J A M A I C A

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 53/76

BEFORE: The Hon. Mr. Justice Luckhoo, J.A., (presiding)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A.

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HUNTLEY BECKFORD - DEFENDANT/APPELLANT

vs.

AUBREY WILLIAMS - PLAINTIFF/RESPONDENT

Mr. B. Macaulay, Q.C. for the appellant.

No appearance or representation for the respondent.

October 15 & November 3, 1976

Swaby, J.A.:

On December 2, 1975 the learned resident magistrate for the parish of St. Ann entered judgment for the respondent herein on his claim for damages sustained by him to his person and motor cycle as a result of the negligent manner in which he alleged the appellant drove his motor car along the main road at Walkerswood in the parish of St. Ann on June 30, 1975. Judgment was also entered for the respondent on the appellant's counterclaim for damages for negligence arising out of the same motor vehicle collison, as also damages for assault inflicted on him by the respondent on July 15, 1975. On October 15, 1976 after argument of a supplementary ground of appeal we allowed the appeal, set aside the judgment of the learned resident magistrate on the plaintiff's claim and on the defendant's counterclaim, ordering that there should be no order

for costs in the court below, but that the appellant should have the costs of the appeal fixed at $50. We stated then that we would later put our reasons in writing. We now do so.

At the outset of the hearing of the appeal learned counsel for the appellant sought and obtained leave to argue as an additional ground of appeal that the learned resident magistrate had no jurisdiction to hear and determine the suit as filed in the resident magistrate's court and that consequently the judgment was a nullity. He urged that although the additional ground was being raised for the first time on appeal; not having been included in the original grounds filed nor raised in the court below it was competent for this court to entertain the ground as it had been decided by the Judicial Committee of the Privy Council, comprising Lord Simonds, Lord Uthwatt, Lord Morton of Henryton and Lord Reid in the case on appeal from the West African Court of Appeal of Chief Kwame Asante vs. Chief Kwame Tawia, reported in (1949) W.N. at p. 40, Lord Simonds delivering the judgment of the Judicial Committee that, "If it appeared to an appellate court that an order against which an appeal had been brought had been made without jurisdiction it could never be too late to admit and give effect to the plea that the order was a nullity."

In order to appreciate the arguments of counsel for the appellant it is convenient at this stage to set out the relevant portions of the plaintiff's particulars of claim and the defendant's counterclaim. They are as follows:

" PARTICULARS OF CLAIM "

"The plaintiff claims from the defendant the sum of one thousand one hundred and six dollars and fity-five cents ($1,106.55) for damages for negligence for that on Monday June 30, 1975 the defendant so negligently drove motor vehicle licensed and numbered NC 8461 along the main road at Walkerswood in the parish of St. Ann that the motor vehicle skidded around a corner at Walkerswood in the said parish and the right rear of the defendant's motor vehicle smashed into the motor cycle licensed and numbered X 2124 ridden

by the plaintiff as a result of which the plaintiff suffered damages and incurred expense as per particulars set out in detail therein totalling $1,106.55". These particulars were followed by this notice:

"TAKE NOTICE that the plaintiff hereby abandons the excess of one hundred and six dollars and fifty-five cents ($106.55) in order to bring this Action in the resident magistrate's court."

NOTICE OF COUNTERCLAIM

"TAKE NOTICE that the defendant herein intends to rely on the following, inter alia, by way of counterclaim at the trial of this action on the 24th day of October, 1975."

PARTICULARS OF COUNTERCLAIM

"The defendant's claim is against the plaintiff to recover the sum of Nine Hundred and Ninety-four dollars and sixty cents as and for damages for negligence and for assault and battery for that ..... expenses."

Particulars of the special damages for negligence were set out totalling $320, whilst the particulars of the special damages for assault and battery were set out totalling $674.60. These particulars were followed by this statement of the defendant's apportionment of his claim:

" AND THE DEFENDANT'S CLAIM IS APPORTIONED AS FOLLOWS

(1) Negligence $320

(2) Assault and Battery $674.60."

Learned counsel for the appellant invited the court's attention to the relevant provisions relating to the jurisdiction of resident magistrates' courts in actions at Common Law to be found in sections 71 and 73 of the Judicature (Resident Magistrates) Act, hereinafter referred to as the Act, which read as follows:

"s.71 - Every Court shall, within the parish for which the same is appointed, have jurisdiction in all actions at law, whether arising from tort or from contract, or from both, when the debt or damage claimed does not exceed six hundred dollars, whether on balance of account or otherwise:

Provided that .....
the local jurisdiction of the Court.

> Provided further that where an action arises from negligence then every Resident Magistrate's Court shall have jurisdiction when the damage claimed does not exceed one thousand dollars"

> "s.73 - It shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts; but any plaintiff having a cause of action for more than six hundred dollars, for which a plaint might be lodged under this Act, if such cause of action had been for not more than six hundred dollars, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding six hundred dollars, and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly; and the plaintiff shall in all cases be held to have abandoned any remaining portion of any debt, demand, or penalty beyond the sum actually sued for in the plaint."

Learned counsel pointed out that the jurisdiction of resident magistrates' courts to hear and determine actions at common law was limited to claims not exceeding $600, whether on balance of account or otherwise, save in action arising from negligence when the jurisdiction of these courts is limited to claims for damages not exceeding $1,000 - see s. 71 and the second proviso thereto. He further pointed out that by virtue of the provisions of s. 73 a plaintiff having a cause of action for more than $600 for which a plaint might be lodged under the Act if such cause of action had been for not more than $600 may abandon the excess, and thereupon the plaintiff on proving his case recover to an amount not exceeding $600 and the judgment of the Court upon plaint shall be in full discharge of all demands in respect of such cause of action.

Learned counsel then contended:

(1) that as the law now stands a plaintiff may not subject to the provisions of s. 72 of the Act, later dealt with, bring a claim in negligence in the resident magistrate's court if his claim exceeds $1,000;

(2) that the only provision whereby a plaintiff may abandon any excess of his claim so as to bring his action within the resident magistrate's court jurisdiction is s. 73 which relates to abandoning the excess of claims over $600 to bring them within the $600 jurisdiction limit,

(3) that on the assumption that a plaintiff who had a claim in negligence in excess of $1,000, (as in the instant case for $1,106.55) could legally abandon the excess of his claim under s. 73 so as to bring it within the resident magistrate's court jurisdiction, he would be obliged to reduce his claim, by $506.55 leaving a balance of only $600 since he cannot recover more than $600 by virtue of the provisions of s. 73. This, he said, would lead to an absurdity and was never the intention of the Legislature when it had increased the resident magistrate's court jurisdiction in negligence actions up to $1,000. It appeared to have been an oversight in not having enacted a suitable proviso to s. 73 regarding the abandonment of any excess over claims of $600 when the jurisdiction of the resident magistrates' courts in negligence actions was first increased in 1953 to claims not exceeding $600 and later further increased to $1,000 in 1965.

Of course, as previously adverted to the parties to a plaint in all common law actions whatever the amount of the debt or damage claimed may agree by memorandum signed by themselves or their attorneys-at-law that any resident magistrate's court named in the memorandum shall have power to try and determine the action - see s. 72 of the Act which reads:

"s. 72 (1) All common law actions, whatever be the amount of debt or damage claimed, wherein both parties shall agree by memorandum, signed by them, or their respective solicitors, that any Court named in such memorandum shall have power to try the action, may be heard and determined in like manner by the Court so named.

(2) A judgment delivered pursuant to such hearing shall have the same effect and be enforceable in all respects as a judgment for an amount within the jurisdiction as to amount or coming within the local jurisdiction of the court before which the same was so tried."

Had the parties in this action availed themselves of the provisions of the above section the resident magistrate's court would have had power to try their claims.

We held that counsel's arguments and submissions were well founded, that the plaintiff/respondent who had not complied with the provisions of s. 72 had no statutory right to file a claim in negligence in excess of $1,000 and to have abandoned the excess thereof thereby purporting to bring his claim within that court's jurisdiction which is limited to claims not exceeding $1,000.

The learned resident magistrate likewise had no jurisdiction to hear and determine the plaintiff's action in the circumstances. His judgment thereon is therefore a nullity. We agree with what was said in Francis v. Allen 7 J.L.R. p. 100 at p. 108, namely,

> "The Resident Magistrates Courts are creatures of statute and cannot have any jurisdiction other than is given by the statute creating them. The parties cannot create the jurisdiction where there is none unless the statute permits it. In the same way a Resident Magistrate cannot take upon himself a jurisdiction where he has none."

What is even more paradoxical are the provisions in s. 191 of the Act relating to counterclaims and set-offs. This section reads:

> "s.191 - A defendant in an action may set up by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sounds in damages or not; and such set-off or counter-claim shall have the same effect as a plaint in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the counter-claim. But the Court may, on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof:
>
> Provided always, that if the defendant's counter-claim be in respect of a claim, as to amount within the jurisdiction of the Resident Magistrate's Court, the Court shall, after deciding on the plaintiff's claim, and on the defendant's counter-claim, decide for which party final judgment shall be entered according to the excess found for such party:
>
> Provided also, that if it shall appear that any such counter-claim be for an amount beyond the jurisdiction of the Court, the Magistrate shall not have power to entertain such counter-claim, unless the defendant abandon the sum in excess of the Court jurisdiction."

It will be observed that by virtue of the second proviso a defendant whose counterclaim in negligence is for an amount beyond the jurisdiction of the court i.e. $1,000 may abandon the sum in excess of the court's jurisdiction so as to give a resident magistrate's court power to hear and determine such counterclaim. There appears to be no valid reason for making this distinction between a

plaintiff's claim and a defendant's counterclaim.

Learned counsel for the appellant was about to embark upon argument that the appellant's appeal relative to his counterclaim could none-the-less succeed, notwithstanding the plaintiff's claim could not be filed for want of jurisdiction. The court however pointed out to him that the appellant had apportioned his claim for damages in his counter-claim as to $320 for negligence and $674.60 for assault and that consequently the provisions of s. 73 were applicable to that part of his counterclaim which related to damages for assault, it being in excess of $600, and therefore not within the court's jurisdiction because the appellant had neither in his particulars of claim nor his evidence stated that he had abandoned the excess over $600. Learned counsel was therefore caught up in his own arguments which he had advanced relative to the amount of the plaintiff's claim being in excess of the court's jurisdiction. Counsel readily conceded the point adding that he did not propose to argue the other seven grounds of appeal filed as they related to the learned resident magistrate's findings of fact which he could not successfully disturb.

For these reasons we allowed the appeal and made the orders previously set out above.

The omission of a suitable proviso to s. 73 of the Act to allow for the abandonment of the excess of claims over $1,000 in negligence actions, so as to bring such claims within the resident magistrates' courts' jurisdiction, without having to obtain the written consent of the parties as provided in s. 72, as such consent may not always be forthcoming, is one requiring early legislative attention.