



The plaintiff's strongest point apparently was that his father is buried on this land. The plaintiff gave no evidence of how or through whom his father came to possess or own the land. The defendant for his part claimed to have bought the land from a person called Alfred Hammond, whose estate both parties recognise as still owning the land to the north and to the west of the disputed land. He claimed such documents as he possessed had been tendered at a previous trial and had never been recovered. The Resident Magistrate apparently did not believe him.

Unfortunately, once again the present action with which we are concerned was not conducted in a manner calculated to settle the issue of either possession or title. We think, and the advocates for both sides agree, that the proper course, having regard to the way in which the action was conducted, was that the Resident Magistrate should have entered a non-suit both on the claim and the counter claim, that is, a finding that neither side had established their case, and we so direct. It will then be open for the parties, assuming that they wish to continue the luxury of this litigation, to bring actions for recovery of possession or ejectment and to proceed to try to establish the title of one or other to this land, which both have possessed for a very long time.

A more sensible course possibly, if it can be arranged, would be that they divide the land by mutual agreement, allowing for plaintiff to have his house spot and grave spot, and the defendant having the half acre which he says is his out of the acre that is there.

The appeal is allowed. The judgement of the court below on the claim in favour of the plaintiff to be set aside and non-suits entered both on the plaintiff's claim and the defendant's counter claim. Each party will bear their own costs in the court below, and insofar as the appeal is

concerned / -

concerned, in as much as the appellant has succeeded, though only partially, there will be costs in favour of the appellant in this court in the sum of Twenty-five Dollars.

CARBERRY, J.A.

CAREY, J.A.

I entirely agree, but since we are disagreeing with the findings of the learned trial judge, I will make a few observations.

My first comment is the case was starved of evidence and there appeared to be some confusion of thought as to what were the real issues before the court below. The learned Resident Magistrate in her reasons for judgement quoted the law in the following terms:

"Since it is uncertain which of the two claimants are in possession, then the one who can prove title will be adjudged to be in possession."

I accept that as good law based on a rather old case, *Canvey Island Commissioners v. Preede* (1922) 1 Ch. 179.

Where the learned Resident Magistrate made findings, however, she stated as follows:

"From the evidence adduced I find that:

(a) Plaintiff is in possession."

and later she said:

"Therefore the plaintiff need only prove that he is in possession."

That, of course, could not be right in the circumstances in which she herself had set out. It was necessary to prove that the plaintiff had a root of title since both parties were in fact in possession as the evidence here disclosed and the learned Resident Magistrate herself at one stage recognised.

The plaintiff / -

The plaintiff has failed to discharge the onus of proving his case. On his own evidence he had shown that both parties were in possession and nowhere in his evidence are there any suggestions as to what was the nature of his father's ownership of the land in question.

The counter-claim ought to have been dismissed as well seeing that the defendant had produced no proof of ownership.

I too would allow the appeal.

CAREY, J.A. (Ag.)

ZACCA, PRESIDENT

I agree with the judgment delivered by Carberry, J.A.

ZACCA, J.A.