

## IN THE COURT OF APPEAL

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RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 3/74

U.W.I. MONA, JAMAICA

BEFORE: The Hon. Mr. Justice Edun, J.A. (Presiding).  
 The Hon. Mr. Justice Hercules, J.A.  
 The Hon. Mr. Justice Zacca, J.A.(ag.).

B E T W E E N	HORACE JONES	}	-	Plaintiffs/Respondents
	and			
	HERBERT FERGUSON)			
A N D	WHITMORE STERLING	-	Defendant/Appellant	

M.K. Chin See for the Appellant.

Respondents not appearing.

June 19 and July 12, 1974

ZACCA, J.A.(ag.):

On November 15, 1972 there was a collision on the Half-Way-Tree Road between a motor vehicle driven by the 2nd named plaintiff/respondent and a motor vehicle driven by the defendant/appellant.

Two persons were named as plaintiffs in this action but only one of these plaintiffs, namely, the 2nd named plaintiff gave evidence at the trial before the Resident Magistrate. The 2nd named plaintiff failed to give any evidence relating to the 1st named plaintiff and in fact no mention was made of the 1st named plaintiff in the evidence of the 2nd named plaintiff.

At the close of the plaintiffs' case, the defendant's attorney moved for judgment against the 1st named plaintiff on the ground that no evidence had been led in relation to that plaintiff. The attorney for the plaintiffs made an application to the learned Resident Magistrate to allow him to recall the plaintiff to give further evidence with respect to the 1st named plaintiff. The learned Resident Magistrate allowed the plaintiffs' case to be reopened (the attorney for the defendant objecting.) The 2nd named plaintiff was recalled and he gave further evidence explaining the reason why the action was brought in the name of the 1st named plaintiff and himself.

It is unnecessary to state the facts leading up to the collision as the only point taken in the appeal was that the learned Resident Magistrate had no discretion to exercise in allowing the plaintiffs' case to be reopened.

Mr. W.K. Chin See who appeared on behalf of the defendant/appellant argued that in civil cases the learned Resident Magistrate may only allow the plaintiff to give evidence after the plaintiff's case has been closed if the evidence is in rebuttal:

- (1) where the plaintiff has been misled;
- (2) where the plaintiff has been taken by surprise.

There are a number of cases in which a plaintiff has been allowed to call further evidence, but these cases deal with the situation where the plaintiff has been taken by surprise or misled and was therefore allowed to call evidence in rebuttal. See Doe d Nicoll v Bower (1851) 16 Q.B. 805; Rogers v Manley (1880) 42 L.T.585; Budd v Davison (1880) 29 W.R. 192; Wright v Willcox (1850) 9 C.B. 650.

White v Hart reported in Stephens Supreme Court Decisions Vol.1 at p.363, was a case in which plaintiff brought an action for Cattle Trespass against the defendant. At the close of the plaintiff's case, the defendant's solicitor moved for a non suit on the ground that there was no evidence, as required by Law 13 of 1888, that he had within 48 hours after the discovery of the damage given notice of the damage to the proprietor or person in charge of the stock causing the damage. The Resident Magistrate recalled the plaintiff (the solicitor for the defendant objecting) and allowed him to supply the evidence. The defendant's solicitor declined to cross-examine the plaintiff on this new evidence and submitted that the Resident Magistrate had no power to recall the plaintiff after a submission for non suit. The solicitor refused to proceed with the defence. The Resident Magistrate thereupon pronounced judgment in favour of the plaintiff. In a case stated to the Supreme Court three questions were asked. One of the questions for the opinion of the Court was:

- (1) was it incumbent on the Resident Magistrate to non suit the plaintiff when the defendant's solicitor called on him to do so?

The Court answered this question in the negative and dismissed the appeal. See also Lowe v Braham reported in the same Volume at p.360.

The question to decide is whether this list is exhaustive or whether a judge in civil cases has the discretion to decide at what stage evidence may be received. The case of Wright v Wilcox (supra) was a case in Trespass for False Imprisonment. In this case the plaintiff was allowed to call further evidence in reply after the defendant had given certain evidence. It is true that in this case the evidence was in reply to certain evidence given by the defendant but Chief Justice Wilde had this to say at p.657. "The objection, is not to the admissibility of the evidence, but to the stage of the cause in which it is offered. Were that objection to prevail, there might often be a failure of justice. The time at which evidence is to be received, must be in the discretion of the judge, the exercise of that discretion being subject to the review of the Court. In this case I cannot see that the admission of the evidence has led to any injustice."

In the same case Maule J. stated at p.657: "The objection to the reception of the evidence was, that it was offered too late. It would be very inconvenient to hold this to be a sufficient ground for setting aside a verdict. Cases in which the discretion of the judge must be exercised, frequently occur. When a party has closed his case, he often asks, and is allowed, to supply a deficiency."

In the instant case the 1st named plaintiff is only a nominal plaintiff. The real issue was as between the 2nd named plaintiff and the defendant.

In our view the learned Resident Magistrate would have a discretion in the interest of justice in deciding whether or not to allow the respondent to reopen his case to supply this deficiency in his case. No injustice can be said to have been done to the appellant. In any event the 2nd named respondent would have been entitled to a judgment against the appellant. Whilst the exercise of the judge's discretion is open to review, we are satisfied that the learned Resident Magistrate properly exercised her discretion in allowing the respondent to reopen his case.

The appeal will therefore be dismissed. The judgment of the learned Resident Magistrate is affirmed, but there will be no order as to costs of the appeal as the plaintiffs/respondents did not appear.