... not appearing — appeal dismissed for want of prosecution and order to pay costs —
Motion to Relist — affidavit in support by appellants' attorney alleges failure to make note in diary — states he believes there is merit in the appeal. Power of CA to relist appeal where no hearing on merits — Only for good and sufficient reasons. Negligence of counsel not sufficient cause. APPLICATION TO RELIST DISMISSED WITH COSTS.

JAMAICA

IN THE COURT OF APPEAL

Authorities reviewed.

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 8/86

CIVIL PROCEDURE II 2 (STATUS?)

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN - LESLIE CHAMBERS]
RANNY CHAMBERS]
AZARIAH RODGERS] - DEFENDANTS/APPELLANTS

AND - CINDERELLA HARRISON - PLAINTIFF/RESPONDENT

Leon Green for appellants

D. Scharschmidt for respondent

9th & 12th March, 1987

ROWE, P.:

The plaintiff/respondent brought an action in trespass against the appellants in the Resident Magistrate's Court for the parish of Portland. On January 9, 1985, judgment was given in favour of the respondent against all three appellants in various sums. They appealed. The appeal came up for hearing on October 6, 1986, November 20, 1986 and again on February 2, 1987, when the appellants not appearing, the appeal was dismissed for want of prosecution and the appellants were ordered to pay costs to the respondent fixed at $52.00.

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Mr. Leon Green, attorney-at-law on the record for the appellants, filed a motion to re-list the appeal, and in his supporting affidavit sworn to on February 16, 1987, he explained that the reason why he failed to appear for the prosecution of the appeal was due to an oversight on his part, in that he failed on receipt of the advice thereof, to insert the fixture in his dairy and was, therefore, at the material time completely unaware of his responsibility to appear and prosecute the appeal. He swore also, that he verily believes that there is merit in the appeal, and on that basis he seeks leave of the court to restore the appeal to the list in order that it may be determined on the merits. The certificate of the order of the court dismissing the appeal for want of prosecution was drawn up on February 6, 1987.

The Judicature (Resident Magistrates) Act, and the Court of Appeal Rules, are all silent as to whether or not there is jurisdiction in the Court of Appeal to order the restoration of an appeal from the Resident Magistrate's Court which has been dismissed for want of prosecution and in respect of which there has been no determination on the merits. This jurisdiction was accepted by the former Court of Appeal of Jamaica in Palmer v. Vernon [1943] 4 J.L.R. 103. An application was there made by Mr. Manley K.C. to relist the case on the grounds that his solicitor was not aware that the case was set for hearing on the date when it came up for hearing, and that the solicitor only became aware that the case was before the court when he saw

in the press that the appeal had been dismissed. Another limb of the excuse was that the solicitor was unaware that the list of cases was published in the print media on the Saturday prior to the hearing. Counsel received his brief on December 14, 1942, and the appeal was dismissed on January 4, 1943. That Court of Appeal held that where there had been no hearing on the merits, the Court of Appeal had power to relist an appeal which had been dismissed for non-appearance. It held, however, that that power should only be exercised in a proper case and for good and sufficient reason. Given the facts of that case, the court held that those facts did not constitute good and sufficient reason to order a re-listing of the appeal. The inadvertence pleaded in that case was much more favourable to the appellant than the facts in the instant case.

In 1943, the court relied on certain English decisions and to the practice in the Court of Appeal in Jamaica where the application was not opposed.

Then came Brown v. Nembhard and Gibson [1966] 4 G.L.R. 128. The principle in Palmer v. Vernon, supra, was successfully relied upon by the appellant whose appeal had been struck out for want of appearance and who sought leave to have it re-listed. There the Registrar of the Court of Appeal had promised to advise the applicant's solicitor of the date set for the hearing of the appeal. The Registrar failed to do so and indeed sent the notice of hearing to a defunct firm of lawyers of which the appellant's solicitor had been a partner but which partnership had ceased to exist some years before the hearing of the appeal. Non-notification of the

solicitor by the Registrar in the circumstances described above was held to be good and sufficient reason why the court should exercise its discretion to re-list the appeal.

And there the matter rested until 1972. Then came Berry and Morris v. K.S.A.C.,12 J.L.R. 771, a civil appeal from the resident magistrate's court which was listed for hearing before the Court of Appeal during the week commencing November 17, 1970. It was not heard during that week and was adjourned for hearing on December 16, 1970. On that day the court was engaged in hearing a case started on December 14 and counsel estimated that the case would continue for the rest of the week. On December 17 counsel for the plaintiffs/ appellants again enquired of counsel whether their appeal was likely to last all of that day and they gave him that assurance. As it happened, on the 17th the appeal came to an abrupt and unexpected end. Thereupon, the court not being aware of the discussions at the Bar, continued with the list and the appellant's counsel not appearing, the appeal in Berry's case was dismissed for want of prosecution.

An application was made to re-list the appeal. The point of law argued was that this court has an inherent jurisdiction to re-list an appeal which has been struck out or dismissed for non-appearance of the appellant where there is no hearing on the merits, provided good and sufficient reason for non-attendance on the part of the applicant is shown. The headnote correctly sets out the decisions of the strong court comprised of Luckhoo, P. (Ag.), Smith and Graham-Perkins, JJ.A.:

"HELD: that the Court of Appeal had acquired the jurisdiction and powers of the former Court of Appeal which itself formed part of the Supreme Court of Judicature established under the Judicature Law 1879 [J.]. The Supreme Court, by the combined effect of ss. 20, 21, and 28 of the 1879 Law (now ss. 24, 25, and 36 of Cap. 180 [J.], was vested with the jurisdiction and powers exercised by the old High Court of Chancery in Jamaica which, in such matters as it tried, adopted the practice and procedure of the High Court of Chancery in England. It followed that, there being no enactment or rule regulating the practice or procedure in respect of the matter in issue, the court had jurisdiction in a proper case to relist an appeal which had been struck out or dismissed for non-appearnace of an appellant there having been no hearing on the merits. The application was clearly one which should be granted."

In our view these cases establish that where a civil appeal from a resident magistrate's court is dismissed for want of prosecution, it may be re-listed notwithstanding the fact that the order of the court has been drawn up and signed. They establish further that re-listing is not as a matter of course and does not depend solely upon an assertion by the applicant that the appeal is meritorious. The guiding principle is that good and sufficient cause for non-attendance to prosecute the appeal must be shown. In the instant case, counsel for the appellant had three separate sources from which he could have obtained information that the appeal had been set down for trial. His affidavit mentions only one, that is, the notice sent to him directly by the Registrar of the Court of Appeal. But there was the Cause List published on January 21, 1987, and the Hearing List published on the 29th January, 1987, both of which carried the information

that the appeal in R.M.C.A. 8/86, and giving the names of the parties and counsel on the record, was to come on for hearing on February 2, 1987. We think it would be a dangerous precedent if the negligence of counsel, without more, could be considered good and sufficient reason for non-attendance. It was not so found in Palmer v. Vernon, supra, on facts almost indistinguishable from those in the instant case.

In the course of argument our attention was directed to R. v. Thompson [1964] 6 W.I.R. 381; 8 J.L.R. 436 in which the proviso to section 297 of the Judicature (Resident Magistrates) Act was construed. That proviso reads:

> "Provided always, that if an appellant fails to attend personally or by counsel at the hearing of his appeal, the appeal shall be dismissed, unless the court is satisfied that his non-appearance is not due to wilful default."

Mr. Green asked us to apply the same test in civil cases as exists in criminal cases and submitted that only where there is wilful default on the part of the applicant or his counsel should the application for re-listing be refused. We do not think that the provisions in relation to criminal appeals bear any relevance to appeals in civil cases and indeed the court as is shown in Berry v. K.S.C.A., supra, has an inherent power to relist civil cases from resident magistrates' courts, a power which it does not possess in criminal cases coming from the resident magistrates' courts except when fraud or mistake is alleged.

For the sake of completeness we will quote a passage from the judgment of Lewis J.A. in R. v. Thompson:

> "With respect to the second proposition, there is no doubt that this court has an inherent jurisdiction in proper cases to set aside its own orders. The question to be considered is in what cases it will exercise that jurisdiction when an appeal in a criminal matter has been dismissed. The functions and powers of the court in relation to criminal appeals are quite different from those in respect of appeals in civil and quasi-civil matters. In the latter case the appeal is a rehearing and determination of the issues involved in the case, though upon the evidence taken in the court of first instance. In a criminal appeal, with limited exceptions the court's function is to consider whether there is sufficient ground for quashing the conviction, and if satisfied that there is none to dismiss the appeal. Consideration of the provisions in Cap. 179 will show what strict compliance is required with the conditions laid down for the exercise and maintenance of the right of appeal.
>
> "In our opinion the appearance of the appellant personally or by his counsel at the hearing of his appeal is a condition the breach of which without reasonable excuse leads to the determination of the appeal, and the court having dismissed the appeal is functus officio. The court of course remains in control of the appeal until the order of dismissal has been signed or otherwise perfected, and until this has been done has power to recall its order. But once the order has been perfected it no longer has seisin of the appeal and has no power to re-list it."

Nothing in R. v. Thompson, supra, could assist Mr. Green in his plea for re-listing the appeal. As we are of the opinion that no good and sufficient reason has been advanced for the non-attendance of the appellant or his counsel on February 2, 1987, when the appeal came on for hearing, the application to re-list is dismissed with costs to the respondent fixed at $52.00.