clear decision is that the finding in the ejection case prevented the defendant when he was a Plaintiff in 1963 from saying that he had title and you cannot be a Court of Appeal on Fox J's decision.

16th November
1972

(continued)

10

In relation therefore to the one issue which you are trying as a preliminary issue - that is the ownership of the land, that matter has already been competently determined by a Court of Competent jurisdiction.

It is not for you at this stage to attempt to re-digest the evidence to discover who told the truth and who lied. That too has already been competently determined.

20

To say that that judgment in the R.M. Court is fraudulently obtained and to ask you now 9 years after to ignore it because of this, is to place upon you a task which is not yours at all in this issue. Your only task in this issue is to discover if what defendant asks you now to determine on the question of ownership is not already determined.

30

In relation to the question of the vesting order, the title shows the vesting order to be made by a Court Competent to make it, and it stands in full force and effect until set aside or nullified by another Court in proceedings brought for that purpose before a Court exercising competent jurisdiction in proceedings brought for that purpose.

These are not proceedings brought to set aside the vesting order and therefore you are not concerned with any argument which challenges the legality of the vesting order.

40

I would therefore ask you to look at the statement of claim to discover what order you can make on this preliminary point.

The statement of claim, claims possession of the said land that is an order you can make on proof of ownership.

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Supreme Court

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Evidence of
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(continued)

The next claim is mesne profits at \$60 per month, that is an order you cannot make on this preliminary issue because there is no evidence before you establishing the quantum of mesne profits.

The third remedy is an injunction restraining defendants from constructing any building on the said land and that is an order you can make now as it would follow the question of the right to possession. 10

If I am entitled to possession as being owner of the land then I would also be entitled to an injunction restraining the defendants from constructing any building on my land.

The fourth remedy asked further or in alternative that defendants pull down dismantle and demolish any building erected on the said land and I claim also that as owner of land, if somebody wrongfully puts up a building on my land and I obtain an order for possession against that person I am likewise entitled to an order for such person to pull down or dismantle the building. 20

Dealing therefore with the defence and Counter Claim, the only issue that would be outstanding would be the alternative claim of the defendants in paragraph 7 with which they are claiming compensation in the sum of \$26,700 for improvement on the said land.

I would ask therefore that your lordship find on the preliminary issues that the question of ownership of the property has already been determined by a Court of competent jurisdiction and to enter judgment for the Plaintiff on its claim in relation to the 1st, 3rd, and 4th remedies asked for in the statement of claim which would leave the only issues outstanding for further determination the 2nd remedy claimed in the statement of claim, and the second remedy claimed in the counter claim, chapter 177 section 237 of the civil procedure code you will find authority for the proposition which I am putting forward. 30 40

I submit on the question as to whether all the issues should go to trial that that is not a

matter for your decision hearing this preliminary issue.

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Supreme Court

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(continued)

10 Whether or not there would be a preliminary issue, was being considered by Mr. Parnell J - that would be something for his consideration at that stage. Having determined at that stage that this issue could properly be tried as a preliminary issue and having so ordered then your lordship has a preliminary issue before you and cannot refuse to make a determination on it.

In any event if your lordship could so determine at this stage I would ask you to say that this issue substantially disposes of the whole action and in any event that it disposed fully of a distinct cause of action and distinct grounds of defence.

20 Seeing that it disposes of the question of ownership resulting in your ability to give to the Plaintiff the remedies that I have already pointed out to you and seeing also that it disposes of the whole of the defence and of the main remedies asked by the defendant on the Counter Claim.

Counter Claim ask that defendants be registered as proprietors of an estate in Fee simple - that has been disposed of and it would dispose of the remedy of Rectification of title asked for by the defendants.

Section 237 of chapter 177 read.

Mr. Parkinson with permission

30 States:- No opportunity was given in regard to the submission that the proper time that whether the preliminary point of law should be argument and whether argument or the preliminary point would conclude the issue or issues on the action was when the matter was before Mr. Justice Parnell who made the order.

40 My reply is that there was not the slightest opportunity for counsel for defendants to make any submission that this was not a case that could be decided on the hearing of the preliminary point of law because counsel was interrupted by Mr. Justice Parnell during his submission in reply to Mr. Chen See's submission and the learned Judge immediately

In the
Supreme Court

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Notes of
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Chambers J.

16th November
1972

(continued)

and of his own motion referred to section 236 of chapter 177 and without inviting or hearing any argument, made the order.

Judgment delivered today orally.

This is a simple and straight forward case which could have been decided and determined after much shorter and more relevant submissions made.

Court finds that the question of ownership of the land subject of this suit has already been determined by a Court of competent jurisdiction and therefore enters judgment for the Plaintiff on the claim for:-

10

- (1) Possession of the said land
- (2) An injunction is hereby granted restraining the defendants from constructing any building on the said land.
- (3) That the defendants are hereby ordered to pull down dismantle, and demolish any building erected on the said land within 2 weeks hereof.

The question of mesne profits claimed by the Plaintiff in his claim and of compensation to Defendant, claimed in the counter claim be tried as a separate issue.

20

Costs of the hearing of the preliminary issue to Plaintiff to be taxed or agreed.

Mr. Parkinson applies for a stay of execution pending the result of the appeal which will be filed in this case.

Mr. Rattray opposes the application. Case has been going on for years. Owners must get possession at some time.

30

One of the chief reasons why this matter still lingers on is because in 1963 when the court made an order for possession it did so setting a minimum and maximum time at which the warrant should issue.

The defendants promptly brought action in the high court so that the warrant couldn't issue.

By the time that action could be disposed of, which was when the hearing of the appeal in 1965, the maximum time for the insurance of the warrant had long passed.

In the
Supreme Court

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Evidence of
Chambers J.

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1972

(continued)

10 These people have remained on, refusing to leave and there must come a time when the orders of the Court can take effect and the authority of the Court be exercised in having them leave their premises. The time is now. I ask that no stay of execution be granted, which would seem that the Plaintiff would be deprived of their property for possible another 3 years and we might well again be met with the argument of adverse possession as in the instant preliminary hearing.

Mr. Parkinson replies

The application for a stay is obviously the just thing when an appeal is going to be brought.

20 Let us suppose the Court of Appeal finds that Mr. Parnell's order was wrong which is a distinct possibility, what would be the position. It would mean that the case would be tried in the normal way. How would it be fair and just to pull down these people's house which they have been living in for nearly 20 years. Home pulled down in 2 weeks and the Court of Appeal holds that the order for hearing on a preliminary point is wrong.

30 Again the company might even go into liquidation. Now is the time for me to make the application and I make it. I ask for a stay until at least when the 2 issues are tried or the determination of the appeal.

Stay of Execution Refused.

NOTE:

ALL GRAMMATICAL AND SEEMING TYPOGRAPHICAL ERRORS CONTAINED IN THE PRINTED NOTES OF EVIDENCE IN THE RECORD ARE AS APPEAR IN THE COPY NOTES SUPPLIED BY THE REGISTRAR OF THE SUPREME COURT AS BEING THE NOTES OF THE LEARNED TRIAL JUDGE.

In the
Supreme Court

No.13

Formal
Judgment of
Chambers J.

16th November
1972

No. 13

Formal Judgment of Chambers J.

Suit No. C.L. 371 of 1972

In the Supreme Court of Judicature of Jamaica

In Common Law

BETWEEN BEVERLEY GARDENS DEVELOPMENT
CO. LTD. PLAINTIFF

AND MR. & MRS. BENJAMIN DEFENDANTS
PATRICK

Dated the 16th day of November 1972

10

This action coming up for hearing on the 12th and 13th October and the 13th, 14th, 15th and 16th November 1972 before Mr. Justice Chambers without a jury and upon hearing Mr. R. Carl Rattray of Queen's Counsel and Mr. W. K. Chin See instructed by Mr. Thomas O. Ramsay of the firm of Messrs. Silvera & Silvera, Attorneys-at-Law for the Plaintiff and Mr. E.C.L. Parkinson of Queen's Counsel, instructed by Mr. Michael A. Williams of the firm of Messrs. Williams & Williams, Attorneys-at-Law for the Defendant, the said Mr. Justice Chambers ORDERED AND ADJUDGED that the question of ownership of the land the subject matter of this Suit has already been determined by a Court of competent jurisdiction and therefore Judgment is entered for the Plaintiff on its claim for:-

20

1. Possession of the said land.

2. An Injunction is hereby granted restraining the Defendant from constructing any building on the said land.

30

3. That the Defendants are hereby ordered to pull down dismantle and demolish any building erected on the said land within two weeks hereof.

4. The question of mesne profits of claimed by the Plaintiff in his Claim and of compensation to the Defendants in their Counter Claim be tried as a separate issue.

5. That the costs of the hearing of the Preliminary issue to the Plaintiff to be taxed or agreed.

In the
Supreme Court

AND IT IS FURTHER ORDERED that an application for a stay of execution be refused.

No.13

SILVERA & SILVERA

Formal
Judgment of
Chambers J.

(Sgd.) (?)

16th November
1972
(continued)

Intd. (?)
27/10/72

10 FILED by SILVERA & SILVERA of Nos. 42-44 East Street, Kingston, Attorneys-at-Law for and on behalf of the Plaintiff.

Entered in Judgment Book 636 - Folio 357.

(Sgd.) (?) Scott 29/11/72

COPY RECEIVED

Silvera & Silvera

(Sgd.) J. Beckford

Time: 3.25 Date: 12/12/72

Supreme Court Official Frank dated 23rd Nov. 1972 and also with \$1.25 and \$14.50 stamps

20 I, ? E. Johnson, DEPUTY REGISTRAR of the Supreme Court of Judicature of Jamaica do hereby certify that the foregoing is a true and correct copy of the Judgment in matter of BEVERLY GARDENS DEVELOPMENT LTD. and Mr. & Mrs. Benjamin Patrick delivered on the 16th day of November, 1972.

Dated this 8th day of December, 1972.

(Sgd.) (?) E. Johnson
Dep. REGISTRAR

In the
Supreme Court

No.14

Endorsement
on Writ
24th January
1974

No. 14

Indorsement on Writ

SUIT NO. C.L. P.005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
COMMON LAW

BETWEEN MR. AND MRS. BENJAMIN PATRICK
15 Sunnyside Avenue PLAINTIFFS
May Pen
Clarendon

A N D BEVERLEY GARDENS DEVELOPMENT CO. LTD. 10
42-44 East Street
Kingston

and

XDOL MIGNOTT DEFENDANTS
16 Trenton Road
May Pen
Clarendon

The Plaintiffs' claim is against the first and second Defendants jointly and severally for damages for wrongful entry by the second Defendant, the servant or agent of the first Defendant, upon the Plaintiffs' land at 15 Sunnyside Avenue, May Pen, in the Parish of Clarendon, on the 5th day of December, 1972, and demolishing the Plaintiffs' house and removing the Plaintiffs' goods. 20

DATED the 24th day of January, 1974.

(sgd.) Eugene C.L. Parkinson, Q.C.
.....
EUGENE C.L. PARKINSON, Q.C.
Plaintiffs' Attorney-at-Law.

THIS WRIT IS ISSUED by Eugene C.L. Parkinson, Q.C., whose address for service is No.19 Church Street, Kingston, Attorney-at-Law for and on behalf of the Plaintiffs herein who reside at No.15 Sunnyside Avenue, May Pen, in the Parish of Clarendon, and whose address for service is that of their said Attorney-at-Law. 30

No. 15

Statement of Claim

SUIT NO. C.L. P.005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

BETWEEN MR. AND MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLEY GARDENS DEVELOPMENT DEFENDANTS
CO. LTD.

and

XDOL MIGNOTT

In the
Supreme Court
of Jamaica

No.15

Statement
of Claim

24th January
1974

10 1. The Plaintiffs are and were at all material
times in possession of land and premises known as
No.15 Sunnyside Avenue, May Pen, in the Parish of
Clarendon, and were and are the owners of and
entitled to possession of the goods, furniture and
utensils in the said premises.

20 2. On the 15th day of December, 1972, the first
Defendant, by its servant or agent the second
Defendant, wrongly entered the said land and
wrongfully demolished the plaintiffs' house and
outbuildings and took and carried away the
Plaintiffs' said goods, furniture and utensils.

3. By reason of the matters herein complained
of, the Plaintiffs have suffered loss and been put
to expense.

PARTICULARS OF SPECIAL DAMAGE

The following are the Special Damages
sustained by the Plaintiffs:

30	(1) Value of house and outbuildings destroyed	\$4,010.00
	(2) Damage to the said goods, furniture, etc.	1,356.00
	(3) Rental of temporary premises	540.00
		<u>\$5,606.00</u>

And the Plaintiffs claim damages.

DATED the 24th day of January, 1974

In the
Supreme Court
of Jamaica

No.15

Statement
of Claim
24th January
1974
(continued)

(sgd.) Eugene C.L. Parkinson, Q.C.
.....

EUGENE C.L. PARKINSON, Q.C.
Plaintiffs' Attorney-at-Law.

FILED BY Eugene C.L. Parkinson of No.19 Church
Street, Kingston, Attorney-at-Law for and on
behalf of the Plaintiffs herein.

No.16

Summons to
strike out
Pleadings
20th March
1974

No. 16

Summons to strike out Pleadings

SUIT NO. C.L. PO05 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

10

IN COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLY GARDENS DEVELOPMENT
COMPANY LTD.

and

DEFENDANTS

EXDOL MIGNOTT

LET ALL PARTIES CONCERNED attend the Master
in Chambers at the Supreme Court Building, Public
Buildings, East King Street, Kingston on the 25th
day of April, 1974 at 10.00 o'clock in the fore-
noon on the hearing of an Application on the part
of the Second-named Defendant for an Order.

20

- (a) That the action be summarily dismissed or
- (b) That the proceedings be stayed on the grounds that

(i) The Pleadings disclose no reasonable
cause of action

(ii) That the action is frivolous and
vexatious.

(iii) That the proceedings amount to an
abuse of the process of the Court.

30

(c) The costs of this application and the costs of and occasioned by such striking out be the Second-named Defendant in any event.

In the
Supreme Court
of Jamaica

DATED the 20th day of March, 1974.

No.16

TO: The abovenamed Plaintiff,
c/o Their Attorney-at-Law,
Mr. Eugene C.L. Parkinson, Q.C.,
19 Church Street,
Kingston.

Summons to
strike out
Pleadings

20th March
1974
(continued)

10

COPY RECEIVED

(sgd.) Eugene C.L. Parkinson
19.4.74 at 10.00 a.m.

FILED by Silvera & Silvera of Nos.42-44 East Street,
Kingston, Attorneys-at-Law for the Second-named
Defendant.

No. 17

No.17

Conditional Appearance

Conditional
Appearance

SUIT NO. C.L. P005 of 1974

1st April
1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

20

IN COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED

and DEFENDANTS

XDOL MIGNOTT

ENTER Conditional Appearance for the second-named Defendant XDOL MIGNOTT, in this cause who appears by his Attorneys-at-Law, Silvera & Silvera of Nos.42-44 East Street, Kingston, whose address for service is that of his said Attorneys-at-Law.

30

DATED the 1st day of April, 1974

SILVERA & SILVERA

per: ?
Attorneys-at-Law for the
Second-named Defendant

In the
Supreme Court
of Jamaica

No.17
Conditional
Appearance
1st April
1974
(continued)

TO: The Registrar,
Supreme Court,
Kingston.

TO: The abovenamed Plaintiffs,
c/o Their Attorney-at-Law,
Mr. Eugene C.L. Parkinson, Q.C.,
19 Church Street,
Kingston.

FILED by Silvera & Silvera of Nos.42-44 East Street,
Kingston, Attorneys-at-Law for the second-named 10
Defendant.

No.18
Affidavit of
John Alexander
Sinclair
9th April 1974

No. 18
Affidavit of John Alexander Sinclair

SUIT NO. C.L. P005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS
AND BEVERLY GARDENS DEVELOPMENT
COMPANY LIMITED

and DEFENDANTS 20
EXDOL MIGNOTT

I, JOHN ALEXANDER SINCLAIR being duly sworn
make oath and say as follows:

1. That I reside and have my true place of abode
at 13A Central Avenue in the Parish of Saint
Andrew, my postal address is Kingston 10.

2. I am an Attorney-at-Law and an Associate of
the Firm of Silvera & Silvera of Nos.42-44 East
Street, Kingston, Attorneys-at-Law for the
Defendants herein. 30

3. That I am reliably informed and verily
believe that the Plaintiffs herein are trespassers
on the abovementioned parcel of land known as
No.15 Sunnyside Avenue, May Pen, in the Parish of
Clarendon, and being the land registered at Volume
30 Folio 58 of the Register Book of Titles.

4. That in the year 1962, the then owner of the aforesaid parcel of land, one Fredericka Walker, and predecessor in title of the First-named Defendant, brought proceedings for recovery of possession of the said land against one of the above-named Plaintiffs, Benjamin Patrick, in the Resident Magistrate's Court for Clarendon. Hearing of the case commenced on 6th December, 1962, and on the 10th day of January, 1963, the Court ordered, inter alia, the issue of a Warrant of Possession against the Plaintiff herein not earlier than 21 days and not later than 28 days from the 10th of January, 1963.

In the
Supreme Court
of Jamaica

—
No.18

Affidavit of
John
Alexander
Sinclair

9th April
1974

(continued)

10

5. That on the 29th day of January, 1963, and before the expiry of the 21 days stipulated in the Order of the Learned Magistrate, the said Benjamin Patrick filed a Suit in this Honourable Court viz. Suit No. E. 11 of 1963 for a declaration that he was entitled in fee simple to the aforesaid parcel of land, and for an Order setting aside, the said Order of the Learned Resident Magistrate for the Parish of Clarendon, made on the 10th day of January, 1963.

20

6. That on the 11th day of February, 1963, the said Fredericka Walker entered an Appearance to the Writ of Summons and on the 12th day of February took out a Summons to stay all proceedings before the Court with reference to the abovementioned Writ of Summons on the grounds that the proceedings were obviously frivolous, vexatious or an abuse of the process of the Court.

30

7. That the Summons to stay or strike out proceedings referred to in paragraph 6 herein after numerous adjournments, finally came on for hearing before His Lordship, Mr. Justice Louis Fox (acting) when the Order was granted as prayed in the Summons and the proceedings were stayed and the Statement of Claim was struck out.

40

8. That an Appeal was filed viz. C.A. 5 of 1967, which was dismissed with costs to the Respondent, Frederick (sic) Walker.

9. That on the 12th day of August, 1969, the First Defendant purchased the said land and became the registered proprietor thereof.

10. That on the 23rd day of March, 1972, Suit No.

In the
Supreme Court
of Jamaica

No.18

Affidavit of
John
Alexander
Sinclair

9th April
1974

(continued)

C.L. 371 of 1972 commenced in this Honourable Court between Beverly Gardens Development Company Limited as Plaintiffs and Mr. & Mrs. Benjamin Patrick as Defendants.

11. The First Defendant, Beverly Gardens Development Company Limited, claimed:-

- (1) Possession of the said land.
- (2) Mesne profit at a rate of \$60.00 per month.
- (3) An injunction to restrain the Defendants from constructing any Building on the said land. 10
- (4) Further and/or alternatively, an Order that the Defendants do forthwith pull down, dismantle and demolish any building erected on the said land.

12. That on the 16th day of November, 1972, Mr. Justice Chambers entered judgement for the Plaintiff on the claim for:

- (1) Possession of the said land.
- (2) An injunction restraining the Defendant from constructing any building on the said land. 20
- (3) An Order that the Defendants pull down dismantle and demolish any building erected on the said land within two weeks and that an application for a stay of execution be refused.

13. That on the 28th day of November, 1972, the said Mr. & Mrs. Benjamin Patrick Appealed Suit No. C.A. 36 of 1972 against the decision of Mr. Justice Chambers as stated in paragraph 12, and further applied for a stay of execution of the judgement. 30

14. That the Court subsequently Ordered a stay of execution pending the outcome of the Appeal but that the motion to stay execution was granted after the judgement had, in fact, been executed and the buildings erected by Mr. & Mrs. Benjamin Patrick demolished.

15. That Appeal Suit No. C.A. 36 of 1972 is still pending, and I crave leave to refer to and rely on

the records of this Honourable Court and of the Court of Appeal.

16. That on the 24th day of January, 1974, the Plaintiffs herein, launched a new action in Suit No. C.L. P005 of 1974.

10 17. That the action herein is essentially the same in substance as the previous actions launched in respect of that parcel of land known as No.15 Sunnyside Avenue, May Pen in the Parish of Clarendon, in that the Endorsement on the Writ of Summons and the Statement of Claim herein claim an entitlement to possession of the said land, and the goods and chattels thereon.

18. That I AM OF THE OPINION THAT THE pleadings disclose no reasonable cause of action or alternatively, that the action is frivolous and vexatious, and further amounts to an abuse of the process of the Court.

20 19. That the Second-named Defendant will be put to unnecessary expense in defending this action, which seeks to raise anew a question which has already been decided between the Plaintiffs and the First Defendant, as well as between the Plaintiffs and the First Defendant's predecessor in title, in respect of the same subject matter, and is now the subject matter of an Appeal.

20. That I pray that this Honourable Court will exercise its inherent jurisdiction and make an Order summarily:-

- 30 (a) Dismissing the action or
- (b) Staying the proceedings kpending the outcome of the appeal in Suit No. C.A. 36 of 1972

With costs against the Plaintiffs.

DATED the 9th day of April, 1974.

(sgd.) John Sinclair

SWORN to at 55 Barry Street in the Parish of

In the Supreme Court of Jamaica

No.18

Affidavit of John Alexander Sinclair

9th April 1974

(continued)

In the
Supreme Court
of Jamaica

No.18

Affidavit of
John
Alexander
Sinclair
9th April
1974
(continued)

Kingston on the 9th day of April, 1974, before
me:

.....(sgd.) O. Shim.....

Justice of the Peace

FILED by Silvera & Silvera of Nos.42-44 East Street,
Kingston, Attorneys-at-Law for and on behalf of the
abovenamed Defendants.

No. 19

Affidavit of
E. C. L.
Parkinson
22nd April
1974

No. 19

Affidavit of Eugene C.L. Parkinson

SUIT NO. C.L. P.005 of 1974

10

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLEY GARDENS DEVELOPMENT
COMPANY LTD.

and

DEFENDANTS

XDOL MIGNOTT

I. EUGENE C. L. PARKINSON, whose true place
of abode is 8 Grosvenor Terrace, in the Parish of
St. Andrew, and whose postal address is 9 Duke
St., Kingston Post Office, Attorney-at-Law and
one of Her Majesty's Counsel for Jamaica, make
oath and say:

20

1. I am the Attorney-at-Law for the Plaintiffs
herein.

2. Contrary to the statements contained in para-
graphs 17 and 19 of the Affidavit of Mr. John
Alexander Sinclair dated the 20th day of March,
1974, the cause of action herein is entirely and
completely different from the cause of action in
Suit E. 11 of 1963 and in Suit C.L. 371 of 1972.

30

3. The cause of action in Suit E.11 of 1963, an
action which was brought by the first Plaintiff

herein was for a Declaration that he was entitled in fee simple to the land in question, having purchased the same for the sum of £250.0.0.

In the
Supreme Court
of Jamaica

In this regard, I crave leave to refer to pages 20A and 21A of the Record in Civil Appeal No.36 of 1972, filed in the Registry of the Court of Appeal.

No.19
Affidavit of
E. C. L.
Parkinson

10 4. The cause of action in Suit C.L. 371 of 1972, an action which was brought by the first Defendant herein against the Plaintiffs herein and which is now on appeal (Civil Appeal No.36 of 1972), was for possession of the said land, and the Plaintiffs herein pleaded in Defence:

22nd April
1974
(continued)

- 20 (a) that the Plaintiff is not entitled to possession or to be registered as the proprietor of the said land;
- (b) that the Defendants are in possession of the said land and have been in possession from July, 1944, and are entitled on the ground of adverse possession to the fee simple estate in the said land;
- (c) that any alleged right of the Plaintiff to the said land is barred and its title extinguished by virtue of Sections 3 and 30 of the Limitation of Actions Law, Chapter 222 of the Revised Edition of the Laws of Jamaica.

30 In this regard I crave leave to refer to page 14 of the Record in Civil Appeal No.36 of 1972, filed in the Registry of the Court of Appeal.

5. It is clear that the case for the Plaintiffs herein is very different from those in Suit E.11 of 1963 and in Suit C.L. 371 of 1972.

In this regard I crave leave to refer to pages 3, 4, 5, 15, 44D, 45D, 46D, and 72 - 76 of the Record in Civil Appeal No. 36 of 1972, filed in the Registry of the Court of Appeal.

40 6. Following the hearing of the so-called Preliminary Point of Law in Suit C.L. 371 of 1972, Mr. Justice Chambers refused to grant a Stay of Execution pending an appeal, and the Plaintiffs herein applied to the Court of Appeal for such a

In the
Supreme Court
of Jamaica

No.19

Affidavit of
E. C. L.
Parkinson

22nd April
1974

(continued)

Stay, which was granted by the Court of Appeal on the 18th December, 1972.

7. On the 15th December, 1972, while the Application for the said Stay of Execution was being heard by the Court of Appeal which had begun the hearing on the 14th December, 1972, and before the hearing was concluded by the said Court, the Defendants herein, with the obvious intention of rendering any grant of a Stay of Execution nugatory and defeating the ends of justice, wrongfully and high-handedly entered the said land which was and still is lawfully in the possession of the Plaintiffs, and demolished the Plaintiffs' house and removed the Plaintiffs' goods. 10

The cause of action in the instant Suit is based on the acts of the Defendants herein and in this regard I exhibit to this Affidavit photocopies of the Indorsement on the Writ and of the Statement of Claim, marked "A" and "B" respectively, for identity, showing that the acts of the Defendants on the 15th December, 1972, are the sole cause of action in the instant case. 20

8. The aforesaid trespass by the Defendants is an entirely new development, constitutes a completely new cause of action, and is separate and distinct from the issues in Suit E. 11 of 1963 and Suit C.L. 371 of 1972.

9. So far from being frivolous and vexatious and an abuse of the process of the Court, the instant Suit is based on a clear breach of the Plaintiffs' legal rights in any event, regardless of the result of the Civil Appeal No. 36 of 1972, (which, incidentally, will be the first opportunity whereby the facts in the previous litigations will be ventilated and the merits adjudicated upon). 30

SWORN TO at 8 Grosvenor Terrace in the Parish of St. Andrew this 22nd day of April, 1974, before me: } (sgd.) Eugene C.L. Parkinson

.....(sgd.) ? M. Parkinson..... 40
JUSTICE OF THE PEACE
for the Parish of St. Andrew

COPY RECEIVED
SILVERA & SILVERA

per: ...?.....

Time: 11 a.m.
Date: 22/4/74

In the
Supreme Court
of Jamaica

No.19

Affidavit of
E. C. L.
Parkinson

22nd April
1974
(continued)

FILED BY Eugene C.L. Parkinson, Q.C., of 9 Duke
Street, Kingston, Attorney-at-Law for and on behalf
of the Plaintiffs herein.

No. 20

No.20

10 Affidavit of Exdol Henry Mignott

Affidavit of
Exdol Mignott
13th May 1974

SUIT NO. C.L. P.005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLEY GARDENS DEVELOPMENT
CO. LTD.

and

DEFENDANTS

EXDOL MIGNOTT

20 I, EXDOL HENRY MIGNOTT being duly sworn make
oath and say as follows:-

1. That I reside and have my true place of abode
at 16 Trenton Avenue in the Parish of Clarendon,
my postal address is May Pen P.O., and I am the
Second named Defendant herein.

2. That on or about the 14th day of December,
1972 on the instructions of the First named
Defendant, I entered the land the subject matter
of the action herein and proceeded to demolish the
buildings thereon as instructed.

30 3. That prior to demolishing the aforementioned
buildings, I removed all the items of furniture
therein.

4. That I was aided in this exercise by at least
one of the abovenamed Plaintiffs, Mrs. Benjamin
Patrick.

In the
Supreme Court
of Justice

—
No.20

Affidavit of
Exdol Mignott
13th May 1974
(continued)

5. That the aforementioned furniture was deposited in premises over which I had control at 11A Manchester Avenue in the Parish of Clarendon, for safe keeping.

6. That they were stored there for approximately eight months, during which time I had made numerous requests of the Plaintiffs for their removal.

7. That I was asked on these occasions for further time as they had no place to keep them. 10

8. That during this period, a Bailiff of the Resident Magistrates Court for the Parish of Clarendon, Mr. Eric Boothe, levied on one of the said items of furniture, a sewing machine, on which money was owed by the Plaintiffs.

9. That on being informed that the Plaintiffs had now erected another building on the said land I effected a delivery of the other items to the Plaintiffs.

10. That at the time of such delivery they were in exactly the same condition as when they were first removed. 20

(sgd.) E. G. Mignott

SWORN TO at 95 Harbour St., in the Parish of Kingston on the 13th day of May, 1974, before me:

(sgd.) ?
Justice of the Peace
St. Andrew

FILED by Silvera & Silvera of Nos.42-44 East Street, Kingston, Attorneys-at-Law for and on behalf of the abovenamed Defendants.

No. 21

Affidavit of Thomas Oswald Ramsay

SUIT NO. C.L. P005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLY GARDENS DEVELOPMENT
COMPANY LIMITED

and DEFENDANTS

10 EXDOL MIGNOTT

I, THOMAS OSWALD RAMSAY being duly sworn make
oath and say as follows:

1. That I reside and have my true place of abode
at Lot 691 Bridgeport in the Parish of Saint
Catherine, my postal address is Gregory Park Post
Office and I am an Attorney-at-Law of the Supreme
Court of Judicature of Jamaica and an Associate of
the firm of Silvera & Silvera of Nos.42-44 East
Street, Kingston, Attorneys-at-Law on the record
for the Second Defendant herein.

2. That I crave leave of this Honourable Court
to refer to the Affidavit of Mr. Eugene C.L.
Parkinson, Q.C., Attorney-at-Law on the record
for the Plaintiffs, dated the 22nd April, 1974 and
filed in this Honourable Court.

3. That in paragraph 7 of such Affidavit it was
stated that the hearing of the application for the
relevant Stay of Execution by the Court of Appeal
had begun on the 14th day of December, 1972.

30 4. That the aforementioned hearing in fact,
commenced on the 15th of December, and not on
the 14th December, 1972 as alleged.

(Sgd.) Thomas O. Ramsay

In the
Supreme Court
of Jamaica

No.21

Affidavit of
Thomas Ramsay

15th May 1974

In the
Supreme Court
of Jamaica

No.21

Affidavit of
Thomas Ramsay
15th May 1974
(continued)

SWORN to at 55 Barry St. in the Parish of Kingston
on the 15th day of May, 1974, before me:

(sgd.) Oscar Shim
Justice of the Peace
Kingston.

FILED by Silvera & Silvera of Nos.42-44 East
Street, Kingston, Attorneys-at-Law for and on
behalf of the abovenamed Defendants.

No.22

Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached
22nd May 1974

No. 22

Affidavit of Thomas Oswald Ramsay

10

SUIT NO. C.L. P005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED

and

DEFENDANTS

EXDOL MIGNOTT

I. THOMAS OSWALD RAMSAY being duly sworn make
oath and say as follows:

20

1. That I reside and have my true place of abode
at Lot 691 Bridgeport in the Parish of Saint
Catherine, my postal address is Gregory Park Post
Office and I am an Attorney-at-Law of the Supreme
Court of Judicature of Jamaica and an Associate
of the firm of Silvera & Silvera of Nos.42-44
East Street, Kingston, Attorneys-at-Law on the
record for the Second Defendant herein.

2. That I exhibit hereto marked "A" a copy of
the Notes of Evidence and Judgment in Information
No.4479/62 in an action for Recovery of Tenement -
Frederica Walker vs. Benjamin Patrick heard in
Resident Magistrate's Court for the parish of
Clarendon before Mr. Justice Shelley.

30

3. That I exhibit hereto marked "B" a copy of
the Judgment in Suit No. E 11 of 1963 - Benjamin

Patrick vs. Frederica Walker - handed down by Mr. Justice Fox, Acting.

In the Supreme Court of Jamaica

No.22

4. That I exhibit hereto marked "C" a copy of the Order made in C.A. 5 of 1967 delivered by the Court of Appeal on the 11th of July, 1969.

Affidavit of Thomas Ramsay with Exhibits "A", "B", "C" and "D" attached

10

5. That I exhibit hereto marked "D" a copy of the Order made by Mr. Justice Parnell dated the 26th April, 1972 in Suit No. C.L. 371 of 1972 - Beverley Gardens Development Company Limited vs. Mr. & Mrs. Benjamin Patrick.

22nd May 1974 (continued)

(sgd.) Thomas O. Ramsay

SWORN to at 55 Barry Street in the Parish of Kingston on the 22nd day of May, 1974, before me:-

(sgd.) Oscar Shim
Justice of the Peace
Kingston

"A"

20

This is the copy of the Notes of Evidence and Judgment in Information No. 4479/62 mentioned and referred to in the Affidavit of Thomas Oswald Ramsay, sworn to on the 22nd day of May, 1974, before me:

(sgd.) Thomas O. Ramsay (sgd.) Oscar Shim
.....
Thomas Oswald Ramsay Justice of the Peace

May Pen.

6th December, 1962

INFORMATION NO. 4479/62

FREDERICA WALKER v BENJAMIN PATRICK

RECOVERY OF TENEMENT

30

Mr. Lopez for Complainant.
Mr. Eccleston for Defendant.

FREDERICA WALKER (sworn):

I live at 11 Cheriton Road, Kingston 2,

In the
Supreme Court
of Jamaica

No.22
Exhibit "A" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

Stenographer. My maiden name was Frederica Lyons. I am neice of Frederica Goode. I am her agent in Jamaica. I hold Power of Attorney from her.

This is it - Exhibit 1. Mrs. Goode owns 15 Sunnyside Avenue, May Pen, in Clarendon. Land registered at Vol.30 Fol.58 in Register Book of Titles. This is duplicate Certificate of Title -

Exhibit 2. Defendant is tenant on the land. My Aunt has lived in New York, U.S.A., ever since I was born. Before I became my aunt's attorney my mother, Mrs. Rebecca Lyons was my aunt's agent.

I know there was agreement between my mother and Defendant about the lands. These 2 documents are the agreement - Exhibit 3. Defendant has been

paying me rent in respect of land. Rental is £6 per year. Defendant last paid rent in April 1960.

Defendant also paid me rent in 1952 and 1955. I have never seen Defendant write. I got these letters through post office at May Pen. They

purport to come from Defendant. One letter dated 1961 purports to come from Mrs. A. Patrick. She

is wife of Defendant. Defendant has paid me moneys for rent beside sending monies through post.

(Mr. Lopez tenders the 3 letters in evidence).

Mr. Eccleston objects - there is no proof of handwriting of defendant).

(Witness has received letters through the post purporting to be from Defendant).

Court rules letters inadmissible at this stage as no nexus between Defendant and letters.

When Defendant pays me money I give him a receipt from a receipt book and I keep counterfoil of receipt given. This is book from which I gave Defendant receipts - Exhibit 4. First counterfoil is dated 18.5.54 and is for £12 for 2 years rent.

Second counterfoil is for £6 for rent from February 54 to January 55. The third is for £3

from February 55 to July 55. Defendant now owes rent from 1957 up to the present. In April 1960

I got from Defendant £12. That was for rent due up to 1957. Since April 1960 Defendant has paid

me no more monies. I gave my Solicitors instructions re termination of Defendant's tenancy.

This is copy of notice my Solicitors sent.

Defendant is still on the lands. I am asking

that Defendant deliver possession to me as my aunt's agent.

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XXD:-

10 I don't own lands. I am agent of landlord. I don't remember year I started keeping Exhibit 4. There are maybe one or two other persons I have given receipts from Exhibit 4. I kept book in a drawer of wardrobe at my home. I have always had control of it. It has never left my possession. I did not give Defendant receipt for payment made in 1960 because he wouldn't pay rent as he should and I had written to him suggesting that rental would be increased to £12 per year and that I would have to get word from my Solicitors. I wrote my Solicitors. I got word from them. I still haven't given defendant a receipt. In 1944 I was living in Spanish Town. My mother was living in May Pen. In 1944 I was 18. I was then going to school. I know of no transaction between Defendant and my mother for sale of land. My mother leased lands to Defendant in 1944. I don't know that 20 Defendant paid my mother £125 as part payment for lands in July 1944. I don't know of payment of £100 to my mother by Defendant in 1945 July. In January 1946 I never saw Defendant at my mother's home. Defendant didn't hand me balance of £25 to hand to my mother. Defendant has paid me rent since 1945. Defendant erected a house on the land. 1951 hurricane blew away that house. Defendant built another house. He still lives in that house and still occupies land. Defendant has paid me 30 rent.

To Court: My mother died in 1946.

CECIL LOPEZ (sworn)

40 Solicitor of Supreme Court in Jamaica. I am a partner in firm of A.E. Brandon & Co. at 45 Duke Street, Kingston, Solicitors for Mrs. Frederica V. Goode of New York, U.S.A. whose agent in Jamaica is Complainant. In January, 1962, I had instructions from Mrs. Goode through her agent to give Defendant notice to quit land at May Pen. I prepared typewritten notice. (Mr. Eccleston objects to all above evidence - witness must prove his instructions explicitly).

Court rules evidence admissible.

(Defendant produces original notice.) This is original notice I sent - Exhibit 5. My firm has

In the
Supreme Court
of Jamaica

No.22
Exhibit "A" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

In the
Supreme Court
of Jamaica

No.22
Exhibit "A" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

acted for Mrs. Goode since 1955. On 21st Oct. 1955 my firm addressed a letter to Mr. Benjamin Patrick, Sunnyside, May Pen P.O. In January, 1956, we received a letter from Delapenha & Iver who were then acting for Defendant. This is letter from Delapenha & Iver (Mr. Eccleston objects).

Delapenha & Iver don't appear for Defendant.

Court rules letter admissible.

Letter - Exhibit 6. In 1960 acting on behalf of Mrs. Goode I made application to R.M. Court for Clarendon for vesting order to vest the lands in question in Mrs. Goode. I personally appeared at May Pen on first day summons came on for hearing. Defendant also attended and was then represented by Mr. Pershadsingh of Counsel. In presence of Defendant I showed Mr. Pershadsingh Exhibit 3.

10

XXD:- I don't remember exact date Vesting Order First came before Court. It might have been in November 1960. I know the handwriting of Mr. H.J. Shelley who was then R.M. for Clarendon. (Witness looks at document). In Mr. Shelley's handwriting is 3.11.60, Mr. R.S. Pershadsingh appears for Benjamin Patrick. At request of Mr. Pershadsingh adj. to 1.12.60. Then it continues 1.12.60 Benjamin Patrick does not appear. Initialled H.S. Nothing on the record that Defendant personally attended. I don't come to May Pen often. I had no other business in May Pen on 3.11.60. I spoke to Defendant in presence of Mr. Pershadsingh. I have been Solicitor for 20 years 2 days ago. I don't know if Defendant's wife came to Court on 3.11.60. I had instructions to serve notice. The Complainant gave me instructions to serve notice. I got instructions from Mrs. Goode. On 11.1.62. This is letter - Exhibit 7. Firm didn't get retainer along with Ex.7. I appreciate that Defendant is tenant of Mrs. Goode's land from 1944. Defendant was first under long lease for 5 years. Defendant has held over as tenant from year to year since expiration of the lease. I first learned that Defendant was claiming he purchased lands from Mrs. Lyons on the return day of this summons. I didn't hear that on 3.11.60. On 3.11.60 I understood from talk between Defendant and Mr. Pershadsingh that Defendant was claiming land by adverse possession.

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30

40

The return day of this summons was on 15.11.62. Mr. Wynter of Counsel was then appearing for Defendant. It surprises me that Defendant is claiming that he purchased the lands. Except for general power in paragraph 9 of Exhibit 1, there is nothing in Exhibit 1 about giving notice. Paragraph 2 of Exhibit 1 gives Complainant power to bring proceedings.

(Defendant produced original notice to quit).

In the
Supreme Court
of Jamaica

No.22
Exhibit "A" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

10

CASE

BENJAMIN PATRICK (sworn):

20

30

40

Cultivator living at 15 Sunnyside in Clarendon. I leased 5 acres of land from Rebecca Lyons from August 1942. I was supposed to pay £6 per year rent. 1942 I paid Lyons £6 rent. This is receipt I got. Receipt Exhibit 8. In 1943 I paid Mrs. Lyons £6. In 1944 I paid Mrs. Lyons £3. She gave me land under lease and sale. I agreed to buy the land in 1944. Mrs. Lyons was selling me land at £50 per acre. £250 for 5 acres. I paid Mrs. Lyons £125 on 8.6.44. She gave me receipt. I paid in August 1945 £100 to Mrs. Lyons. I got a receipt. Balance of £25 left. I went to Mrs. Lyons' home in January 1946 to pay balance. I saw Complainant who asked me what I wanted. I told her I would like to see Mrs. Lyons as I had brought some money to pay her. Complainant told me she was Mrs. Lyons' daughter. I paid Complainant the £25 and she gave me a small piece of receipt. I get a receipt from Mrs. Lyons for the £25. Mrs. Lyons died. I built house from the first I got it. I plant coconuts, orange and other fruit trees. From I paid last £25 I never paid any rent. I never posted rent to Complainant. I never paid her any rent for lands. I never gave Complainant any monies. I have been in possession of lands cultivating it. In 1960 I got a registered letter from post office. I went to Court House and got Mr. Pershadsingh. That was in October 1960. When I got notice to leave in this case was first I saw Mr. Lopez. Mr. Lopez and I had no talking about the land. I have always maintained that land is land I bought. I got notice to quit the land and then a summons. I remember 1951 hurricane. My house and clothes and everything was blown away. On account of that I can't produce receipts. I have never paid any rent since I bought lands.

In the
Supreme Court
of Jamaica

No.22
Exhibit "A" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

XXD:-

I had all receipts together when hurricane blew them away. I don't know how Exhibit 8 escaped being blown away. The agreement between Mrs. Lyons and I was reduced to writing. I didn't sign agreement as I can't read or write. I don't know Felix Haughton. I have never written to A.E. Brandon & Co. I have never consulted Messrs. Delapenha & Iver about these lands. I can't write. My wife can write. If I saw something 10 that my wife wrote I would recognise it.

(Witness shown a letter).

Ques. Can you say if it is your wife's handwriting?

Ans. I can't recognise the handwriting.

In 1960 when I went to Court I never saw Exhibit 3. I never acknowledged to Mr. Pershadsingh that signature "Benjamin Patrick" on Exhibit 3 was mine. Mr. Pershadsingh didn't tell me that I couldn't fight the case because I had acknowledged signature on lease. I have never got any letter 20 from A.E. Brandon & Co. about the lands. No one ever told me that I shouldn't build the house on the land. I didn't write letter to Brandon & Bolton in 1955 enquiring the price of these lands. I never got letter from Brandon & Bolton telling me cost of land and then I consulted Delapenha & Iver. I didn't write to Brandon & Bolton on 5.2.56 asking for personal appointment. Never got anyone to write letters to Brandon & Bolton for me. This was first notice I got to quit land. 30 I didn't get one in 1956. I don't know if Brandon & Bolton wrote to Delapenha & Iver about house I was building on the land. I didn't write letter and send money £12 to Complainant on 14.5.52. On 19.3.55 I didn't send money £6 and letter to Complainant. I have not been paying rent all along and up to 1957. The land belonged to Rebecca Lyons. I didn't know it belonged to Mrs. Goode, Mrs. Lyons' sister. Complainant never told me that land belonged to her aunt. The first 40 receipt I got was blown away. Exhibit 8 is not first receipt I got. I got a lease paper in 1942. Not 1944. I did pay Mrs. Lyons and Complainant money for sale of land.

Adjourned to 20.12.62.

IVAN LAWRENCE (sworn):

Farmer living at Rock River in Clarendon. I know Defendant. I know one Mrs. Lyons who used to live at Chapleton Road. In 1944 I went with Defendant to Mrs. Lyons' home. It was July. Defendant paid Mrs. Lyons £125. Mrs. Lyons gave Defendant a receipt. In 1945, July, Defendant and I went to Mrs. Lyons' home. Defendant paid her £100 and got receipt. Defendant paying money for piece of land at Sunnyside.

XXD:-

I know Defendant from 1943. Defendant used to live at Reid's home at Hazard in May Pen. Defendant moved to Sunnyside the same year I knew him. Defendant paid first money in July, 1944. I can't read or write. I can only sign my name. I can't say how long after Defendant moved to Sunnyside I went with him to Mrs. Lyons. First payment was in paper or silver. Don't remember exactly but I know it was £125. The £100 was in paper money. I know '51 hurricane blew away Defendant's house. Paper that Defendant got from Mrs. Lyons was a blue paper like what is bought at post office. Paper had on stamped receipt. Defendant touched the pen. When Mrs. Lyons wrote the paper I believe the Defendant signed his name. I never heard Defendant say that he had place on lease. Defendant and I are not friends. When Defendant asked me to go to Mrs. Lyons I was living at Hazard and Defendant at Sunnyside. I went back with Defendant in July 1945. Defendant got a blue receipt, a post office paper on second occasion. I don't know that Defendant had the lands on lease. I am quite sure it was in July 1944. Receipt Defendant got didn't look like Exhibit 8. Defendant signed his name on the second occasion. I don't remember if Defendant touched pen or signed his name as it was such a long time ago. I am not telling parcel of lies. I went only twice to Mrs. Lyons. It was only the two of us who went to Mrs. Lyons. Hazard about 1 mile from May Pen Square. I call Hazard May Pen. Defendant didn't pay £3 in August '44 for lease.

In the
Supreme Court
of Jamaica

No.22
Exhibit "A" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

CASE

Mr. Eccleston:- Bailey v. Hookway (1945) L.J.114 at 318. Court has to decide whether notice properly served and whether Solicitor properly instructed to

In the
Supreme Court
of Justice

No.22
Exhibit "A" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

serve notice. Singleton J at 320 - So long as there are conflicting rights as regards lands jurisdiction of Justices ousted as JJ not required to determine the rights of the parties. Mahfood v Hanna 5 J.L.R. 99 at 102 and 3.

2. In any event if Defendant a tenant of Mrs. R. Lyons he was never attorned tenant to Complainant.

3. Solicitors have served notice which they say they have instructions to do but action brought by Complainant. Action is misconceived under this statute, but should have been in civil court. 10

Mr. Lopez:- Letter from registered proprietor of lands in evidence instructing Solicitors to give notice. Complaint is made by Complainant who is attorney and agent of registered owner.

If it is open to tenant to come and say he has bought lands that alone cannot oust jurisdiction after vesting order made. Defendant paid rent to Complainant. Defendant cannot deny notice of proceedings by vesting order as he was represented by Counsel. 20

Lease in evidence in two parts. Not open now to Defendant to deny landlord's title as lease is dated 1.8.44. Mahfood v Hanna does not apply to facts of this case.

Asks for possession.

Postponed to 10.2.63. for Judgment.

On 10.2.63 Court rules Ex. 6 wrongly admitted and expunged. Court accepts evidence of Complainant and witnesses as truthful and regards that of Defendant as being a mere fictitious pretense of title. 30

Warrant of Possession to issue not earlier than 21 days and not later than 28 days.

Defendant ordered to pay costs £5.5/- to be recovered by distress.

In default, 30 days imprisonment.

"B"

This is the copy of the Judgment in Suit No. E 11 of 1963 mentioned and referred to in the Affidavit of Thomas Oswald Ramsay, sworn to on the 22nd day of May, 1974 before me:

(sgd.) Thomas O. Ramsay.....(sgd.) Oscar Shim.....
Thomas Oswald Ramsay Justice of the Peace

In the Supreme Court of Jamaica

No.22 Exhibit "B" to Affidavit of Thomas Ramsay with Exhibits "A", "B", "C" and "D" attached

22nd May 1974

COPY

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

10 IN THE HIGH COURT OF JUSTICE

IN EQUITY

Suit No. E 11 of 1963

BETWEEN BENJAMIN PATRICK PLAINTIFF
A N D FREDERICKA WALKER DEFENDANT

J U D G M E N T

20 In this Summons the Defendant asks for an Order that the Statement of Claim be struck out on the ground that the Pleading disclosed no reasonable cause of action, was obviously frivolous and vexatious and sought to raise anew a question which has already been decided between the same parties by a Court of competent jurisdiction.

The Plaintiff's claim as endorsed on the writ of Summons filed herein on 29th January, 1963, was for:-

- 1. A Declaration that the Plaintiff is entitled in fee simple to the parcel of land situate at Sunnyside, May Pen in the Parish of Clarendon, consisting of 5¼ acres, now in the possession of the Plaintiff;
- 2. A Declaration that the defendant has no right, title, estate or interest in the said land;
- 3. An Injunction restraining the Defendant, her servants and agents, from taking possession

In the
Supreme Court
of Jamaica

No.22
Exhibit "B" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

of the said land, or interfering with the
possession of the plaintiff in any way;

4. An Order setting aside the order of the Resident Magistrate's Court for the Parish of Clarendon on the 10th day of October, 1962 that the Defendant is entitled to possession of the said land and also the order of the said Court on the 10th day of January, 1963 for a Warrant of Possession to issue against the Plaintiff; 10
5. Damages
6. Costs
7. Further and/or other relief.

The Plaintiff repeated these claims in his Statement of Claim and also alleged:-

1. The Plaintiff was and is possessed of a certain parcel of land situate at Sunnyside, May Pen, in the Parish of Clarendon, consisting of $5\frac{1}{4}$ acres, purchased by the Plaintiff in July, 1944 from the late Rebecca Lyons, mother of the defendant herein, for the sum of £250.0.0. 20
2. In July, 1942, the plaintiff leased the said land from the said Rebecca Lyons for five years at a yearly rental of £6, payable in advance, with an option to purchase at any time, upon giving six months notice of intention to purchase or paying six months rent in lieu of notice;
3. In July, 1944, the Plaintiff duly exercised his option to purchase, paid a half year's rent of £3 in lieu of notice and paid £125 as part-payment of the purchase price; 30
4. In July, 1945, the Plaintiff made a further payment of £100 to the said Rebecca Lyons on account of the purchase price;
5. In January 1946, the plaintiff paid the balance of £25 to complete payment of the purchase price. The said amount was received by the Defendant herein, in the temporary absence of the said Rebecca Lyons, 40

and the Plaintiff subsequently received a receipt for the said amount of £25 from the said Rebecca Lyons;

In the
Supreme Court
of Jamaica

- 10 6. There was no formal conveyance of the said parcel of land by the said Rebecca Lyons to the Plaintiff, but the Plaintiff had his receipts for the said amounts paid to the said Rebecca Lyons, viz. £125, £100, and £25 respectively, which receipts he kept in his possession until August, 1951, when he lost them in the destruction of his house in the hurricane of that year;
7. The plaintiff has for the period from July, 1944 to the present been in exclusive, uninterrupted, and undisturbed position (sic) for the said parcel of land as owner, and Plaintiff claims the right to the fee simple absolute in possession thereof;
- 20 8. In 1961, one Fredericka Goode sued the Plaintiff for possession for the said parcel of land and the case was tried behind the Plaintiff's back and judgment given against him on the 10th October, 1962. The Plaintiff knew of no one called Fredericka Goode, and has never had any transaction with such a person. The said suit was brought at the instance of the Defendant herein, who gave evidence that he (sic) was the agent of Fredericka Goode;
- 30 9. On the 10th day of January 1963, the Defendant obtained an Order in the Resident Magistrate's Court at May Pen in the parish of Clarendon for a warrant of possession to issue against the plaintiff not earlier than 21 days and not later than 28 days from the said date.

No.22
Exhibit "B" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

40 On 30th January 1963, the Plaintiff filed a motion applying for an Interlocutory Injunction to restrain the Defendant from taking possession of the land, the subject of the action. This motion was dismissed on 1st February, 1963, by Shelley, J. on the ground as I have been assured by both parties, that the affidavit in support thereof did not disclose sufficient facts. On 2nd February, 1963, the Plaintiff filed a fresh motion for an Interlocutory Injunction and this was fixed

In the
Supreme Court
of Jamaica

No.22
Exhibit "B" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

for hearing before me on 13th February 1963.

The Defendant entered appearance to the Writ on 11th February 1963, and took out this Summons on the following day. This Summons and the Motion came before me in Chambers on 13th February 1963. I adjourned both matters for hearing in Open Court, and ruled that first I would hear and determine the Summons to strike out. Thereafter I listened to submissions by Mr. Alberga and Mr. Norman Hill for the Defendant, and by Mr. Parkinson for the Plaintiff, and I adjourned the matter to enable the parties to file further affidavits if they so desired.

10

The Summons came before me again on 26th September, 1963 when further affidavits were referred to, and additional submissions were made to me by Mr. Hill and Mr. Parkinson. I reserved my decision and promised the parties to deliver the same in writing at a later date and this I now proceed to do.

20

As I understand the matter, this Summons is essentially an appeal to the inherent jurisdiction of the Court to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process, and to enter the proper judgment which is a natural consequence of such a stay of proceedings. In the course of their submissions, both Mr. Alberga and Mr. Hill made this clear. Mr. Parkinson, by the active engagement which he took in the investigation of all the relevant facts, by his acquiescence in the use of affidavits as to these facts by the Defendant, and by the use which he himself made of such affidavits cannot of course be heard to say otherwise.

30

The facts may be summarised as follows:-

- (a) The land which is the subject matter of the action was registered on 11th July, 1904 at Vol. 30 Folio 58 under the Registration of Titles Law in the name of Ann Brown, the grandmother of the Defendant;
- (b) Fredericka Goode, the daughter of Ann Brown became entitled to the ownership of the land many years before the Plaintiff came to be concerned in any way therewith;

40

- (c) Fredericka Goode has been living in the United States of America since 1908. Fredericka Lyons (the sister of Fredericka Goode and the mother of the Defendant) acted as the Attorney and the Agent of Fredericka Goode in respect of the land, up to the date of Fredericka Lyons' death on 11th April, 1946. After her death, the Defendant acted as such attorney and agent;
- 10 (d) The Plaintiff became a tenant of the land, according to him in 1942, according to the Defendant in 1944. This tenancy agreement was made by Fredericka Lyons;
- (e) On 1st December, 1960, an order was made by the Resident Magistrate's Court for the parish of Clarendon in Equity Suit No. E 897 of 1960, vesting the land in Fredericka Goode. The plaintiff was served with copies of the Summons and Affidavits filed in the Resident Magistrate's Court in connection with the application for the Order, and was represented by Counsel when the matter first came before the Court. The Defendant made no effective opposition to this application;
- 20 (f) In 1962, the Defendant laid an information in the Resident Magistrate's Court, Clarendon, claiming recovery of possession of the land from the Plaintiff. This information was heard by the Resident Magistrate for Clarendon in December, 1962, when the Plaintiff was represented by Counsel and the Defendant by her Solicitor. The Judgment of the Court, ordering the issue of a warrant of possession was delivered on 10th February 1963;
- 30 (g) The notes of evidence of this trial by the Resident Magistrate were exhibited during the course of Counsels' submissions to me.

In the Supreme Court of Jamaica

No.22

Exhibit "B" to Affidavit of Thomas Ramsay with Exhibits "A", "B", "C" and "D" attached

22nd May 1974
(continued)

40 From these notes, it is clear that a most determined attempt was made in that Court to establish the allegations stated in paragraphs 1 - 7 of the Plaintiff's Statement of Claim. For this purpose the Plaintiff gave evidence, called a witness, and his Counsel made submissions. The Defendant and her Solicitor also gave evidence, and in accepting this evidence, the Court stated that it

In the
Supreme Court
of Jamaica

No.22
Exhibit "B" to
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Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

regarded that of the plaintiff as being a mere fictitious pretence of title;

Mr. Parkinson submitted that there were several matters of fact fit to be investigated - which he detailed as follows:-

- (i) Whether the Plaintiff has been in exclusive, undisturbed possession of the land as owner from July, 1944 to the present time, and has thereby obtained a prescribed title to the land; 10
- (ii) Whether the plaintiff paid £250 to Rebecca Lyons, in installments as alleged;
- (iii) Whether Plaintiff has paid rent after July, 1944;
- (iv) Whether there was illegality or irregularity in obtaining the Vesting Order;

It is clear that the first three matters of fact were investigated in the Resident Magistrate's Court, and that the Plaintiff's present action in this Court, is an attempt to retry questions of fact which have already been conclusively decided against him by a Court of competent jurisdiction. Nevertheless, Mr. Parkinson submitted further that the plea of Res Judicata did not apply in an action for recovery of possession of land. However acceptable this proposition may be in appropriate circumstances, where the essential issue decided in the first action was the question of the ownership of the land (which is the situation here), it seems elementary that the plea would apply in a second action which sought to canvass this question again on substantially the same evidence as that in the first action. 20 30

In connection with the fourth matter of fact detailed by Mr. Parkinson, it is important to note firstly, that the Plaintiff did not oppose the making of the Vesting Order and secondly that in the trial of the Recovery of Possession case in 1962 he did not challenge this Order on the ground that it was obtained by Fraud or any irregularity. In the light of these two circumstances, and of the fact that the affidavits filed in this Summons contain no evidence of such fraud or irregularity, there does not seem to be any merit in this submission. 40

In my view the case of Reichel v McGrath, 14 App. Case 665 is a directly relevant authority for the granting of the Order asked for by the Summons. I therefore order accordingly, and I order further that judgment be entered for the Defendant with costs to be taxed or agreed.

Dated this 29th day of October 1963.

(sgd.) Louis Fox
JUDGE (Acting)

In the
Supreme Court
of Jamaica

No.22
Exhibit "B" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

10

"C"

This is the copy of the Order made in C.A.5 of 1967 mentioned and referred to in the Affidavit of Thomas Oswald Ramsay, sworn to on the 22nd day of May, 1974, before me:

Exhibit "C" to
Affidavit of
Thomas Ramsay

(sgd.) Thomas O. Ramsay (sgd.) Oscar Shim
Thomas Oswald Ramsay Justice of the Peace

COPY

JAMAICA
CIVIL FORM 9 Rule 38

IN THE COURT OF APPEAL

20

CERTIFICATE OF THE ORDER OF THE COURT

Civil Appeal No. 5 of 1967

Appeal from the Order of a Judge in Chambers dated the 10th day of January, 1967

.....Motion
C.A.5/67 Appeal No.

Between

BENJAMIN PATRICK (Plaintiff)Appellant(s)

and

FREDERICKA WALKER (Defendant)Respondent(s)

30

This appeal came on for hearing on the 10th and

In the
Supreme Court
of Jamaica

No.22
Exhibit "C" to
Affidavit of
Thomas Ramsay
with Exhibits
"A", "B", "C"
and "D"
attached

22nd May 1974
(continued)

14th day of July, 1969

before The Hon. President (Ag.)
The Hon. Mr. Justice Luckhoo
The Hon. Mr. Justice Edun

in the presence of E.C.L. Parkinson, Esq., Q.C.
for the Appellant(s) and N. Hill, Esq. for the
Respondent(s)

I HEREBY CERTIFY that an Order was made as follows:-

"Application dismissed with costs to
Respondent".

10

Given under my hand and the Seal of the Court this
14th day of July 1969.

E.C.L. Parkinson, Esq., Q.C.,
Chambers,
19 Church Street, Kgn.

(sgd.) L.S. Hunt
.....
Deputy Registrar

N. Hill Esq.,
Chambers,
20 $\frac{1}{2}$ Duke St., Kgn.,

Mr. Harold W. Norton,
Solicitor,
72 Church St., Kgn.

20

"D"

This is the copy of the Order dated the 26th April
1972 made by Mr. Justice Parnell, mentioned and
referred to in the Affidavit of Thomas Oswald
Ramsay, sworn to on the 22nd day of May, 1974
before me:

(sgd.) Thomas O. Ramsay (sgd.) Oscar Shim
.....
Thomas Oswald Ramsay Justice of the Peace

26/4/72

Beverley Gardens Development)
Co. Ltd.)
vs.)
Mr. & Mrs. Benjamin Patrick)

C. L. 371/72

30

- (1) Court orders that pursuant to Section 236 of Cap. 177 that the question whether the ownership of the land claimed by the Plaintiff is res-judicata as between the Plaintiff and the Defendants or as between the Plaintiff's predecessor in title and the Defendants, be set down for hearing and the meantime the hearing of this Summons on the merits be stayed.
- (2) Defendants restrained by themselves or their agents from carrying on any further building on the land until May 29th 1972 or on oral undertaking being given by Mr. W.K. Chin See, Attorney-at-Law for Plaintiff to pay any loss or damage sustained by the Defendants if the Plaintiff should fail to prove the issue herein being reserved.

10

20

30

In the Supreme Court of Jamaica

No.22
Exhibit "D" to Affidavit of Thomas Ramsay with Exhibits "A", "B", "C" and "D" attached

22nd May 1974
(continued)

No. 23

Notes of Evidence of Vanderpump, J.(Ag.)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

IN COMMON LAW

SUIT NO. C.L.P. 005 of 1974

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFF

A N D BEVERLEY GARDENS DEVELOPMENT 1st DEFENDANT
COMPANY LIMITED

A N D EXDOL MIGNOTT 2nd DEFENDANT

Chambers 21/5/74

Mr. Ramsay for both defendants.

Mr. Parkinson for Plaintiffs.

Mr. Ramsay seeks to have Statement of Claim herein struck out under Order 18R 19 or for it to be stayed pending the outcome of the appeal. Refers to the affidavit of John Alexander Sinclair dated 9th April, 1974 and paragraph 7 of the affidavit of Mr. Patrick dated 22nd April 1974 and to the Statement of Claim dated 24th January, 1974 and reads the affidavit of 2nd named defendant dated 13th May, 1974.

No.23

Notes of Evidence of Vanderpump J. (Ag.)

21st May 1974

In the
Supreme Court
of Jamaica

—
No.23

Notes of
Evidence of
Vanderpump, J.
(Ag.)

21st May 1974
(continued)

Mr. Ramsay refers to in re Vernezza at 1 A E R page 183 and submits that the plaintiff there is on all fours with the applicant in that case. Mr. Ramsay then reads pages 185-186, page 190, page 192 of the report.

Mr. Ramsay states that Mr. Parkinson says that this action is not the same but submits that it is the same therefore if the plaintiff are (sic) not entitled to possession or ownership of the said land then the cause of action in that suit cannot arise. 10

Refers to the fact that the first defendant is registered proprietor of the land and to the Judgment of Chambers, J. If the Courts is not minded to strike out the Statement of Claim then it must consider staying the proceedings until the decision of the Court of Appeal is known on the basis that the action is to be ventilated by the Court of Appeal.

Refer to the second paragraph of Statement of Claim says that he heard Mr. Parkinson say in the Court of Appeal that the second defendant had gone into the land on the 14th December, 1972. He was acting on the orders of the rightful owner. The value of the house depends on the appearance. No damage was done to the furniture, it was all returned except the machine. Plaintiff acted in a manner in filing this action. 20

Mr. Parkinson Contra.

Refers to his affidavit. Plaintiff bought the land from Rebecca Lyons. Suit 11/63 was against Walker. Refers to 20a and 21a the record in suit 36 of 72 still pending. Submits Vernazza has no application because plaintiff here has no several actions. Suit 11/63 was a claim for declaration by the Plaintiff that he was entitled to the land. Suit 371 of 1972 was brought by Beverley Gardens for possession of the land refer to page 14 of the record. The defence in that suit was adverse position. Plaintiff not entitled to possession, title extinguished. 30 40

Refers to sections 3 and 30 of chapter 222, the Limitation of Action Law.

Mr. Parkinson then proceeds to read from the

record in the Court of Appeal Suit 371 of 72 still pending Ground of Appeal is Adverse Possession. He reads pages 3, 4, paragraph 9 issue in Claim whether the land was purchased, issue adverse possession page 5, 25, 44 where Ann Brown was the original registered owner 11/7/04 page 45D where E 897/60 on 1/12/60 Vesting order in favour of Gooden transfer from Fredrick Joseph (nee Walker) to Beverley Gardens Development Company Limited dated 30th May, 1969 and registered 12th August, 1969. Rebecca Lyons is the mother of Fredrick Josephs (nee Walker).

In the
Supreme Court
of Jamaica

—
No.23

Notes of
Evidence of
Vanderpump, J.
(Ag.)

21st May 1974
(continued)

10

20

Mr. Parkinson continues reading on pages 46D 72 affidavit of Plaintiff dated 24/4/72 page 73, page 74 page 75. 11/63 is the same as R.M. claim in addition of the R.M. court proceedings as she is the landlady no jurisdiction. The appeal is 33/63 (not 5/67) sent off because of a technicality as it was filed before lease. Fox J. said he should appeal and gave leave out of time, it was a fit and proper appeal.

Mr. Parkinson continues to read pages 75 and 76, paragraph 5.

Adjourned 24/5/74

24/5/74

30

On 24/5/74 Mr. Parkinson submits not a preliminary point of law although it was so treated by Chambers J. Stay granted 18/12/72. Refers to 236/177 and to order O18Rll(2) and refers to Scott vs. Mer. Ac. Coy 8 T.L.R. page 431, paragraph 7. Refers to PRR 11/10/62 Court of Appeal rules of 1962 22 (3) notice given to plaintiff that going to the Court of Appeal for stay of execution, stay relates back.

Refers to Straud Judicial Dictionary (sic) Volume 3 second edition page 1700 relation book.

40

Cause of action in Statement of Claim is trespass only no question of title. Refers to Clerk & Lindsell, 11 edition page 238 paragraph 371 successive actions can be brought on the same subject matter. On 218/177 defence of adverse position order of Parnell J.

Refers to Wenlock vs. Maloney and others 1965 2 AER 871. Statement of Claim struck out by Master appealed allowed. There must not be a trial in Chambers. Sellers, J. P872.

In the
Supreme Court
of Jamaica

Refers to Pyson and the Attorney General 1911
1 KBD 410, 418, his power should be very sparingly
used.

No.23

Notes of
Evidence of
Vanderpump, J.
(Ag.)

24th May 1974
(continued)

Refers to Hunter vs. Stewart Volume 4 Feb.,
F & J page 168, 172. Decision of the first case
does not involve second. Same evidence would
support both. Submits adverse position is
different from where he says he purchased the land.
Same evidence would not support both. The second
defendant said, he knocked down the house which is
an admission of trespass. Submits that defendant
is a with the first named defendant.

10

Submits action should not be stayed pending out-
come of the appeal unless it is identical with some
action gone before and it is not related.

Under O12 rule 7 Conditional appearance should
not apply to strike out as jurisdiction only for
some irregularity of the writ should have entered
appearance in the usual way general appearance
that Summons be dismissed with cost, same subject
matter but not the same cases of action.

20

Mr. Ramsay in reply

In the first case the defendant were tenants
and no appeal then filed an action in the
Supreme Court. Judgment for defendant
entered by Fox J. that is Fredrick Walker
predecessor in title to Beverley Gardens.
Patrick refused to leave the land so Beverley
Gardens took him to Court on 3/7/72.
Interlocutory Injunction sought before
Parnell J. who said that res Judicata should
be tried.

30

Mr. Ramsay refers to matter tried in
Clarendon on the 6th December, 1962 and by
Fox J. on 29/10/63, Parnell J. 24/6/72,
Chambers J. 16/11/72. Ownership embraces
possession.

Statement of Claim struck out as being
vexatious and frivolous. Action stands dismissed
with cost to the second-named defendant.

40

No. 24

Formal Order of Vanderpump J. (Ag.)

SUIT NO. C.L. P005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED

and

DEFENDANTS

10

EXDOL MIGNOTT

IN CHAMBERS

The 24th day of May, 1974

Before The Honourable Mr. Justice Vanderpump (Ag.)

UPON the Application of the Second-named Defendant to strike out the Pleadings herein coming on for hearing on the 21st and 24th days of May, 1974 AND UPON hearing Mr. Thomas Oswald Ramsay of the firm of Silvera & Silvera, Attorneys-at-Law for the Second-named Defendant and Mr. Eugene C.L. Parkinson, Q.C., Attorney-at-Law for the Plaintiffs
IT IS HEREBY ORDERED:-

20

1. That the Statement of Claim herein be struck out.
2. That the action against the Second-named Defendant be dismissed.
3. That the costs of this action to be paid to the Second-named Defendant to be taxed or agreed.

BY THE COURT

30

BOYD CAREY
Ag. Registrar

TRUE COPY
(sgd.) Boyd Carey
Ag. Registrar

FILED by Silvera & Silvera of Nos.42-44 East Street, Kingston, Attorneys-at-Law for and on behalf of the abovesaid Defendants

In the
Supreme Court
of Jamaica

No.24

Formal Order
of
Vanderpump J.
(ag.)

24th May 1974

In the
Supreme Court
of Jamaica

No.25

Judgment of
Vanderpump J.
(Ag.)

Undated

No. 25

Judgment of Vanderpump J. (Ag.)

SUIT NO. C.L. P005 of 1974

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS

A N D BEVERLEY GARDENS DEVELOPMENT
CO. LTD.

and
EXDOL MIGNOTT

DEFENDANTS

10

This is a Summons asking several things under Order 18/19 Proceedings started in the Resident Magistrate's Court at May Pen in 1962 by the successor in title to the first Defendant Walker for a warrant of possession against Mr. Patrick one of the Plaintiffs, this the R.M. duly granted. He did not appeal but instead brought an action, E.11 of 1963, in the Supreme Court. This action was not tried as the Statement of Claim was struck out and Judgment entered for the Defendant by Fox J. on 29/10/63.

20

Subsequently the first Defendant took out a Summons asking for an Interlocutory Injunction against the Plaintiffs. Parnell, J., appeared to be in doubt as to the ownership of the land in question and ordered that this point be set down for hearing as a Preliminary Point of Law.

Chambers, J., before whom the matter next came, gave Judgment for first Defendant vs. the Plaintiffs in Suit C.L. 371 of 1972.

30

The first Defendant in the present Suit, although Application for stay of execution by the Plaintiffs was filed in the Court of Appeal, demolished the plaintiffs' house accordingly by his agent the 2nd Defendant.

Mr. Parkinson says that the cause of action in the present case is different from the cause of action in previous cases. It must be remembered, however, that ownership means possession.

One Judge follows the other in this matter. This action is based on the same subject matter as before.

I am satisfied that this is a reasonable cause of action i.e. one known to the law but in the circumstances, I strike out the Statement of Claim as being frivolous and vexatious and order that the action stand dismissed with costs to the 2nd defendant.

10

(sgd.) ? Vanderpump
Judge (Ag.)

In the Supreme Court of Jamaica

No.25

Judgment of Vanderpump J. (Ag.)
Undated

(continued)

No. 26

Notice and Grounds of Appeal (C.A.36 of 1972)

SUIT NO. C.L. 371 of 1972

FILED
25 NOV.1972
COURT OF APPEAL

In the Court of Appeal

No.26

Notice and Grounds of Appeal (C.A. 36 of 1972)

21st November 1972

IN THE COURT OF APPEAL

20

CIVIL APPEAL NO. 36 of 1972

BETWEEN MR. & MRS. BENJAMIN PATRICK -
- DEFENDANTS/
APPELLANTS
A N D BEVERLEY GARDENS DEVELOPMENT
CO. LTD. - PLAINTIFF/
RESPONDENT

Exhibit "B" to Affidavit of Thomas Ramsay is Exhibit "A" to the Affidavit of Trevor Weston (Document No. 3, p.17)

30

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Defendants-Appellants ON APPEAL from that part of the Judgment herein of the Honourable Mr. Justice Chambers given at the hearing of a Preliminary Point of Law in this action on the 16th day of November, 1972, whereby it was ordered:

1. THAT possession of the land known as No.15 Sunnyside Avenue be given to the Plaintiff-

In the Court
of Appeal

No.26

Notice and
Grounds of
Appeal (C.A.
36 of 1972)

21st November
1972

(continued)

Respondent by the Defendants-Appellants.

2. THAT an Injunction restraining the Defendants-Appellants from constructing any buildings on the said land be granted.

3. THAT a Mandatory Injunction that the Defendants-Appellants pull down, dismantle and demolish any building erected on the said land be granted.

4. THAT the costs of the hearing be paid to the Plaintiff-Respondent by the Defendant-Appellants.

10

FOR AN ORDER -

(a) THAT the said Judgment of the learned trial Judge be set aside.

(b) THAT the Order of Mr. Justice Parnell made on the 26th day of April, 1972, that pursuant to Section 236 of Chapter 177 of the Revised Edition of the Laws of Jamaica a preliminary point of law had been raised by the pleadings, be set aside.

(c) THAT for the purpose of deciding questions of law, it was necessary and desirable to ascertain the facts beyond those that appeared in the Pleadings.

20

(d) THAT the issue in the instant case was whether the Defendants-Appellants had acquired a possessory title to the said land.

(e) THAT Suit No. C.L.371 of 1972 be tried in the normal way, so that all the facts can be ascertained.

30

(f) THAT the Plaintiff-Respondent do pay the costs of and incident to this Appeal, and the costs of the Court below.

(g) THAT the Defendants-Appellants be granted such further and other relief as may be just.

AND FURTHER TAKE NOTICE that the Grounds of this Appeal are:

1. On the 26th day of April, 1972, an application

for an Interlocutory Injunction was made by the Plaintiff-Respondent before Mr. Justice Parnell after the Writ in Suit No.C.L. 371 of 1972 was filed, but before any Statement of Claim by the Plaintiff-Respondent was filed.

In the Court
of Appeal

—
No.26

Notice and
Grounds of
Appeal (C.A.
36 of 1972)

21st November
1972
(continued)

10 There were thus no pleadings before Mr. Justice Parnell, and no point of law was or could be raised by the Pleadings, nor any application made by Counsel for the Plaintiff-Respondent for the hearing of any preliminary point of law.

20 The learned Judge interrupted Counsel for the Defendants-Appellants while he was replying to the submissions of Counsel for the Plaintiff-Respondents and of his own motion made an Order "that pursuant to Section 236 of Chapter 177 the question whether the ownership of the land claimed by the Plaintiff and the Defendants or as between the Plaintiff's predecessor in title and the Defendants (has been determined) be set down for hearing and in the meantime the hearing of this Summons (on the merits be stayed)".

This Order of the learned Judge (Mr. Justice Parnell) was gravely improper, wrong, and entirely contrary to law.

30 2. The Affidavit of Benjamin Patrick, one of the Defendants-Appellants, dated the 24th April, 1972, was before Mr. Justice Parnell on the 26th April, 1972, and showed clearly that the Defendants-Appellants would be relying in their Defence on the issue of adverse possession. The said Affidavit showed that there were facts in dispute, and that this was not a case which could be tried on a preliminary point of law.

3. The said Order did not even make clear what was the precise point of law to be decided.

40 4. For the purpose of deciding questions of law, it was necessary and desirable to ascertain the facts beyond those that appeared in the Pleadings, and this could be done only at the trial of the action in the normal way, not on the trial of any preliminary point of law.

5. The issue in the instant case involves dealing with the whole subject matter of the action, and was not a preliminary point of law.

In the Court
of Appeal

No.26

Notice and
Grounds of
Appeal (C.A.
36 of 1972)

21st November
1972
(continued)

6. It is only in the clearest cases, and where a point of law can substantially dispose of the cause of action, that the procedure laid down in Section 236 of Chapter 177 can be adopted. The instant case was not such a case, and the unwisdom of adopting the said procedure in the instant case was obvious.

7. Pursuant to the said Order of Mr. Justice Parnell there was a hearing before Mr. Justice Chambers, who, on the 16th day of November, 1972, gave Judgment in favour of the Plaintiff-Respondent and in doing so said that the ownership of the land claimed by the Plaintiff Respondent had already been determined by a Court of competent jurisdiction and therefore all he had to do was to give Judgment for the Plaintiff-Respondent.

10

The learned trial Judge thus showed a fundamental misconception and misunderstanding of his duties, misdirected himself in the law governing the case, and completely ignored the Defendants-Appellants Defence and Counterclaim (save as to the issue of compensation).

20

8. The duty of the learned trial Judge at the hearing, after reading the Pleadings, was to have set aside the Order of Mr. Justice Parnell, and Order that the action in Suit No. C.L. 371 of 1972 go to trial in the normal way. Instead, he took the view that he had no power so to do as he was not a Court of Appeal.

30

9. It was and is abundantly clear that the issue in the Resident Magistrate's Court in Clarendon in 1963 is completely different from the issue in the instant action. In the previous litigation, the issue was whether the Defendant-Appellant, Benjamin Patrick, had purchased the land in question from one Rebecca Lyons, while the issue in the instant case was and is adverse possession.

The Judgement of Mr. Justice Fox in Suit No. E.11 of 1963 was merely a commentary on the evidence given in the Resident Magistrate's Court.

40

10. The record (with Exhibits) of the litigation in the Resident Magistrate's Court for Clarendon was not produced before Mr. Justice Chambers by

the Plaintiffs-Respondents, and this was essential. The absence of this record made it impossible for the learned trial Judge properly to adjudicate on any preliminary point of law in the instant case involving the principle of res judicata.

In the Court
of Appeal

No.26

Notice and
Grounds of
Appeal (C.A.
36 of 1972)

21st November
1972
(continued)

10 11. A copy of the notes of evidence in the litigation in the Resident Magistrate's Court for Clarendon was used by the learned trial Judge, and this discloses that Fredericka Walker, the Complainant in that litigation, had given obviously false and self-serving evidence on the all-important point as to whether Benjamin Patrick, one of the Defendants-Appellants, had possession of the land in question as a tenant of Fredericka Goode. This fact, and the easily demonstrable fact that Fredericka Walker obtained an order for possession in the Resident Magistrate's Court by fraud, were relevant to the only issue in the instant case, and this ought to have been recognised by the learned trial Judge.

20

12. The said notes of evidence are to the effect that a Vesting Order was obtained in the Resident Magistrate's Court for Clarendon on the 1st December, 1960, vesting the land in question in Fredericka Goode, and that Rebecca Lyons and her daughter Fredericka Walker were the "agents" of Fredericka Goode after the latter had obtained the said Vesting Order. The notes of evidence also disclose that the Defendants-Appellants were in possession of the said land from 1944, i.e. sixteen years before Fredericka Goode obtained her Vesting Order.

30

Prima facie, therefore, the Defendants-Appellants could not have been tenants of Fredericka Goode between 1944 and 1960, had been in exclusive and undisturbed possession of the said land before Fredericka Goode obtained her Vesting Order, and had thus obtained an indefeasible possessory title to the land.

40 This fact apparently escaped the learned Resident Magistrate for Clarendon in 1963, the learned Judge in Suit E.11 of 1963, and the learned trial Judge in the instant case. This fact is completely relevant to the sole issue in the instant case, adverse possession.

In the Court
of Appeal

No.26

Notice and
Grounds of
Appeal (C.A.
36 of 1972)

21st November
1972
(continued)

13. Even assuming the truth of the evidence of Fredericka Walker, since 1957 the Defendants-Appellants paid no rent to her as "agent" for the "landlord" Fredericka Goode, and the result in law would be that they have developed a possessory title to the land.

14. The procedure adopted by Fredericka Walker in the Resident Magistrate's Court to obtain possession of the land was clearly a device calculated to be fraudulent. It was not a civil action for recovery of land, in which she would have had to prove title by the strength of her principal's root of title. 10

15. The said Vesting Order obtained by Fredericka Goode, the root of title on which the Plaintiff-Respondent relies, was a nullity, as not having been obtained in accordance with Section 12 of Chapter 166 of the Revised Edition of the Laws of Jamaica.

16. The Defendants-Appellants are entitled in the instant case to put forward any legal Defence they please, whether it was put forward or not in the Resident Magistrate's Court in Clarendon. 20

17. A case for recovery of land is an exception to the res judicata principle, unless a perpetual injunction is granted preventing a litigant in such a case from proceeding. This applies to a plaintiff, and a fortiori to a defendant, who is in a stronger position than a plaintiff.

18. The Defendants-Appellants are entitled to have their Defence and Counterclaim tried together with the Plaintiff-Respondent's claim, and this could not be done on the hearing of a preliminary point of law. 30

19. There was material before the learned trial Judge to suggest that the Defence of jus tertii might be available to the Defendants-Appellants as an alternative to the Defence of adverse possession, and even this fact ought to have prevented him from deciding the case on arguments on a preliminary point of law. 40

20. The Judgment of the learned trial Judge, based as it is on an absence of knowledge of the facts of the instant case and a failure to consider

the material and authorities which were before him at the hearing, is a denial of justice to the Defendants-Appellants, who have resided on the land for 28 years.

In the Court of Appeal

No.26

21. The Mandatory Injunction ordered by the learned trial Judge is particularly harsh and oppressive and is contrary to law.

Notice and Grounds of Appeal (C.A. 36 of 1972)

DATED the 21st day of November, 1972.

21st November 1974 (continued)

SETTLED

10

Sgd. Eugene C.L. Parkinson

Eugene C. L. Parkinson, Q.C.

WILLIAMS & WILLIAMS

Per: (sgd.) M.A. Williams (?)

ATTORNEYS-AT-LAW FOR THE DEFENDANTS-APPELLANTS

TO: The abovenamed Plaintiff-Respondent or its Attorneys-at-Law, Messrs. Silvera & Silvera 42 East Street, Kingston.

20

FILED by WILLIAMS & WILLIAMS of No.64 East Street, Kingston, Attorneys-at-Law for and on behalf of the abovenamed Defendants/Appellants, whose address for service is that of their said Attorneys.

No. 27

No.27

Notice and Grounds of Appeal (C.A. 21 of 1974)

Notice and Grounds of Appeal (C.A. 21 of 1974)

IN THE COURT OF APPEAL

3rd June 1974

30

BETWEEN MR. & MRS. BENJAMIN PATRICK PLAINTIFFS/APPELLANTS AND XDOL MIGNOTT DEFENDANT/RESPONDENT

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Plaintiffs/Appellants ON APPEAL from the whole of the Order herein of the Honourable Mr. Justice Vanderpump (Acting) made at the hearing

In the Court
of Appeal

No.27

Notice and
Grounds of
Appeal (C.A.
21 of 1974)

3rd June 1974
(continued)

of the Summons to Strike Out Pleadings in Suit
C.L. P.005 of 1974, on the 24th day of May, 1974,
whereby it was ordered -

That the Statement of Claim be struck out
with costs to the Defendant/Respondent to be paid
by the Plaintiffs/Appellants

FOR AN ORDER:

- (a) That the Order of the learned Judge made on the 24th day of May, 1974, be set aside.
- (b) That the Summons taken out by the Defendant/Respondent to Strike Out the Plaintiffs/Appellants' Pleadings or dismiss or stay the action in Suit C.L. P.005 of 1974 was misconceived and invalid and ought to have been dismissed with costs against the Defendant/Respondent. 10
- (c) That the issue in the instant Suit was entirely different from the issues in Suit E.11 of 1963 and in Suit C.L.371 of 1972.
- (d) That there was reasonable cause for the bringing of Suit C.L. P.005 of 1974, and the said Suit was not frivolous and vexatious. 20
- (e) That the instant Suit was not one in which the summary procedure of Striking Out Pleadings and Dismissing or Staying the action could be employed.
- (f) That the Plaintiffs/Appellants be allowed to proceed with their action against the Defendant/Respondent.
- (g) That the Defendant/Respondent do pay the costs of and incident to this Appeal. 30
- (h) That the Plaintiffs/Appellants be granted such further and other relief as may be just.

AND FURTHER TAKE NOTICE that the Grounds of this Appeal are:

- 1. On the 1st April, 1974, the Defendant/Respondent entered Conditional Appearance in the action, and on the 4th April, 1974, the

Registrar of the Supreme Court granted Leave in these terms:

"This Appearance is to stand unconditional unless the Defendant applies within 14 days to set aside the Writ and service thereof and obtains an order to that effect."

In the Court
of Appeal

No.27

Notice and
Grounds of
Appeal (C.A.
21 of 1974)

3rd June 1974
(continued)

10 On the 10th April, 1974, the Defendant/
Respondent took out a Summons to Strike Out
the Plaintiffs/Appellants' Pleadings and
asking for an Order that the Plaintiffs/
Appellants' action be dismissed or stayed, and
this Summons was on the basis of the Leave
granted on the 4th April, 1974.

20 The said Summons was completely invalid as
being contrary to the terms of the Leave
granted, and contrary to the purpose for
which the entry of a Conditional Appearance
is allowed under the Law. Unconditional
Appearance was necessary before a Summons
asking for the Striking Out or Dismissing or
Staying of an action can be heard.

2. Even if the Defendant/Respondent had issued
the said Summons on the basis of an un-
conditional appearance, the application ought
to have been rejected by the learned Judge
on the following grounds:

30 (1) All the evidence before the learned
Judge showed clearly that the issue
in the Suit was entirely different
from the issues in Suit E.11 of 1963
and Suit C.L. 371 of 1972, and no
question of res judicata could there-
fore arise, as suggested by the
Defendant/Respondent.

40 (2) It was abundantly clear from the
evidence before the learned Judge
that so far from disclosing no reason-
able cause of action, being frivolous
and vexatious, or an abuse of the
process of the Court, the instant Suit
was based on a reasonable cause of
action, as indeed was expressly stated
by the learned Judge when delivering
his decision.

In the Court
of Appeal

No.27

Notice and
Grounds of
Appeal (C.A.
21 of 1974)

3rd June 1974
(continued)

- 3. In giving his decision, the learned Judge said:

"It must be remembered that ownership means possession. In the cases which have gone before, the subject-matter has been the same, and of the Judges who heard these cases, one Judge follows the others. This action is the same cause of action as before."

In making these statements, the learned Judge gravely misdirected himself in the Law and on the facts. 10

- 4. In giving his decision, the learned Judge also said:

"I am satisfied that this is a reasonable cause of action, but in the circumstances, I would strike out the Statement of Claim as being frivolous and vexatious."

In making these statements, the learned Judge again misdirected himself in Law, as it is clear that if there is a reasonable cause of action it follows that the case cannot be frivolous and vexatious. 20

- 5. The fact that the Defendant/respondent filed Affidavits in support of his said Summons, which Affidavits would have been inadmissible had he been depending on the ground that the Statement of Claim disclosed no reasonable cause of action, showed that he was not depending on this ground, but rather on the other two grounds of 30

- (a) the Statement of Claim being frivolous and vexatious; and

- (b) being an abuse of the process of the Court.

The evidence contained in the very Affidavits filed by and on behalf of the Defendant/Respondent shows conclusively that the two grounds on which he depended were wholly misconceived. 40

6. The learned Judge gravely erred in directing himself as to the legal principles that apply to a case of this kind, and purported to do what he had no power or jurisdiction to do, namely, to try the case on Affidavits, without witnesses, and without cross-examination of witnesses.

In the Court of Appeal

No.27

Notice and Grounds of Appeal (C.A. 21 of 1974)

3rd June 1974 (continued)

10

It is only in plain and obvious cases that recourse should be made to the summary procedure of striking out a statement of claim or dismissing an action and thus "driving a litigant from the judgment seat."

The instant case was certainly not a plain and obvious case but rather the very reverse.

DATED the 3rd day of June, 1974.

(sgd.) Eugene C.L. Parkinson.....

EUGENE C.L. PARKINSON, Q.C.
Attorney-at-Law for the
above-named Appellants.

20

TO: The above-named Defendant/Respondent
c/o His Attorneys-at-Law
Messrs. Silvera & Silvera
42/44 East St.,
Kingston.

COPY RECEIVED

SILVERA & SILVERA

per: ?

Time: 12.00

Date: 5/6/74

30

FILED BY Eugene C.L. Parkinson, Q.C., of 9 Duke Street, Kingston, Attorney-at-Law for and on behalf of the above-named Plaintiffs/Appellants whose address for service is that of their said Attorney-at-Law.

In the Court
of Appeal

No.28

Written
Reasons for
Judgment
(Hercules and
Zacca, J.J.A.,
and Edun J.A.
dissenting)

20th December
1974

No. 28

Written Reasons for Judgment
(Hercules and Zacca, J.J.A., and Edun J.A.
dissenting)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS Nos. 36 of 1972
and 21 of 1974

BEFORE: The Hon. Mr. Justice Edun, J.A.
(Presiding) 10
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Zacca J.A.(ag.)

BETWEEN:- No.36 of 1972

Mr. & Mrs. BENJAMIN PATRICK - Defendants/
and Appellants

BEVERLEY GARDENS DEVELOPMENT - Plaintiffs/
CO. LTD. Respondent

No.21 of 1974

Mr. & Mrs. BENJAMIN PATRICK - Plaintiffs/
and Appellants 20

BEVERLEY GARDENS DEVELOPMENT
CO. LTD. - Defendants/
XDOL MIGNOTT Respondents

Mr. E.C.L. Parkinson Q.C. with Mr. J. Kirlew Q.C.,
for the Appellants.

Mr. W.K. Chin See with Mr. Thomas Ramsay for
Respondents.

14th, 15th, 16th and 17th October 1974 30
20th December 1974

EDUN, J.A.:

Appeal No.36 of 1972 is against the judgment of Chambers J., in which on a preliminary point of law he decided that the question of ownership of the land in dispute (referred to as "the land") was already determined by a court of competent jurisdiction, that is, the adjudication on Information

No. 4479/62 before the magistrate of the Parish of Clarendon under the Recovery of Small Tenements Law, Chapter 206, s.54. Appeal No.21 of 1974 is against the judgment of Vanderpump J.(ag.) who struck out the statement of Claim in suit No. P 005 of 1974 as being frivolous and vexatious.

In the Court
of Appeal

No.28

Written
Reasons for
Judgment
(Hercules and
Zacca, J.JA.,
and Edun J.A.
dissenting)

20th December
1974

(continued)

10 At the hearing of these appeals, Mr. Chin See attorney for respondents submitted that this court is entitled to look at the facts and reasons for judgment on Information No.4479/62, not to decide if the findings were correct but to see if they establish the same issues as in suit C.L.371/1972 against which there is the appeal No.36 of 1972. Mr. Parkinson, attorney for the appellants, in the course of submissions was discussing the evidence led in the information proceedings and was urging that the magistrate's conclusions were wrong when objection to such arguments was taken by Mr. Chin See. A majority of us held that Mr. Chin See was correct but Mr. Parkinson was allowed to continue such submissions because of the difference of opinion between us.

20

From the various submissions in these two appeals, a very simple question arose as to what is the effect of the decision of the magistrate in Information No.4479/62 when he granted a warrant of possession of the land against Benjamin Patrick (conveniently referred to as "appellants").

30 Let me begin by referring first to R. v. Bolton (1835-42) A.E.R. Rep. P.71. In addition to the proceedings in that case, the parties on each side brought before three judges of the Court of Queen's Bench, affidavits disclosing evidence affecting the merits not adduced before the justices. In that case, an order was made by the justices for possession of a parish house occupied by the defendant as a pauper. The defendant stated on affidavit that he had not occupied the house as a pauper but had paid parish rates, done repairs and that he had not been chargeable to the parish during the time of his occupation. Those facts, if true, would disentitle the justices to make the order for possession. A rule nisi was made for a writ of certiorari to remove the order and all things touching the same, into the Court of Queen's Bench. Two points were made in support of the order:

40 (1) that the proceedings all being regular on the face of them and disclosing a case within the

In the Court
of Appeal

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No.28

Written
Reasons for
Judgment
(Hercules and
Zacca, J.J.A.,
and Edun, J.A.
dissenting)

20th December
1974
(continued)

jurisdiction of the magistrates, the Court could not look at the affidavits for the purpose of impeaching the magistrates' decision; and (2) even if the affidavits were looked at, the case would be found to be one of conflicting evidence in which there was much to support the conclusion to which the magistrates had come. The Court decided that the enquiry must be limited as to whether the magistrates had jurisdiction to enquire and determine, supposing the facts alleged in the information be true for it was not contended that there was any irregularity on the face of the proceedings. The Court discharged the rule because the justices had jurisdiction and the proceedings were regular on the face of them.

10

Lord Denman C.J., in delivering the judgment of the Court, said at p.73:-

".... Where the charge laid before the magistrate as stated in the information does not amount in law to the offence over which the statute gives him jurisdiction, his finding that the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction. The conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had misstated it in drawing up the proceedings so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to be insufficient, we should quash the conviction. In both these cases a charge has been presented to the magistrate over which he had no jurisdiction; he had no right to entertain the question, or commence an inquiry into the merits; and his proceeding to a conclusion will not give him jurisdiction. 20
But, as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the enquiry. In this sense, therefore, and for this purpose, it is true that the affidavits are receivable. 30
40

Where, however, a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry

.....
The question of jurisdiction does not depend on the truth or falsehood of the charge, but on its nature; it is determinable on its commencement, not at the conclusion, of the enquiry; and affidavits, to be receivable, must be directed to what appears at the former stage and not to the facts disclosed in the progress of the enquiry."

R. v. Bolton (supra) has been considered and referred to in many later cases, the most recent of which is in Anisminic v Foreign Compensation (1969) 1 AER 208, where the order of Brown J. declaring that the provisional determination of the Foreign Compensation (Egypt) Commission was made without, or in excess of jurisdiction and was a nullity, was restored by the House of Lords.

In the case of The Colonial Bank of Australasia v Robert Walan (1874) L.R.5 P.O. 417, it was held that objections on the ground of defect of jurisdiction may be founded on the character and constitution of the inferior Court, the nature of the subject-matter of the enquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court. R. v. Bolton (supra) was recognised and followed. In the judgment of the Privy Council, Sir James W. Colville, had this to say at pp.444-445:-

"There is a third class of cases, in which the judge of the inferior Court, having legitimately commenced the enquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject-matter of the enquiry beyond it. To this category belong such cases as Thomson v Ingham [14 Q.B. 710] which was much relied upon in the argument, Pease v Clayton [3 B & S 620] and R v Stimpson [4 B & S 301]. In all these cases the inferior Court, being incompetent to try a question of title, was bound to hold its hand when a bona fide dispute as to title arose before it. And the general rule in such a case is that stated in the passage from the judgment of the Exchequer Chamber in Bunbury v Fuller [9 Ex III]

In the Court
of Appeal

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No.28

Written
Reasons for
Judgment
(Hercules and
Zacca, J.JA.,
and Edun, J.A.
dissenting)

20th December
1974

(continued)

In the Court
of Appeal

No.28

Written
Reasons for
Judgment
(Hercules and
Zacca, J.JA.,
and Edun J.A.
dissenting)

20th December
1974
(continued)

which is cited by Mr. Justice Blackburn in Pease v Clayton. 'It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit of its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary enquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to enquiry in the superior courts.' And, accordingly, the cases shew that the decision of the inferior Court on such a point is examinable either on formal proceedings in prohibition, as in Thomson v. Ingham, or in an action of trespass, 20 as in Pease v Clayton, or on certiorari, as in Reg. v Stimpson. Whether the Court, in the latter case, would have exercised its summary jurisdiction by quashing the order if there had been evidence on which the magistrates might have reasonably concluded that the question of title was not raised bona fide, may be doubtful." (underlining mine).

10

20

In the instant case:-

30

1. The application before the magistrate, was for the issue of a warrant of possession under S.3 Law 18 of 1912 (Recovery of Small Tenements) same as section 54 of the Landlord and Tenant Law, Ch. 206.
2. The magistrate had jurisdiction to issue the warrant of possession, if
 - (a) there was proof of personal service of the summons,
 - (b) the holding over of the premises at the determination of the tenancy,
 - (c) where the title of the landlord accrued since the letting of the premises, proof of the right by which he claimed possession, and

40

- (d) neglect or refusal of the defendant to quit and deliver up the premises.

In the Court
of Appeal

No.28

Written
Reasons for
Judgment
(Hercules and
Zacca, JJ.A.,
and Edun J.A.
dissenting)

20th December
1974

(continued)

10 On such an application for a warrant of possession it is incompetent for the magistrate to try a question of title. He was bound to hold his hand when a bona fide dispute of title arose before it. "The general rule of law applicable to justices exercising summary jurisdiction is, that they are not to convict where a real question as to the right to property is raised between the parties: (then their jurisdiction ceases, and the question of right must be settled by a higher tribunal; for the justices by convicting would be settling a question of property, conclusively and without remedy, if their decision happened to be wrong." Blackburn J. in R. v Stimpson (1863) 4 B & S p. 301 at p. 309. "I agree that there are many cases in which the justices may properly decide upon the evidence before them that a claim of title is not bona fide set up; but in all cases it is for this court to say whether they were justified in their decision; the prosecutor gave proof of enjoyment under a paper title; but the defendant asserted that he could prove a case to the contrary, and supported his assertion by some evidence. That shewed that there was a question of title to be tried, and the justices, in convicting the defendant, took upon themselves to try it, which the legislature intended that they should not do. I think that there was no reasonable evidence on which the justices could say that there was not a bona fide claim or dispute; on the contrary, the circumstances stated in the affidavits shew that there was such a claim:" (underlining mine) Crompton J. in the same case at pp.308 & 309.

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40 In my view there is ample authority for saying that in the instant case a superior Court must examine the decision of the magistrate to ascertain whether he has given himself jurisdiction by a wrong decision on a point collateral to the merits of the application for the warrant of possession. The collateral issue before the magistrate, was whether there was a bona fide claim of title set up by the defendant, if there was not then he would proceed to hear and determine the merits of the application, that is, whether the landlord should be given possession in accordance with section 54 of the Landlord and Tenant Law, Ch. 206. If there

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was evidence raising a bona fide dispute of title, he should have stayed his hands. By proceeding wrongly to hold that he regarded the evidence of the defendant as a mere fictitious pretence of title, he was giving himself jurisdiction by such wrong conclusion on a collateral matter. It is most important therefore to examine the evidence before the magistrate, to ascertain whether or not there was a bona fide dispute of title raised.

It is not correct to hold as Mr. Chin See submitted that this Court is entitled to look at the facts and reasons for judgment in Information proceedings No.4479/62, not to decide if the findings were correct but to see if they establish the same issues as in CL 371 of 1972. In my view that approach would result in any superior Court holding the magistrate's decision as conclusive even if he was wrong in giving himself jurisdiction. I, therefore, proceed now to examine the evidence led before the magistrate.

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Evidence led on Information No. 4479/62 proceedings.

Frederica Walker (nee Lyons) niece of Fredericka Goode, daughter of Rebecca Lyons and complainant in the recovery of tenement proceedings claimed that the defendant had been paying her rent in respect of the disputed land at £6 per year. She said he paid her rent in 1952, 1955. She said she gave him receipts and in evidence produced three counterfoils from a receipt book of hers. Since April 1960 the defendant paid her no more monies. Under cross-examination she said: "My mother leased lands to Defendant in 1944. I don't know that Defendant paid my mother £125 as part payment for lands in July 1944. I don't know of payment of £100 to my mother by Defendant in 1945, July Defendant erected a house on that land. The 1951 hurricane blew away that house." She gave evidence that her mother died in 1946. She denied receiving £25 in 1946. The land was registered land.

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Her solicitor gave evidence that in 1960 he made application on behalf of Mrs. Goode to the Resident Magistrate for Clarendon for a vesting Order of the lands in question in Mrs. Goode. The defendant at an appearance was represented by Counsel. But there was nothing on the record that when the vesting order was made the defendant

personally attended court. The solicitor said that the defendant was tenant of Mrs. Goode of the land from 1944 for a period of 5 years and then the defendant held over as tenant from year to year since expiration of the lease. The defendant was served with a notice to quit the land.

10 The defendant gave evidence that he leased the lands from Rebecca Lyons from August 1942 and paid rent of £6 in that year; he produced receipt, Ex.8. He paid £6 in 1943 but only £3 in 1944 for half-year because he paid Mrs. Lyons £125 on June 8, 1944 on account of the purchase price of £250 for the lands. He got a receipt. In August 1945, he again paid Rebecca Lyons £100, he also got a receipt. He paid the complainant the balance of £25 and also got a receipt. After the payment of £3 in 1944, he never paid any rent nor did he pay the complainant any monies as rent as she claimed. He was in possession of the land since 1944 and he cultivated it. In 1960, he received a notice to quit. He did not produce any of the receipts for the purchase of the land because of his house, clothes and everything being blown away by the 1951 hurricane.

30 Ivan Lawrence, his witness said on oath that in July 1944 he went with the defendant to Mrs. Lyons' home and defendant paid Mrs. Lyons £125 and she gave him a receipt. In July 1945, he again went with the defendant and he paid her £100 and he got a receipt. The defendant, he said was paying money for the land in dispute. Counsel for Benjamin Patrick did submit to the magistrate that so long as there were conflicting rights as regards the land, the jurisdiction of justices was ousted.

40 After reserving his decision, the Magistrate on February 10, 1963 said he accepted the evidence of Complainant and witnesses as truthful and regarded that of the Defendant as being a mere fictitious pretence of title.

In examining the evidence, attorney for the appellants submitted, that:-

1. The three counterfoils purporting to be receipts for rent paid by the appellants were self-serving evidence and the weight of it - worthless.

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2. If that were true, the appellants were in possession of the land from 1944 until 1962 when they were seeking to eject him. So too, it would go to show that he must have bought the land if he remained in possession for over 18 years without payment of rent.
3. Though it can be said that the appellants produced receipt Ex.8 which was received in 1942, yet no receipts were produced for the purchase price of the land. That may well be so, but it cannot be denied as the Complainant did support the evidence that the house and belongings were blown away in 1951. 10
4. The vesting order was a mere transmission of title without a conveyance of the land and it has not been denied that Rebecca Lyons was rightfully possessed of a registered title to the land.
5. Ivan Lawrence testified that he was present when the appellants paid Mrs. Rebecca Lyons in all £225 for the purchase of the land. It is true he claimed that the monies were paid in months of July 1944 and 1945 whereas the appellants claimed that those monies were paid in the months of June and August respectively. However that may be, that was evidence which supported the appellants' assertion. 20
6. No matter how the facts were viewed, it cannot be disputed that the complainant has not proved that for the years 1945 to 1952, that is for 7 years, the appellants paid any rent. Though Rebecca Lyons died in 1946, it was not until 1954, that the first counter-foil in the receipt book disclosed that the appellants paid complainant £12 for 2 years' rent. The complainant's evidence as to the payment of rent by the appellants was obviously "trumped-up". 30
7. The circumstances of the case were such that by the device of a summary and less expensive procedure though a real question as to right of property has been raised between the parties yet the magistrate by granting the warrant of possession has by his wrong decision on a collateral point given himself jurisdiction and denied justice to the appellants. 40

Attorney for respondent, as I have stated, by a majority ruling of this court, did not discuss those criticisms of the evidence. Nevertheless, the question which remains to be decided was whether on a reasonable view of the entire proceedings, the evidence raised a bona fide dispute of title.

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Bona fide dispute of title

10 In the local case of Perris Bailey v Ivan Brown R.M.C.A. No.25 of 1973, the defendant was alleging in a civil case of recovery of possession, sale to him of part of the land in dispute. The question was gone into as to whether his allegations gave rise to a dispute as to title so as to oust the jurisdiction of the magistrate. Several cases were discussed:

20 The Warrior (1828) 2 Dods 288
Mountenoy v Collier (1853) 1 E & B 630
Re Marsh v Dewes (1853) 17 Jur. P.I. 558
Sewell v Jones (1850 L.J. Q.B. 372
Howorth v Sutcliffe (1895) 2 Q.B. 358

In this appeal, the last two cases were referred to, and discussed by the attorneys. In my view, the principles involved in a matter like this, have been succinctly stated by Sir William Scott in The Warrior (supra) at p.289:

30 "It cannot be laid down that the Court is to decline its jurisdiction ... on the mere averment of one of the parties that there is a conflicting claim of title. If the mere averment of title, without any examination as to its foundation, would be sufficient to arrest the progress of a cause, the jurisdiction of the court would be ousted altogether. It would be idle to say that the court retained its jurisdiction if the moment a warrant was extracted by one party, the other was at liberty to put an end to the suit by asserting a title, resting, perhaps, on no foundation whatever. The nature of the title must be shown before it can be permitted to have the effect of arresting the cause. It must be made to appear that it is not a mere cobweb title that is set up, but that it is such to raise a real and substantial doubt to whom the property belongs; and, in that case, the Court would

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certainly decline to interfere as to the possession until the title should have been determined upon by the courts in which such questions have been more usually agitated in the modern practice of the law."
(underlining mine).

In the instant case,

1. The defendant has not on a mere averment stated that a conflicting claim of a title arose. He has led in evidence the supporting witness of Ivan Lawrence. 10
2. On the complainant's own case, there was no evidence of the payment of rent by the defendant for about 7 years.
3. The defendant's title rested on the foundation that he had purchased the land for £250 and although he was unable to produce receipts for same, he gave a reasonable account for the absence of same and for what it is worth, he produced a witness to verify the foundation of his claim. 20
4. If his side of the story were believed, he had been in possession of the land in dispute from 1944 without the payment of rent for over 18 years.

In those circumstances, it is my view that the Magistrate should have stayed his hands. He was wrong to proceed to regard the evidence of the complainant and his*^{witness} as truthful and to regard the evidence of the defendant as a mere fictitious pretence of title. By adjudicating as he did where it appeared on a reasonable assessment of the evidence that there was a bona fide dispute as to title, the magistrate on a collateral issue was giving himself jurisdiction. Even if it appeared to him doubtful whether or not there was a bona fide dispute as to title - and it is not without significance that he took time to consider his decision - he should have stayed his hands, that is, dismissed the information for want of jurisdiction. 40

*[sic]

Litigation after the Magistrate's decision

The question must now arise, if my view is

correct that the magistrate was wrong, whether after all these years, from February 10, 1963 to this date, over 10 years, the defendant can now succeed in having his rightful claims litigated - in other words, be successful in these appeals.

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10 1. By Equity Suit No.11 of 1963, the appellants filed a claim on January 29, 1963 for a declaration that they were entitled to the land and that Frederica Walker had no right, title,
20 estate or interest in the said land. They also claimed an injunction restraining her from taking possession of the said land, and asking for an order setting aside the magistrate's order for possession. On February 11, 1963, Frederica Walker took out a summons praying that in the inherent jurisdiction of the Court, it will stay all proceedings of Suit E 11 of 1963 on the ground
30 that it was frivolous or vexatious or an abuse of its process. After hearing arguments, the trial judge held that the relevant issues were investigated and adjudicated upon in the magistrate's Court - a court of competent jurisdiction. He said that the first action (proceedings before the magistrate) the question of ownership of land was the essential issue and it seemed elementary that the plea of res judicata would apply in a second action which sought to canvass the same question on substantially the same evidence as that in the first action. He entered judgement
for Frederica Walker with Costs.

Much argument was directed to the fact that there was no appeal from the magistrate's decision and suit E 11 of 1963 could not then challenge the findings of the magistrate. Section 54 of the Landlord and Tenant Law Chap. 206 has this proviso:-

40 "Provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession where such person had not at the time of granting the same lawful right to the possession of the premises,"

By suit No. E 11 of 1963, the appellants were claiming that at the time when the warrant of possession was authorised by the magistrate to be

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issued, Frederica Walker had no right to possession of the said land. In my view, they were entitled by that suit to ask a superior Court to examine the evidence in the inferior Court as to whether or not it had jurisdiction to adjudicate upon a bona fide dispute of title. The Landlord and Tenant Law Ch.206 was enacted in 1838. The Justices of the Peace (Appeals) Law Ch.187 was enacted in 1857. So that, the right of action conceded by the proviso to section 54 of Chap.206 until 1857 was the exclusive means of challenging proceedings before the justices on a grant of a warrant for possession. After 1857, it is my view that there is even now concurrent jurisdiction in an action in the Superior Court to challenge such proceedings and such an action or suit cannot be vexatious or an abuse of its process.

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In Sivyer v Amies (1940) 3 AER 287 a landlord brought ejectment proceedings under the Small Tenements Recovery Act 1838 but because the evidence of an aged man could not be taken on commission, justice could not be had before the justices. It was held that it was only right where the landlord refused to bring proceedings in the County Court, the tenant should be allowed to bring proceedings in the High Court claiming a declaration that the premises in dispute were held on a yearly tenancy and not on a weekly tenancy as claimed by the landlord. The landlord asked for an order that the action might be dismissed as vexatious and an abuse of the process of the Court. It was held that in the circumstances, the action was properly brought, and was neither vexatious nor an abuse of the process of the Court.

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The circumstances of the instant case are that (1) the tenant was asserting by credible evidence that there was a bona fide dispute of title and that the landlord was not entitled to a warrant of possession; (2) that at the time of the granting of the warrant of possession, the tenant had a lawful and/or equitable right to remain in possession of the land. Having decided that there was a bona fide dispute of title to the land, I am of the view that the appellants had a lawful right to bring suit No. E 11 of 1963 for a declaration that they were entitled to the fee simple of the land and that their suit was neither frivolous

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nor vexatious nor an abuse of the process of the court.

An appeal No.33 of 1963 was filed against the decision of the judge in E 11 of 1963 but it was dismissed with costs to Frederica Walker; it is stated the ground for dismissal was that the appeal was interlocutory and filed before leave was granted by the Court of Appeal. However that may be, the fact remained that the decision to strike out suit E 11 of 1963 was wrong.

2. Action C.L. 371 of 1972

Beverley Gardens Development Co. Ltd. (referred to as the "company") who had by the year 1972 become the registered owner of the land filed the above-numbered suit on March 23, 1972 claiming possession of the land from the appellants and an injunction restraining the appellants from erecting any further buildings of any type whatsoever. The appellants filed defence stating that they were in possession since 1944 and that the right to recover possession was barred by sections 2 and 30 of the Limitation Law, Chapter 222. Also, that the company's predecessors in title wrongfully obtained an order against the appellants for possession. The appellants counterclaimed a rectification of the Certificate of title and, in the alternative, compensation in the sum of \$26,700 for improvement of the said land.

By summons of the same date, the company asked that the appellants be restrained from erecting any further buildings and that they demolish buildings already on the land. On April 26, 1972 Parnell J., made an order under section 236 of the Civil Procedure Code Ch. 177, as amended by section 72 of the Civil Procedure Code (Amendment) Rules 1960 that as a point of law arose on the pleadings, the question of ownership of the land as between the company's predecessors in title and the appellants be set down for hearing and in the meantime the hearing of the summons on the merits be stayed.

The appellants sought leave to appeal from that order. It would appear that an application for leave to appeal in the Court of Appeal was pending when Chambers J., heard arguments and determined the point of law. Chambers J., adjudged that the question of ownership of the land, the

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subject-matter of the suit was already determined by a court of competent jurisdiction. He entered judgment for the company for possession, granted an injunction and ordered the appellants to pull down, dismantle and demolish any buildings erected on the land within two weeks from the date of his order. The "court of competent jurisdiction" referred to in his judgment, are obviously:-

1. The Magistrate's court which heard Information 4479 of 1962; and 10
2. Supreme Court of Judicature hearing suit No. E 11 of 1963.

The appellants have appealed against the order of Chambers J. and that is one of the two appeals No. 36 of 1972, now before us.

3. Action C.L. P 005 of 1974

The appellants applied for a stay of execution of the order of Chambers J., who refused such an application. The appellants then applied to the Court of Appeal for a stay of execution and whilst that application was pending, the company and its agent, Xdol Mignott, on December 15, 1972, demolished the appellants' house and out-buildings, took and carried away goods, furnitures and utensils belonging to the appellants. On January 24, 1974, the appellants brought the above-numbered action against the company and its agent, claiming damages for wrongful entry and injury to their house, goods, furniture and utensils; special damages they claimed amount to \$5606.00. 20 30

On March 24, 1974, the company took out a summons to strike out that action. The summons was heard by Vanderpump J., and on May 24, 1974 although he stated that the action was a reasonable cause of action, i.e., one known to the law, yet he struck out the Statement of Claim as being frivolous and vexatious and dismissed the action against the company and its agent with costs to Xdol Mignott.

Against that order is the appeal No. 21 of 1974 which is also before us and together with appeal No.36 of 1972 have been heard. 40

Consideration and conclusions as to appeal No.36
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10 In my view, the trial judge in considering the summons to strike out suit No. E 11 of 1963 should not have misdirected himself that the issue of ownership of the land was already determined by the magistrate. He had jurisdiction to examine the evidence led before the magistrate or which was sought to be led before him for his consideration and adjudication.

Crossman J., in Sivyer v Amies (supra) discussed the procedure involved in the recovery of possession under the Small Tenements Recovery Act 1838 and the right of a party to obtain a declaration in the High Court. He said at p.287, thus:-

20 "..... It is a very interesting procedure, because it apparently contemplates giving the tenant something in the nature of a right of appeal if the justices grant the warrant against him, and the appeal would depend upon whether or not the tenant was in a position to show that the landlord was not entitled to possession, which would be a question to be determined here, because the tenant does not admit that the landlord is entitled to possession."

Valdecote L.C.J. in R. v Droxford Justices (1943) 1 A.E.R. p.209, said at p.210:-

30 "I respectfully agree with what Crossman J., we are informed said in Sivyer v Amies at p.287, namely that section 3 seems to provide something of the character of an appeal from the decision of the magistrates; but, whether it is to be described as an appeal or not, the only thing with which we are here concerned is first whether the magistrates did their duty and secondly, whether, in the circumstances, this court should issue an order of mandamus to them to do their duty, if they have not already done it."

40 Humphrys J. and Tucker J. agreed with him.

The second proviso to section 54 of the Landlord and Tenant Law Ch. 206 has given the

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tenant a right of action in the High Court where he is alleging that at the time when a warrant of possession was granted, the landlord was not entitled to possession. Hence action E 11 of 1963 was lawfully instituted and was not vexatious. In my view the judge in suit No. E 11 of 1963 should have gone on to consider whether the magistrate hearing the proceedings on Information No. 4479 of 1962 had done his duty having regard to the evidence led before him. The trial judge should not have misdirected himself that the appellants were trying to litigate again a matter already heard by the magistrate.

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Chambers J. also misdirected himself on the issues involved in the application before him. That is, that the ownership of the land had already been adjudicated upon by court or courts of competent jurisdiction.

For the reasons, I have given, I would allow this appeal with costs to the appellants.

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Consideration and conclusions as to appeal
No. 21 of 1974

If there was evidence of a bona fide dispute before the magistrate in Information proceedings No.4479 of 1962, then there is no question that this appeal must be allowed without any further arguments because the ownership of the land was never decided. But irrespective of the fact as to whether or not the proceedings, before the magistrate, before the judge in suit No. E 11 of 1963, before Chambers J. in action No. 371 of 1972 and before Vanderpump J., in action No. P 005 of 1974, were wrongly decided, throughout the years and among all the issues involved, two undisputed facts emerge:-

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1. The company on December 15, 1972 demolished the appellants' house and the appellants alleged that it had taken away their goods, furniture and utensils and they have suffered special damages to the extent of \$5606.00. And,
2. the house and outbuildings and goods were the property of the appellants.

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In an affidavit dated April 9, 1974 the

solicitor for the company in action C.L. P 005 of 1974, stated that the appellants were trespassers and that in his opinion the pleadings in that action disclosed no reasonable cause of action, or alternatively, the action was frivolous and vexatious, and further amounted to an abuse of the process of the Court. The Company never applied to the Registrar for a writ of possession and delivery of the land in question in pursuance of the judgment or order of Chambers J., and in accordance with section 648 of the Civil Procedure Code, Chap. 177. If the company had done so, the officers entitled to execute the writ of possession must in law have seen to it that no more force than was reasonably necessary to obtain possession for the company was in fact exercised. The company assumed that appellants were trespassers despite the fact that at all times the appellants were setting up a right or title to remain in possession. Xdol Mignott, the second named defendant in an affidavit dated May 13, 1974 stated that upon the instructions of the company, he entered the land and proceeded to demolish the buildings thereon. He claimed he removed all items of furniture belonging to the appellants and he was aided in such removal by Mrs.* Patrick Benjamin. Subsequently he effected delivery of those items save for a sewing machine which was levied by a bailiff for moneys owing by the appellants. He concluded that at the time of such delivery all items of furniture were in exactly the same condition as when they were first removed. The appellants claimed otherwise. However, that was a triable issue raised in action C.L. P 005 of 1974.

Apart from any question as to the company being entitled to possession of the land on the basis of the orders of the magistrate "the person entitled to possession can enter or re-enter the premises, but the Statutes of Forcible Entry beginning with one of A.D. 1381 require him to do so in a peaceful manner, otherwise he commits a crime punishable by imprisonment. But whatever his criminal liability may be, he is not civilly liable if he uses no more force than is necessary. After some conflicting opinions this was finally settled by the Court of Appeal in Hemmings v Stoke Poges Golf Club [1920] 1 K.B. 720/. The plaintiff, a tenant of a cottage owned by the defendants, refused to quit it after notice had been duly given to him. The defendants thereupon entered the

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cottage and removed the plaintiff and his furniture with no more force than was necessary. He sued them for assault, battery and trespass, and they were held not liable:" Winfield on Tort, 8th Ed. p.347. But the judgment in that case recognises this qualification, as per Bankes L.J.: "... A person who makes a forcible entry upon lands and tenements renders himself liable to punishment, and he exposes himself as to civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods." And Scrutton L.J., puts it thus: "Indeed the fact that while Newton v Harland was taken as preventing a person entitled to possession from using force to expel a trespasser Jones v Foley allowed such a person to pull the roof down over the trespasser's head, showed that the law was in a ridiculous state, from which I hope our decision may release it. It will still remain the law that a person who replies to a claim for trespass and assault that he ejected a trespasser on his property with no more force than was necessary may be successfully met by the reply that he used more force than was necessary, if the jury can be induced to find it. The risk of paying damages and costs on this finding, and the danger of becoming liable to a prosecution under the statutes of forcible entry, may well deter people from exercising this remedy, except by order of the court. But I see no reason to add to the existing privileges of trespassers on property which does not belong to them, by allowing them to recover damages against the true owner entitled to possession, who uses a reasonable amount of force to turn them out."

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In Jones v Foley (1891) 1 Q.B. 730 referred to in the above case, application was made to the justices under the Small Tenements Recovery Act 1838 and a warrant of possession was granted for possession to be given up within 21 days from the date of the order. On the same day, the defendant's workmen acting under instructions pulled down a cottage adjoining to the plaintiff's and in doing so took some tiles from the plaintiff's roof over a bedroom thus exposing the room to the sky and damage was done to the plaintiff's furniture by falling tiles and mortar. The men, however, desisted on being spoken to by

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the Plaintiff. On the next day, the defendant commenced digging the foundations of new cottages in the plaintiff's garden, and in so doing pulled up some fruit trees and cabbages. About 17 days later the plaintiff vacated the cottage but early in the morning of the same day the defendant and his workmen pulled off some tiles from the roof of the plaintiff's cottage. The cottage was the landlord's property. The plaintiff brought an action for £504 damages for trespass at a cottage and garden in the occupation of the plaintiff, and damage to the plaintiff's furniture, pictures, garden produce and other effects. It was held that the claim failed because the removal of the roof and the circumstances of the case did not amount to forcible entry. Day J., in the judgment of the court said: "The magistrate's order did not extend the tenant's right to remain in possession, but merely fixed a time when the landlord might have the assistance of an officer to take possession. The tenant had no right to be in the house; he was a trespasser, and the injury to his furniture was the result of his obstinacy in remaining on the premises. The magistrate's order in no way affected the common law rights of the defendant."

However, in the instant case:-

1. The house and outbuildings belonged to the appellants and were claimed to value \$4,010.00. The special damages to goods and furniture were claimed at \$1,356.00.
2. The appellants brought suit No. E 11 of 1963 which in the view of Sivyer v Amies (supra) was not vexatious.
3. The appellants entered defence and counter-claim to suit C.L. 371 of 1972, but these were struck out without a hearing.
4. The facts and circumstances of the taking of possession of the land by the company, if true, amounted to a flagrant and high-handed case of forcible entry. Especially, having regard to the fact that an application for a stay of execution, to the knowledge of the company was pending in a court of competent jurisdiction. At least the question of a forcible entry was a triable issue far removed from ownership of the land.

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5. The appellants were persistent in the pursuance of their lawful rights; they were not contumacious, or obstinate.

But what has the judge in action C.L. P 005 of 1974 done? Under the misdirection of deciding that the allegations in that action were based upon the same subject-matter as before, he has denied justice to the appellants on a totally different cause of action even on the assumption that the appellants were trespassers on the company's land. He heard no evidence, made no findings. He followed so many judges so mistakenly.

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For the reasons I have given, I would also allow the appeal in this matter with costs to the appellants.

HERCULES, J.A.:

The history of these two appeals constitutes a rather sombre and melancholy tale.

For purposes of this judgment, it began when a parcel of land registered on 11th July, 1904, at Vol. 30, Folio 58 under the Registration of Titles Law, was vested in Fredericka Goode by an order of the Resident Magistrate for Clarendon, on 1st December, 1960. Benjamin Patrick, although served with copies of the Summons and Affidavits seeking the vesting order from the Resident Magistrate, did not oppose the application.

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Then in 1962, Frederica Walker, as Attorney of Fredericka Goode, laid an information in the Resident Magistrate's Court, Clarendon, claiming recovery of possession of the land from Benjamin Patrick. That information was heard by Shelley R.M. (as he then was) in December, 1962. Patrick was represented by Counsel. On 10th February, 1963, the learned Resident Magistrate ordered a Warrant of Possession to issue not earlier than 21 days and not later than 28 days. In delivering his judgment, the learned Resident Magistrate accepted the evidence of Frederica Walker and her witnesses as "truthful". He described the evidence of Benjamin Patrick as "a mere fictitious pretense of title". Fredericka Walker had set up

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that Patrick was a tenant. Patrick contended that he had not been paying rent as tenant but that he had purchased the land. This was his defence to the action. Shelley R.M. decided that Patrick was a tenant and ordered a Warrant of Possession to issue. It was a pure question of fact for the learned Resident Magistrate and I see nothing in the evidence which suggested a bon a fide issue of title so as to oust his jurisdiction. (See Howorth v. Sutcliffe (1895) 2 Q.B. 358 at p.364). It is to be noted that at that hearing Patrick never put forward any claim of adverse possession, which was so monotonously belaboured subsequently. There is indeed authority against that course of conduct, which I shall cite presently.

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As the next significant event in this drama, Patrick sought before Fox J. (as he then was) in the Supreme Court in 1963 to obtain inter alia, "a declaration that the Plaintiff (Patrick) is entitled in fee simple to the parcel of land situate at Sunnyside, May Pen; in the Parish of Clarendon, consisting of $5\frac{1}{4}$ acres, now in the possession of the Plaintiff." Fox J. ruled that Patrick was attempting to have questions of fact retried after they had been conclusively decided against him by Shelley R.M. in a Court of competent jurisdiction. Accordingly Fox J. upheld a plea of Res Judicata. Patrick never appealed against the order of Shelley R.M. but he appealed unsuccessfully against the judgment of Fox J. It is trite law that a judicial decision is conclusive until reversed and its verity cannot be contradicted. But during the hearing of these appeals reference was made to the second proviso to Section 54 of the Landlord and Tenant Law, Cap. 206, which reads:-

"Provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession where such person had not at the time of granting the same lawful right to the possession of the premises." This proviso was invoked on behalf of Patrick as a legal basis for all the proceedings subsequent to the 1962 order of Shelley R.M. In other words that proviso ousted any question of Res Judicata. I am afraid that I do not accept that that proviso was intended to preclude a plea

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of Res Judicata, and in any event, on the evidence and the unchallenged order of Shelley R.M., what could be the factual or legal basis for saying that Frederica Walker had not, at the time when the order was granted, the lawful right to possession? In my view that proviso is totally irrelevant.

Some time after the order of Fox J., (on 12th August 1969 to be precise), Beverly Gardens Development Co. Ltd., became successors in title to Fredericka Goode. In a statement of claim in C.L. 371/1972 dated 4th May, 1972, the Company claimed against Mr. & Mrs. Benjamin Patrick:-

- (1) Possession of the land;
- (2) Mesne profits at the rate of ₦60.00 per month;
- (3) An injunction to restrain the Defendants from constructing any building on the said land;
- (4) Further and/or alternatively, an order that the Defendants do forthwith pull down, dismantle and demolish any building erected on the said land.

Chambers J. adjudicated upon this matter on 16th November, 1972. He made an order in terms, except as to (2) mesne profits, which he ordered to be tried as a separate issue. One appeal is against the order of Chambers J. A great deal of rigmarole characterized the argument against that order. For instance, prior to the adjudication of Chambers J., Parnell J. had ordered the trial of the preliminary issue of Res Judicata. There was no appeal against the order of Parnell J., but Mr. Parkinson described that order as "improper, wrong and contrary to law." He even submitted that Chambers J. should have set aside the order of Parnell J. Whatever may have been right or wrong about it, I have no hesitation at all in deciding that the order of Parnell J. was absolutely irrelevant to a consideration of the appeal against the order of Chambers J.

The most important of Mr. Parkinson's "broad propositions" on the preliminary issue of Res Judicata before Chambers J. was that the claim of adverse possession was not raised on behalf of

Patrick and adjudicated upon before, and therefore the principle of Res Judicata could not be applied notwithstanding the adjudications and judgments of Shelley R.M. in the 1962 suit and Fox J. in suit E. 11/1963. Mr. Parkinson persisted then and still persists on appeal that it was competent for Chambers J. to retry, 9 or 10 years later, questions which were finally disposed of by courts of competent jurisdiction. In my view Chambers J. was right in applying the principle of Res Judicata.

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Apart from the fact that there was no reversal of the judgments of Shelley R.M. and Fox J., why was not the issue of adverse possession raised from the very outset of this unhappy tale? Is it because it was inconsistent with the plea of possession by purchase, and that plea having failed, this desperate effort is made subsequently to put forward a claim of adverse possession?

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The authority against that course of conduct is to be found in the case of Henderson v. Henderson (1843) 3 Hare 114/5 where Wigram V.C. declared:

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"I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

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This case is the locus classicus on this matter

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and more recently the quotation above was referred to as settled law by Lord Shaw in Hoystead & Others v Commissioner of Taxation (1926) A.C. 155 at p.170. I am of the view that on the facts and the law the judgment of Chambers J. stands unassailable. The formal order was dated 16th November, 1972.

On 25th November, 1972, Mr. & Mrs. Benjamin Patrick filed Notice of Appeal against the judgment of Chambers J. No.21 of the Court of Appeal Rules, 1962, provides as follows:-

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21 (1) Except so far as the Court below or the Court may otherwise direct -

- (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
- (b) no intermediate act or proceeding shall be invalidated by an appeal.

The Notice of Appeal was followed on 28th November, 1972, by a Motion for a stay of execution. The Court of Appeal on 19th December, 1972, granted a stay of execution. But before this stay of execution was granted, i.e., on either the 14th or 15th December, 1972, one Xdol Mignott, as agent for Beverly Gardens Development Co. Ltd., effected execution of the order made by Chambers J. This gave rise to another suit C.L. P 005/1974 dated 24th January, 1974, in which the Patricks claimed damages for trespass.

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This suit came before Vanderpump J. in Chambers on 21st May, 1974. The second appeal herein derives from the judgment of Vanderpump J. At that hearing, learned Attorney for the Defendants took a preliminary point to have the Statement of Claim struck out. Learned Attorney contended that the issue of trespass involved questions of ownership and/or possession which were already decided by Courts of competent jurisdiction, i.e., Shelley R.M. and Fox J. as indicated above. Mr. Parkinson however urged that since the ground of appeal against the judgment of Chambers J. was the claim of adverse possession, the question of title was still outstanding, and the action in trespass could be maintained, pending the decision

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of the Court of Appeal, as no question of title was involved. With that sort of basic submission, Mr. Parkinson made it irresistible for Vanderpump J. to strike out the action as frivolous and vexatious and an abuse of the process of the Court. To say the most in their favour, the Patricks should have awaited the outcome of their appeal against the judgment of Chambers J. In the unlikely event that it resulted in their favour, they would then have had some basis (albeit questionable) on which to proceed with their trespass action.

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The plea of adverse possession connotes undisturbed possession for at least 12 years. In 1962, as a conclusion of fact, based on abundant evidence, Shelley R.M. gave Benjamin Patrick the status of tenant of Frederica Walker and ordered a warrant of possession against him. Therefore in suit E 11 in 1963, Fox J. held that the plea of adverse possession was not open to Patrick. When moreover he filed his writ 371/72 on 23rd March, 1972, 12 years had not elapsed since the order of Shelley R.M. So on no consideration of the facts could he have maintained the plea of adverse possession.

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Mr. Parkinson submitted that the Vesting order in 1960 was nullity; that the order of Shelley R.M. in 1962 was a nullity, and everything based on those two orders would also be a nullity. I agree with Mr. Chin See that if a judgment or order could be upset after a lapse of 12 years, and in the manner contended for, then persons who complete business transactions upon judgments of the Courts, not appealed against and not reversed, would be in dire straits.

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I hold that the facts were litigated and duly adjudicated upon by Shelley R.M. in 1962. Fox J. confirmed this in E 11/1963. There is a note to Order 18/19/10 B on page 306 of the Supreme Court Practice, 1973, Volume 1. Here I wish to adopt the statement of the learned Editors as follows:-

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"If a party seeks to raise anew a question which has already been decided between the same parties by a Court of competent jurisdiction, this fact may be brought before the Court by affidavit, and the statement of claim, though good on the face of it, may be struck out, and the action dismissed; even though a

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plea of res judicata might not strictly be an answer to the action; it is enough if substantially the same point has been decided in a prior proceeding (MacDougall v Knight, 25 Q.B.D.1; Reichel v Magrath, 14 App. Cas. 665 at p.667, Humphries v. H (1910) 2 K.B. 581 C.A; Green v Weatherill (1929) 2 Ch.213)). The Court should strike out a pleading under O.18, r.19, and its inherent jurisdiction, as soon as cause of action estoppel is brought to its attention." 10

It seemed clear that Mr. Parkinson was seeking to relitigate substantially the same matters. His strongest contention was that a plea of adverse possession was neither litigated nor adjudicated upon before. This of course was in total disregard of the fact that it was raised unsuccessfully before Fox J. in 1963. In the light of Henderson v Henderson (supra) however, Mr. Parkinson never even attempted to show any special circumstances why this plea was not raised at the very outset. I feel constrained to the conclusion that the plea of Res Judicata was well taken before Chambers J. and Vanderpump J. 20

An aphorism that comes to mind forcibly at this stage is: "interest reipublicae ut sit finis litium" - (It is in the public interest that litigation is not protracted). In the result I would dismiss both appeals.

ZACCA, J.A.(ag.) 30

I have had the advantage of reading the judgments delivered by my brothers Edun and Hercules. I agree with the conclusions at which my brother Hercules has arrived in dismissing these two appeals. I would also dismiss both appeals.

EDUN, J.A.:

The appeals are dismissed. Costs of both appeals to the respondents to be taxed or agreed.

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Formal Order granting leave to Appeal
to Her Majesty in Council

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No.29

Formal Order
granting
leave to
Appeal to Her
Majesty in
Council

30th May 1975

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 36 of 1972
and 21 of 1974

BETWEEN (1) No. 36 of 1972

MR. & MRS. BENJAMIN PATRICK

DEFENDANTS/
APPELLANTS

10

and

BEVERLEY GARDENS DEVELOPMENT
COMPANY LTD.

PLAINTIFFS/
RESPONDENTS

(2) No. 21 of 1974

MR. & MRS. BENJAMIN PATRICK

PLAINTIFFS/
APPELLANTS

and

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BEVERLEY GARDENS DEVELOPMENT
COMPANY LTD.
XDOL MIGNOTT

DEFENDANTS/
RESPONDENTS

BEFORE:

The Honourable Mr. Justice Luckhoo
The Honourable Mr. Justice Swaby
The Honourable Mr. Justice Zacca (Acting)

THE 30th DAY OF MAY, 1975.

UPON the Application of the Defendants/
Appellants and Plaintiffs/Appellants, Mr. and Mrs.
Benjamin Patrick, for FINAL LEAVE TO APPEAL to
Her Majesty in Council from the Judgment of the
Court of Appeal of Jamaica dated October 14th,
15th, 16th and 17th, 1974, and December 20th, 1974,
coming on for hearing this day:

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AND UPON HEARING Mr. Eugene C.L. Parkinson,
Q.C., Attorney-at-Law for and on behalf of the
Applicants, Mr. and Mrs. Benjamin Patrick, and the
Respondents, Beverley Gardens Development Company

O N A P P E A L
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

MR. AND MRS. BENJAMIN PATRICK

Appellants

- and -

1. BEVERLEY GARDENS DEVELOPMENT
COMPANY LIMITED

2. XDOL MIGNOTT

Respondents

RECORD OF PROCEEDINGS

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