 Judgement book

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 1/92

COR: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	**LIONEL GOLAUB**	**PLAINTIFF/APPELLANT**
AND	**AMOS WALKER ET AL**	**DEFENDANTS/RESPONDENTS**

J. Vernon Ricketts instructed by Rupert McDonald for the Appellant

Jack Hines instructed by Michael B. Erskine for the Respondents

June 2 and 23, 1992

ROWE, P.

At the conclusion of the arguments we allowed the appeal and, as promised, we now deliver our written reasons for so doing.

The appellant filed a plaint in the Resident Magistrate's Court at Savanna-la-mar. In his particulars of claim he alleged that the respondents were committing acts of trespass on his property. He, therefore, prayed an injunction restraining the respondents from entering on his land and also damages for the loss he suffered as a result of the said acts of trespass.

On the 3rd day of October, 1985 when the matter came up for hearing, the learned Resident Magistrate, with the consent of all parties through their respective attorneys, ordered that the matter be referred to Mr. R.H. Anderson, a Commissioned Land Surveyor. A formal order of reference was drawn up. The surveyor was required:

> "To lay down on earth the boundary line between the respective holding of the Plaintiff and the Defendant having reference to documents and title deeds in the possession of the parties to ascertain the true boundary line and to report the position of the existing fence in relation to the line so found by the Surveyor."

Thereafter the order of reference contained certain provisions as to notice to be given of the time of making the survey, the report to the Court to contain a diagram of the survey, and as to payment of the cost of making the survey.

The surveyor, Mr. Anderson, followed the instructions of the Court and sent a report to the Court by letter dated January 13, 1987. It reads in part, as follows:

> "The Resident Magistrate
>
> ...
>
> Dear Sir,
>
> Re: Plaint No. 952/83 - Lionel Golaub and Amos Walker
>
> In obedience to an order from His Honour the Resident Magistrate in this case dated 3rd day of October, 1985, I submit copy Plan marked 'A' attached with the following report:
>
> ...
>
> 3. On examination of the plans attached to the aforementioned Titles, it was pointed out to both Amos Walker and Lionel Golaub that there was no road through lands registered at Volume 427 Folio 70 or Volume 1046 Folio 640 (belonging to the Plaintiff). The Titles showed that the access road to the respective properties ended in a cul-de-sac at the position indicated on the plan 'A' by the letters BCD. The point C is the midpoint on the common boundary of the Parochial Road with lands registered at Volume 427 Folio 70 and Volume 1046 Folio 640. BC and CD each represent an 8 ft. frontage on the road.

" 4. Having ascertained the facts set out in paragraph 3 above, I laid down on ground the line AB, BC, CD and DE representing the frontage of lands registered at Volume 590 Folio 50, Volume 427 Folio 70. I also advised the parties that the road ends on ground at the position indicated on Plan by the line BCD." [Emphasis added]

The facts do not reveal the defence put forward by the respondents before the matter was referred to the Surveyor. However, from the circumstances it can be inferred that the respondents were claiming that Cherry Lane did not end at the plaintiff/appellant's land, but continued between his parcels of land and ended at Mr. Vicker's land.

Eventually the matter was relisted and trial continued on the 1st day of October, 1990. At the continuation of the trial, the attorney for the respondents stated their defence viz. "The defence is that the defendants claim a right of way by virtue of common usuage for 50 years in respect of the bit of land." The appellant in his evidence stated that in 1983 he discovered the respondents walking through his land. It appeared to him that his land was being utilized as a means of gaining access to land situated behind his which belonged to one Mr. Vickers. The appellant further stated that the respondents had other means of reaching Mr. Vickers' land as they could do so from the main road. The respondents all supported their defence of easement by prescription. They stated that Cherry Lane started at the main road and ended at Mr. Vickers' property so that it ran through the appellant's property.

The learned Resident Magistrate filed his reasons for judgment on the 13th November, 1991. He stated the issue in the case as being "whether there is a right of way at common law beyond the point BCD on the diagram attached to the Surveyor's Report."

He found that Cherry Lane ends at the line BCD and that beyond that line is land belonging to the plaintiff/appellant. In his reasons for judgment the learned Resident Magistrate said:

> "Under the terms of paragraph 1 (a) of the Order for Surveyor's Report the Surveyor was to report on firstly where the road ends depicted on the diagram attached to the Registered Titles of the Plaintiff. Secondly, the Surveyor ought to report whether this road was the only access by the Defendants to their property."

He further stated:

> "It appears that the issue that was put to the Court was where the road ends. I do not understand this issue to be the same as whether there is a right of way or easement at common law over the plaintiff's land. It appears that the second question in the Order of Surveyor's Report was concerned with an <u>easement of necessity</u>. The Surveyor did not give any report on this."

The learned Resident Magistrate found that the respondents raised the defence of <u>easement by prescription</u> at the trial. He acknowledged that the trial was not presented on the terms of the original questions in the Order of the Surveyor's Report. It is of importance that he thus said:

> "I am of the view that Exhibit 1 (the Surveyor's Report and Diagram) by itself did not determine the issue whether there was a right of way or an <u>easement of prescription</u> beyond the line BCD. I preferred and accepted the evidence of the defendants and their witnesses as to this fact."

The learned Resident Magistrate then found that for over forty years the respondents had had uninterrupted access beyond the line BCD at Cherry Lane across the plaintiff's land. He therefore, found for the respondents.

The appellant appeals from this decision on the following grounds:

"1. The Judgment of the Learned Resident Magistrate is contradictory and in conflict with the evidence given in Court.

2. The Judgment of the Learned Resident Magistrate does not give sufficient weight to the findings and report of the Court-appointed Surveyor which says there is no right of way over the land of the Plaintiff/Appellant."

The provisions of section 97-99 of the Judicature (Resident Magistrates) Law, Cap. 179 are applicable to this action. These sections permit plaints to be filed to determine boundary disputes or disputes concerning easements or rights of way. Section 101 is of particular application to this matter. It reads:

> "In any suit under sections 97, 98 and 99, or in any other suit where it may be desirable for the purpose of determining the matter in issue, the Magistrate, if he thinks it expedient so to do, may make an order that the matter in controversy shall be referred to a commissioned surveyor, or, with the consent of both parties, to some other fit person or persons whom he shall nominate, and the person or persons so appointed shall, under the control and direction of the Court, make a survey of the lands in question, so far as the same may be necessary to ascertain and settle the boundary line between the said lands, or the right of way or other easement in dispute, or such other matter at issue as aforesaid, and shall ascertain and settle the said boundary line, or right of way, or other easement or matter as aforesaid, and shall, if necessary, make a plan or diagram of the said lands, indicating the boundary line, or the right of way, or other easement ... and shall make a report thereof to the Court; and the Court shall, on a day to be appointed for that purpose, take the said report into consideration; and it shall be competent for either of the parties to take exceptions to the said report, and the Court shall hear arguments upon such exceptions, and shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require:

> "Provided, that the Court may refer back the report to the persons who made it, or to any other surveyor or person nominated as aforesaid, for a further report, with such instructions as the Court may think fit to give, and on the making of such further report the Court may proceed as it might have proceeded on the first report." [Emphasis added]

In **Whitelock v. Campbell** [1970] 15 W.I.R. 481, Smith, J.A. at page 486 interpreted the effect of this section. He stated:

> "Here it is 'the matter in controversy' that is referred to a surveyor."

He stated that the section makes no provision for the hearing of evidence and that the purpose of a reference under section 101 is to settle the dispute between the parties. In the case before him Smith, J.A. remarked that the defendant had not raised the question of title when the action came on for hearing and that that was the proper time for raising it. He, therefore, agreed with the learned Resident Magistrate that having consented to the reference, the defendant could not, at the late stage at which he did so, raise the issue of title. Smith, J.A. stated:

> "Both the defendant and the solicitor then acting for him consented to the dispute being referred for determination under the provisions of s 101. In my judgment, in doing so they did not only admit that the sole matter in issue was the question of what was the correct boundary line according to the plan and diagram referred to in the order of reference but impliedly undertook to be bound by the findings of the surveyor, subject to any exceptions to the report as may properly be raised."

In the case of **Cox v. Shields** [1909] 9 S.C.J.B. page 89 the Court held that after the surveyor had made his report it was too late for the party who is unsuccessful in the report to offer evidence of a boundary acquiesced in or of possession for the statutory period, unless the order or reference specially reserved the question. The Court went on to hold that there were no words in the order or reference from which any intention to leave any

question to be settled by the Court on evidence could be gathered. The Court, therefore, held that the order of the Resident Magistrate adjourning the consideration of the report to enable the three defendants (respondents) to give evidence of long possession was wrong and should be set aside.

In reviewing the instant case, three observations can be made. Firstly, the learned Resident Magistrate was mistaken when he stated that the Surveyor's Report had been meant to ascertain "whether [Cherry Lane] was the only access by the defendants to their property" that is, whether the respondents could plead an easement by necessity. The Order of Reference to the Surveyor was solely concerned with the point at which Cherry Lane ended. The Surveyor's Report clearly established that boundary.

Secondly, the real difficulty in this case arose because, as the learned Resident Magistrate said, the issues brought before the Court after the Surveyor's Report was done, were different from the ones facing the Court at the commencement of the action. At first the issue was merely one of boundary but later the defendants raised the defence of an easement through the property of the appellant.

Thirdly, as a consequence of the divergence in issues before the Court, the Surveyor's Report dealt with only the first issue of boundary. Despite this, the learned Resident Magistrate determined the case on the basis of the existence of an easement by prescription. This procedure was clearly erroneous.

The purpose of the Surveyor's Report is to settle the dispute between the parties. It is to establish facts on which the Resident Magistrate can base his decision. The Report will be the sole basis on which the dispute is to be settled unless the parties reserve a question or questions for the determination of the Court on other evidence.

When the parties agreed to the reference they were impliedly stating that the sole issue to be determined was one of boundary. The Report did determine this issue. It established the boundary of the appellant's land to be at line BCD in Exhibit 1. It gives no indication as to whether at the end of Cherry Lane there is a track or path across the appellant's land. This is so because the Surveyor was not required to report on such a matter by virtue of the Order.

The parties took no exception to the Report, as was within their competence. They reserved no questions for the determination by the Court on evidence apart from the Report. They were thus impliedly undertaking to be totally bound by the findings of the Surveyor. It was clear, however, that in the circumstances this Report was unable to "settle the matter in controversy."

The defence of easement by prescription was a proper one to have been raised on the facts in this case. This should have been done before the reference to the Surveyor had been made. In the Surveyor's Report it would then have been possible for the Surveyor to indicate whether a track or path existed across the land of the appellant.

In the circumstances, the learned Resident Magistrate should not have proceeded to determine the case on the basis of the new defence raisd by the respondents without a further reference to the Surveyor.

We therefore allowed the appeal, set aside the order of the Court below and ordered a new trial before a different Resident Magistrate. The respondents are ordered to pay costs, fixed at $500.