JAMAICA

N THE COURT OF APPEAL

ESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 11/1972

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

B E T W E E N GURZEL BUCHANAN - DEFENDANT/APPELLANT

A N D EUSTACE IRVING - - PLAINTIFF/RESPONDENT

L.R. Cowan for the appellant.

D. McFarlane for the respondent.

Heard: October 19, 1972, January 26, 1973

LUCKHOO, J.A.:

On October 19, 1972, we allowed this appeal and promised to put our reasons therefor in writing. We regret the delay in doing so but this was due to the fact that the exhibits in the case were returned to the Resident Magistrate's Court Office in Hanover soon after the determination of the appeal and were only recently recovered from that office.

The respondent Eustace Irving, in the Resident Magistrate's Court for the parish of Hanover, alleged that on October 9, 1969, the appellant Gurzel Buchanan, trespassed upon his lands situate at McQuarrie in that parish and that she (the appellant) wrongfully and unlawfully stopped and interrupted a survey which was then being made of those lands at his instance.

The learned resident magistrate found for the respondent in respect of both acts alleged. He awarded the respondent $19 as damages in respect of trespass and $31 as damages in respect of obstructing the survey together with costs to be agreed or taxed.

The lands to which the respondent's claim relates were in the ownership of the respondent's father William Irving at the time of the latter's death intestate in 1914. William Irving was married to Marion Kerr and had a number of children by her of whom the respondent was one. William Irving and his family all resided at Gravel Lane where he owned a parcel of land.

At the time of William Irving's death the respondent was 3 years old and was the only surviving son of his parents. As heir at law the respondent would have been entitled to the lands at McQuarrie and Gravel Lane under the law of inheritance then in force. Shortly after the husband's death the mother re-married. She sold the land at Gravel Lane and with her second husband took her children to live at premises on the McQuarrie lands. In 1928 the mother took the appellant, then a child, to live with her. The mother's second husband died. The appellant continued to live with the respondent's mother as a de facto adopted child until the mother's death in December, 1966. At all times they resided on the McQuarrie lands. In the meanwhile, in 1946, the respondent built his own house on those lands, married three years later and with his wife resided in that house. In 1956 the mother had the McQuarrie lands surveyed and made application to have those lands - some 1 acre and 39.5 perches in extent - registered in her own name. In 1957 the respondent lodged a caveat against his mother's application and no further step was taken by the mother up to the time of her death. The mother's last Will was duly proved on November 30, 1967, and probate thereof granted to the appellant, the sole executrix named in the Will. The devises contained in that Will material to this matter are as follows -

> " I GIVE DEVISE and BEQUEATH unto the said GERZEL BUCHANAN my house in which I now live together with ONE HALF ACRE of land on which the said house is situate as owner in fee simple and the boundaries of this said ONE HALF ACRE of land must be selected and determined by her.
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> I GIVE DEVISE and BEQUEATH unto LILIETH IRVING ONE HALF ACRE of my said land at Hopewell the boundaries of which must be selected and approved by my said Executor.
>
> UNTO EUSTACE ADOLPHUS IRVING I GIVE DEVISE and BEQUEATH the sum of ONE SHILLING AND SIX PENCE as an evidence of his improper conduct and bad behaviour towards me.
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> ALL the rest residue and remainder of my estate both real and personal whatsoever and wheresoever situate not hereinbefore specifically devised or bequeathed and of which I might die possessed I GIVE DEVISE and BEQUEATH unto the said GERZEL BUCHANAN as to the Realty in fee simple and as to the Personalty absolute."

The Will was made on October 25, 1955, and as the learned resident magistrate concluded it would appear that the mother believed herself entitled to the lands at McQuarrie and at Gravel Lane as widow of her deceased husband William Irving. The McQuarrie lands she purported to devise by her last Will and as already noticed she sold the Gravel Lane lands in 1914. On October 9, 1969, the respondent engaged the services of a land surveyor one Mr. Alexander to survey the McQuarrie lands and paid the surveyor's fee of 10 guineas. According to the respondent the appellant was served with a notice of intended survey. Such a notice is given in a form prescribed by the Schedule to the Land Surveyors Regulations, 1944 made under the authority of s.43 of the Land Surveyors Law, Cap.211 and is required by s.27 of that Law to be given to owners or occupiers of all lands adjoining lands proposed to be surveyed where those adjoining lands may be affected by the survey. Such a notice after specifying the lands to be surveyed and the time it is proposed to commence the survey requests the person served to attend by himself or his agent at the place and time of commencement of the survey and to bring all diagrams and other papers referring to his land in order to protect his interest therein. Section 29 of the Land Surveyors Law, Cap. 211 provides as follows -

> "29. Where the survey is undertaken by appointment of the owner of any land then every owner of any land upon whom notice has been served, and any person interested in and affected by the survey of such land, may cause to be served upon the surveyor, prior to the completion of the survey, notice of objection, in the prescribed form, to such survey. Upon service of such notice of objection the surveyor shall not proceed with the survey in so far as it affects the land in respect of which notice was given until notice of withdrawal, in the prescribed form, is served upon such surveyor."

Although the appellant denied that she received such a notice she attended at the time and place the survey was being carried out and made objection to the survey in writing. Whether she did or did not receive a notice of intended survey is not material to the respondent's claim in trespass for if she did her presence on the lands at that time would have been in pursuance of the request contained in the notice and therefore could not be a trespass and if she did not (as she asserted in the course of her evidence), she was at that time residing on a portion of the lands and had been so residing as the de facto adopted daughter of the respondent's mother since 1928. Indeed Mr. McFarlane

for the respondent conceded that for this latter reason alone it is not possible to support the learned magistrate's finding in favour of the respondent on his claim in trespass.

We now come to the question whether in obstructing the survey the appellant was liable in damages to the respondent. It is clear that the appellant's act in obstructing the survey proceeded on the basis that the lands being surveyed were in her ownership by reason of the dispositions contained in the last Will of the respondent's mother. It is not disputed that her claim to the lands based as it was on the respondent's mother's last Will was made bona fide, that is with a genuine belief that she was entitled thereto under the respondent's mother's Will. However, Mr. McFarlane submitted that even though her claim to the lands may be held bona fide it must have some basis in fact and in law. By that we understand him to be saying that an objection based on a claim which is honestly made would not avail the claimant as a defence to a claim for damages for obstructing a survey unless it turns out that the claim is well founded in fact as well as in point of law. In support of that contention he cited the cases of Marshall v. Jacks & Wilson R.M.C.A. No. 90/1971 decided by this Court on February 25, 1972 and Stokesfield Ltd. v. Taylor & Bennett (1928) Clark's Reports 287. The former case is easily distinguishable from the instant case in that the objector in the former case was neither the owner nor occupier of adjoining lands which might have been affected by the survey and also no notice of intended survey was served upon the objector, whereas in the instant case the appellant was in occupation of part of the land to be surveyed and further it was a part of the respondent's case that a notice of intended survey was served on the appellant. The report of the latter case is scanty and does not state whether or not a notice of intended survey was served on the objector. That case appears to have turned on a question of fact as to whether or not the defendant was in possession of the land to be surveyed. A finding that he was not is tantamount to a finding of a lack of bona fides on the part of the defendant. In our view once the objector who has been served with a notice under s.27 of Cap. 212 bona fide claims to have, that is genuinely believes himself on reasonable grounds to have, an interest in the land to be surveyed it matters not that such a claim is later proved to be unfounded in law. So that although the respondent in the instant case as heir at law was

titled to succeed to his father's lands on the latter's death and those lands might have remained at all times in his ownership, it is apparent that the appellant bona fide claimed to be entitled under the respondent's mother's Will. In such circumstances she was entitled on being served with a notice of intended survey, as the respondent asserted she was, to make her objection as contemplated by s.29 of Cap. 212 and cannot be held liable in damages when by operation of law the survey is stopped. In this connection see Perry & Rodgers v. Senior (1969) 15 W.I.R. 127.

For these reasons we allowed the appeal.