

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL No. 57/72

B E F O R E : The Hon. Mr. Justice Fox - Presiding
The Hon. Mr. Justice Graham-Perkins - J. A.
The Hon. Mr. Justice Robinson - J. A. (Ag.)

Festus Harris - Defendant/appellant

v.

Egbert Thorpe - Plaintiff/respondent

Mr. Newton Burgess for Defendant/appellant
No appearance for Plaintiff/respondent

11th May, 1973

FOX, P:

This action is concerned with land at Sherwood Forest in Portland formerly owned by Beryl and Balfour Thompson, hereinafter referred to as the vendors. In 1954 the appellant bought a plot of this land from the vendors. This plot was surveyed on the 15th of October, 1957. The resulting plan, Exhibit 4 shows a 6-foot right of way running all along the length of the southern boundary of the plot. The appellant said that he had known these lands for over 30 years prior to his purchase. In 1959, respondent purchased from the vendors a plot of land to the south-west of the lot purchased by the appellant. Both plots were separated from each other by the 6-foot right of way to which I have referred. The respondent's plot was surveyed on the 1st of November 1960. The resulting plan/^{exhibit 2} shows a part of the right of way to which I have referred. The continuation of the right of way to the east, as shown on the plan Exhibit 4, was not shown. Instead, on exhibit 2 the right of way is shown turning to the south. Consequently, the respondent's land is shown on exhibit 2 to be bounded on the north-east by a right of way, only a part of which separates the respondent's land from the plot purchased by the appellant in 1954. The appellant bought a second piece of land. In his evidence he said that he bought it before the respondent bought his piece of land. The respondent claimed that

the appellant's second purchase was subsequent to his purchase. However that may be, this second piece of land purchased by the appellant is south of his first purchase and separated from it by the right of way shown in the plan of 1957, exhibit 4.

This action was brought by the respondent to vindicate a right of way which he said was given to him by the vendors at the time of his purchase. This right of way is a continuation through the second plot purchased by the appellant of the right of way shown on the plan, exhibit 2, to the north-west of respondent's land.

The matter was referred to a surveyor. His diagram was received in evidence as exhibit 1. It shows the right of way claimed by the respondent as running through the second plot purchased by the appellant so as to intersect a house which the appellant has built on this second lot purchased by him.

The action took the form of a claim for damages for assault arising out of a clash between the appellant and the respondent when the respondent insisted upon using what he claimed to be his right of way and the appellant opposed this insistence by physical action, resulting in the respondent being knocked to the ground by a blow of the fist. A medical certificate tendered in evidence showed that the respondent received extremely minor contusions to his chest.

The Magistrate was of the view that the respondent had been given this right of way by the vendors at the time of his purchase. In his reasons for judgment, he found that the appellant was present at the survey of the respondent's plot on the 1st of November 1960, that the appellant held the chain, and that the surveyor's diagram, exhibit 2 clearly shows plaintiff's right of way. The Magistrate held that the respondent was entitled to walk along the right of way, that he was not a trespasser and that, therefore, the assault was unlawful. He gave judgment in accordance to these findings.

There is no evidence that the so called right of way claimed by the respondent is the result of long user or that it came into being as a consequence of any document in writing. At the highest, it amounts to a licence without an interest given by the vendors to the respondent. The fact that the appellant held the chain at the time of the survey of the

respondent's plot in November 1960 is not sufficient to fix him with notice of this licence. He denied any knowledge of this allaged right of way. The vendors would have been entitled to revoke this licence. The appellant is in an even stronger position to do so. It is relevant to notice that in his findings the Resident Magistrate accepted the 6-ft. right of way traced on the plan exhibit 1 from point "X" to point "15". This is the original right of way shown on the 1957 plan, exhibit 4.

In our view, it is not established that the respondent was entitled in law or in equity to the right of way which he claimed. The appellant was entitled to treat him as a trespasser. In our view further, the action which the appellant took to restrain the respondent from passing through his land was reasonable in all the circumstances. We therefore allow the appeal. The judgment of the Magistrate is set aside. Judgment is entered for the defendant with costs. The appellant is to have the cost of the appeal, fixed at \$40.00.