

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 90/71

BEFORE: The Hon. Mr. Justice Fox - Presiding
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Graham-Perkins

SAMUAL MARSHALL - defendant/appellant

v.

ISAAC JACKS)
MINETTE WILSON) - plaintiffs/respondents

Mr. Horace Edwards, Q.C. for the defendant/appellant
Mr. L. Cowan for the plaintiffs/respondents

25th February, 1972

FOX, J.A.:

In the Statement of Claim the plaintiffs/respondents alleged trespass to their land at Smithfield, Boston, in Portland, by the defendant on the 20th November, 1970. Alternatively, that on that date the defendant wrongfully and maliciously induced and/or procured the breach of a contract of survey made between the plaintiffs and one D.K. Byles, a commissioned land surveyor, in consequence whereof the said D.K. Byles discontinued the survey of the said land.

The plaintiffs live as man and wife on a square of land which they bought in January, 1970 from Egerton Wilson the father of the female plaintiff. The Magistrate found -

- (1) this square of land is a part of a larger tract of 1½ acres for which Wilson holds a registered title;
- (2) it is bounded on three sides by the remaining portion of the 1½ acres owned by Wilson and on the east by land owned by Thomas Ingleton;
- (3) it has no boundary with land owned or in the possession of the defendant;
- (4) Mr. Jacks had been living on the land since 1966;

(5) On 20th November, 1970, the defendant came upon the land and stopped a survey which was being made on behalf of the plaintiffs. On these findings the learned Resident Magistrate gave judgment for the plaintiffs on the claim for trespass and awarded as special damages \$31.50, being the surveyor's fee, and general damages \$18.50.

A single ground of complaint was argued on appeal.

Mr. Edwards contended that on the undisputed evidence all the land in question together with other surrounding land was formerly owned by a common ancestor of the defendant and Egerton Wilson, and that as the defendant's claim to the portion being surveyed was on the basis of its status as 'family land', he was 'a person interested in and affected by the survey of such lands' within the meaning of that phrase as it occurred in s.29 of the Land Surveyors Law, Cap. 211. The defendant had caused to be served upon the surveyor, prior to the completion of the survey, a notice of objection to the 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". (s.29). Consequently, so ran Mr. Edwards' argument, the survey has been stopped not by any action on the part of the defendant but by the law. The authority relied upon for this proposition was the decision of this court in Perry and Rodgers v. Senior (1969 - 15 W.I.R. 127). The proposition is entirely misconceived. In that case Senior had arranged to have surveyed a parcel of 4 acres of land, part of a larger tract of 25 acres, which he had previously bought from Perry. In compliance with s. 27 of the Land Surveyors Law, the surveyor caused Perry, as an owner of adjoining land which might be affected by the proposed survey, to be served with a notice of intended survey in the prescribed form, which after specifying the time and place of the proposed survey, stated: "at which time and place you are requested to attend by yourself or agent as you

may think fit and in the mean time I shall make such traverses as I may deem requisite. You must bring all diagrams and other papers referring to your land in order to protect your **interest** therein". At that time Perry was serving a sentence of imprisonment and he accordingly sent the appellant, Rodgers, as his agent to give notice of objection to the proposed survey being proceeded with. Rodgers went upon the respondent's land at the time stated in the notice of intended survey and on behalf of Perry duly served notice of objection to the surveyor, specifying three grounds of objection. Thereupon the surveyor in compliance with s. 29 of the Land Surveyors Law declined to proceed with the survey.

The position is altogether different here. The defendant was neither the owner nor the occupier of any adjoining land which may be affected by the survey. The Magistrate **rejected** his evidence to this effect. In addition no notice in the prescribed form was served upon him, consequently, unlike Perry, he did not come within the ambit of the category of persons described in the first part of s.29.

I am grateful to Mr. Cowan for bringing to the attention of the court the decision in Stokesfield Ltd. v. Taylor and Bennett, Clarke's Report, p. 287. The factual situation in that case is in all essential respects the same as in this case. The land in that case was part of land comprised in a Certificate of Title and in the possession of the plaintiff. The Magistrate disbelieved the version of the defendant that he was in possession of and exercised acts of ownership over the land at the time of the alleged trespass. He found that the entrance by the defendants on the land constituted a trespass. The trespass complained of consisted of entering upon the plaintiff's land and stopping a survey. In the course of its judgment the full court said: "it is sufficient to support the judgment that the Resident Magistrate has found that the land on which the defendants entered are part of Stokesfield and are comprised in the Plan attached to the plaintiff's Certificate of

Title. The defendants were not persons 'interested in and to be affected by the survey' within the meaning of the relevant law, which is the same in all material respects as the existing law. On the authority of this decision, which I accept, the defendant is excluded from the category of persons entitled to object to a survey which is described in the second limb of s. 29. The entry upon the land by the defendant in this case and his stopping of the survey were therefore not authorised by the Land Surveyors Law and the Magistrate was right in holding that the defendant had trespassed.

A plaintiff is entitled to a monetary award upon mere proof of trespass to his land. In this respect the Magistrate awarded \$18.50 and I see no reason to disagree with this assessment which he identified as general damages. The plaintiffs proved that on the day the survey was stopped they paid a fee of \$31.50 to the surveyor. This evidence was not challenged. It was therefore sufficient to establish a specific loss. This loss is within the scope of the trespass committed by the defendant, since it was obviously capable of being foreseen by the defendant as a consequence of his act of stopping the survey. If proof of damages were an essential element in establishing liability for trespass the damages were not too remote. I consider, therefore, that the causal link is sufficiently distinct to make this payment a consequential loss attendant upon the trespass and therefore properly recoverable. I would dismiss this appeal and affirm the judgment of the Resident Magistrate.

SMITH, J.A.:

I agree. A person not being an adjoining owner on whom a notice has been served under s. 26 of the Land Surveyors Law, who enters upon land and objects to and stops a survey on the ground of being a person 'interested in and affected by the survey', runs the risk of being found liable in trespass if it turns out that

he is found not to be an interested person by the court of trial.

For the reasons so fully given by my learned brother, Fox, J.A., I would also dismiss the appeal and affirm the judgment.

GRAHAM-PERKINS, J.A.:

I agree, for the reasons contained in the judgment of my brother Fox, with the finding that the defendant in this case committed a trespass. I wish, however, to reserve for further consideration whether the item involving the surveyor's fee is an item which may properly be awarded as damages as a result of such an act.

FOX, J.A.:

The appeal is therefore dismissed, the judgment of the Magistrate is affirmed, the respondent is to have the cost of this appeal fixed at \$40.
