JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 42/72

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding).
The Hon. Mr. Justice Robinson, J.A. (Ag.).
The Hon. Mr. Justice Zacca, J.A. (Ag.).

B E T W E E N MACIE MORGAN
LUCILLE MAXEY
executrices of the estate of Emma Welsh deceased
substituted for
EMMA WELSH - Defendant/Appellant

A N D USINA WELSH - Plaintiff/Respondent

Mr. Horace Edwards, Q.C. for Defendant/Appellant.

May 1, 31, 1974

ROBINSON, J.A.:

This appeal was heard on the 1st May 1974 when judgment was reserved by the Court; the Plaintiff/Respondent did not attend on the day of hearing nor was she represented.

For the purpose of this judgment, it is not necessary to set out the facts in detail; it is sufficient to state as follows:-

(1) It is common ground that Thomas Welsh, the husband of the Defendant/Appellant died possessed of 60 acres of land at Orange Vale in Portland. He died in 1934.

(2) Thomas Welsh had six children, boys and girls, one of whom was Joseph Welsh, husband of the Plaintiff/Respondent.

(3) Joseph Welsh was put in charge of the 60 acres of land by his father shortly before he died.

(4) Joseph himself died in October 1966 and was in possession of the said land up to the date of his death a period covering 32 years. While Joseph was alive, he cultivated a portion of the land,

said to be 10 acres. The entire parcel of land is described as family land.

Joseph gave his mother (the Defendant/Appellant) from time to time some of what he reaped from the land.

(5) Emma Welsh, Defendant/Appellant, did not give evidence at the trial and no will of Thomas Welsh was produced.

(6) Joseph Welsh left a will dated 20th August 1966 in which he bequeathed to his wife, the Plaintiff/Respondent, "my portion of land which is Ten (10) acres at Orange Vale for herself absolutely." His wife was granted probate on 13th April 1967.

(7) In January 1967, Emma Welsh the Defendant/Appellant gave notice to quit to the Plaintiff/Respondent who, as a consequence, left the land; the Defendant/Appellant took over control of the 60 acres i.e. the entire property.

(8) The Defendant/Appellant through her agents placed Nathan Ford and Vernal Richards on portions of the land.

(9) It is as a consequence of this notice to quit, that this action was brought by the Plaintiff/Respondent principally to recover possession of the 10 acres of land referred to at para (4) above.

It was argued that in the circumstances of this case, the correct verdict should have been a judgment for the Defendant/Appellant or a non suit; with this we do not agree for the reasons set out hereunder.

On the facts of this case and in the state of the law as it then was in 1934, on intestacy, any real estate would pass on descent to the deceased's heir; this position subsisted up to 1st June 1937 when "all existing modes, rules and canons of descent etc" were abolished by the Intestates Estates and Property Charges Law, Law 35 of 1936. (Chapter 372 of the 1938 Revised Edition). If Joseph had been the eldest son of Thomas Welsh and the Defendant/Appellant his wife, then the 60 acres of land would have passed on descent to Joseph as heir-at-law. There is no evidence that Joseph was the eldest son, though he may well have been. Joseph, in his life time, never claimed the entire 60 acres

of land but as the Resident Magistrate found, he cultivated a portion said to be 10 acres which he "treated and claimed as his own." (See also Joseph's will dated 20th August 1966); the remainder he treated as belonging to his brothers and sisters in equal undivided shares.

It seems clear, as was found by the Resident Magistrate, that Joseph was in possession of the 60 acres (including the portion which he cultivated) for 32 years from the time of his father's death in 1934 until his own death in 1966, and that for a like period he treated one sixth portion of that land as his own.

It is not clear whether the land in its entirety was ever surveyed; what is clear is the fact that the portion he cultivated, said to be 10 acres, was not. Dorrell Tyrell who gave evidence for the Plaintiff/Respondent at the trial and who, it appears, used to assist Joseph Welsh in looking after the 60 acres said "Joseph never marked out his 10 acres but the way he worked amounting to 10 acres and call it his own;" the Plaintiff/Respondent however purported to give evidence as to the boundaries of this 10 acre plot. In our view the evidence does not support the conclusion of the Resident Magistrate that the boundaries are sufficiently defined to enable her to make the order for possession which she did make, that is, that the plaintiff be put in possession of "the 10 acres of land within 30 days of the date on which this judgment is delivered." The Plaintiff/Respondent is, however, entitled to one undivided sixth share in the 60 acre portion of land. The order made by the learned resident magistrate is therefore varied by the substitution for the part of her order above recited of an order that the Appellants do deliver up possession to the Plaintiff/Respondent immediately of one undivided sixth share of the land. The remainder of the order of the learned resident magistrate shall stand. In the result the appeal is dismissed and the order of the learned resident magistrate varied as just stated.

There will be no order as to the costs of this appeal the Respondent not appearing when the matter was called on for hearing.