

J A M A I C A

IN THE COURT OF APPEAL

R.M. COURT CIVIL APPEAL NO. 91/76

BEFORE: THE HON. MR. JUSTICE ZACCA J.A.
THE HON. MR. JUSTICE HENRY J.A.
THE HON. MR. JUSTICE ROBOTHAM J.A. (ag)

ETHLYN MURPHY

AND

EDWARD NATHANIEL PUSEY Plaintiffs/Appellants
(Executors of the estate
of Reuben Errar)

AND

RUDDY De MERCARDO

A McLEAN Defendants/Respondents

ENOS CURRY

Mr. Horace Edwards Q.C. and Mr. R.A. Penso for Plaintiffs/appellants

Mr. Eric Frater for Defendants/respondents

24th February 1977
1st April 1977
1st June 1977

27th July 1977

ROBOTHAM J.A. (ag)

The plaintiffs/appellants, the duly appointed executors of the estate of Reuben Errar, brought an action in the Resident Magistrates Court for the parish of St. Catherine, claiming against the defendants/respondents jointly and severally the sum of two hundred dollars (\$200) as and for damages for trespass for that they in or about the month of April 1974, and on divers other occasions unlawfully trespassed on the land situated at Creary Road in the parish of St. Catherine belonging to the estate of Reuben Errar, deceased, reaped produce thereon, trampled the herbage and other wrongs then and there did. The defence was that the plaintiffs were not in possession, and had no right to the land. Further, that all three defen-

dants had equal rights on the land: In the case of De Mercardo, he held a lease and has since purchased, McLean had a lease and Curry also had a lease.

Both Plaintiffs were duly appointed executors of Reuben Errar who died on the 14th December 1973, and on 17th June 1974, they obtained probate of his Will in the Supreme Court (Exhibit 1). Under his Will, Reuben Errar devised four acres of land to Ethlyn Murphy at Creary Road and it is on this particular bit of land that the plaintiffs are saying the defendants have committed acts of trespass.

At the conclusion of the hearing the Resident Magistrate non-suited the plaintiffs, entered judgment for the defendants with costs, and in his reasons for judgment he stated:-

"I came to the conclusion that the Plaintiffs had merely proven that they were in their capacity as executors of the deceased Reuben Errar entitled to enter and take possession of all the land which formed part of his estate. The action brought by the Plaintiffs was a claim for damages for trespass and such a claim must be based on the disturbance of actual possession of the plaintiffs and not merely a disturbance of the Plaintiffs right to possession. The action in my view was misconceived and should have been brought under Section 89 of the Resident Magistrate's law as a claim for recovery of possession, both plaintiffs having become entitled to possession from the moment probate was granted to them by the proper Court."

The question which this Court has to decide is, can an executor who is not in possession and who has not made an entry upon the land the subject of the action maintain an action for trespass? The Resident Magistrate having found that neither plaintiff was in possession of the land, for the purposes of this decision it is not necessary to go into any exhaustive or detailed examination of the evidence, but rather, it is only necessary to examine such portions of the evidence on which either and/or both plaintiffs sought to establish that they were in possession. In so far as Edward Nathaniel Pusey is concerned, his only connection with the case is that he happened to be one of the executors of Reuben Errar. At no time was he ever in possession,

nor did he make any entry on the land. This only leaves to be examined the basis on which the first named plaintiff Ethlyn Murphy claimed to be in possession. She said that for many years prior to the death of Reuben Errar, she lived with him in one room of a three apartment house on the land. About ten years prior to his death she removed him to her own home, and remained his caretaker until his death. It is interesting to note that whilst she and Errar lived in the one room, the other two were rented to the first defendant De Mercardo, and upon their removal, the third room was also rented to him. She said in cross-examination, "I was taking care of the old man and he put me in possession. That was before Reuben Errar died. Reuben Errar and I both had possession before Reuben Errar died." Despite the fact that she said she was in possession, she said in examination in chief that it was not until April 1974, four months after Errar's death that she noticed De Mercardo had fenced around more than half acre of the land. Suffice it to say that on the evidence before the Resident Magistrate, he rejected the contention of Ethlyn Murphy that she ever was in possession of the land. This Court sees no reason to differ from the finding of the Resident Magistrate that neither Plaintiff was in possession of the land at the time the action was brought.

Trespass is an injury to a possessory title and a person having the right to the possession of the land acquires by entry, the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of entry wrongfully continues on the land. If an owner who has a right to enter makes an entry on land, his right of possession relates back to the time at which his right of entry accrued, and he may sue for trespass committed before entry, the wrong-doer thus becoming a trespasser by relation.

(See Halsbury's (3rd edition) para. 1215 - page 745 and Barnett v the Earl of Guildford (1855 11 Exch. 19)).

In Street on Torts (4th edition) page 69, the following

appears:-

"If a Plaintiff has a right to immediate possession of the land he can, once he has entered upon it sue for trespass committed by third parties between the date of accrual of his right and his entry."

(Barnett v Guildford 1855 11 Exch. 19).

These references seem to point to the fact that in England an entry upon land was a condition precedent to be fulfilled by anyone who sought to say he was in possession. The further question has got to be asked - is that the law applicable in Jamaica today, even where an executor is involved?

Mr. Edwards for the appellants strenuously contended that in a case such as this, entry upon the land was not necessary on the part of the executor before he can maintain an action for trespass. He submitted that an executor would only have to enter upon the land if the testator himself had not been in possession. Since, therefore, the executor steps into the shoes of the testator from the moment of his death, then anything the testator could have done in his life time, the executor can do.

He referred us to Halsbury's (3rd edition) Vol. 16 para. 995 which deals with "injury to property" and which reads:-

"As the legal personal representative is in point of law the owner of property of his testator or intestate, he may maintain action in respect of injury done to such property after the death of the owner whether he has been in actual possession or not."

(Hollis v Smith 1808 - 10 East 293).

Both this paragraph and the case referred to are, however, referring to personal chattels. The case of in the goods of Pryse 1904 Probate 301 cited by Mr. Edwards does not assist in this matter.

Whilst it is correct to state that the interest of an executor in the estate of the deceased is usually derived from his will, so that it vests in the executor from the moment of death, a distinction has always been drawn between movable and immovable goods.

In Williams on Executors and Administrators (14th edition)

Vol. 1 page 259 it is stated:-

"All movable goods no matter where situated have always been regarded as vesting in the possession of the executor immediately on the testator's death, the rule of law being that the property of personal chattels draws with it possession. It was considered otherwise however of things immovable, as leases for years of lands and houses for of these the executor or administrator was not deemed to be in possession before entry. So of leases for years of a rectory consisting of glebe lands and tithes for years it was doubtful if there could be actual possession without entry into the glebe land. It would seem that as leases can now take effect in possession without actual entry (See Law of Property Act 1925. Sec. 149 (2).) chattels real of the testator immediately on his death vest in possession in his executor (without the necessity for actual entry); and the same principle would seem to apply to his real estate."

Section 149 (2) of the Law of Property Act 1925, is not applicable to Jamaica, and there is no comparable legislation in Jamaica. Section 3 (1) of our Real Property Representative Act (passed on 1st December 1903) reads:-

"Where real estate is vested in any person without a right in any other person to take by survivorship it shall on his death notwithstanding any testamentary disposition devolve to and become vested in his personal representatives from time to time as if it were a chattel real vesting in them or him".

This is a reproduction of the English Land Transfer Act 1897 section 1 (1), which was subsequently repealed in respect of deaths after 1925 by section 2 (1) of the Administration of Estates Act 1925. Certainly, in England therefore prior to 1925 since real estate had to be dealt with as a chattel real (e.g. leases) an executor was not deemed to be in possession before entry (Barnett v Guildford). This was a rule of common law, and although applicable only to chattels real was by the Land Transfer Act of 1897 made applicable to real estate. It was not unknown for this doctrine to create hardship, and Professor Cheshire in his Modern Law of Real Property 10th edition page 341 had this to say on it:-

"There was a troublesome doctrine of the common law which established in the case of a lease not operating under the Statute of uses that the lessee acquired no estate in the land until he had actually entered into possession. Until that time he was said to have a mere right to take possession and this right was called an interesse termini. This requisite of entry to perfect a lease was swept away by the Law of Property Act 1925 and all term of years absolute whether created before or after the commencement of the Act take effect from the date fixed for the commencement of the term without actual entry."

(See Section 149 (1) (2) of the Law of Property Act 1925). Section 149 (1) specifically abolished the doctrine of interesse termini and Section 149 (2) is reproduced in the statement of Professor Cheshire (supra).

If therefore that was the common law position in England up to 1925, then it would be the same in Jamaica both prior to 1925, and subsequent thereto unless there was specific legislation here in pari materia with the 1925 legislation. There is no statute in Jamaica to correspond with the Real Property Acts of 1925 in England, although some laws passed in Jamaica since that year have incorporated certain sections of these Property Acts. Where an English common law rule has been recognized in Jamaica, its abolition in England does not render it inoperative in Jamaica - See Gray v Referee of Titles 1927 Clarke's reports page 238.

In Hart v Campbell (1904) Stephen's reports pages 1891-1892, the Court decided that in the absence of any local law raising a strong inference to the contrary it was impossible to suppose that a provision taken verbatim from an English statute was intended to bear in Jamaica a meaning different to what it bore in England. (Compare the Land Transfer Act 1897 and our Real Property Representative Act).

We are of the opinion that the law applicable to Jamaica for the purpose of the question to be answered in this case, is that which was applicable in England prior to the Real Property Act of 1925. The question therefore mentioned earlier on, viz can an executor who is not in possession, and who has not made an entry upon the land the subject of the action maintain an action

for trespass must be answered in the negative.

The decision in this matter turns solely upon the finding of the Resident Magistrate that the Plaintiffs were not in possession of the land. The question whether or not Reuben Errar did in fact have the power to dispose of the land was not considered by the Resident Magistrate and it is to be clearly understood that this Court makes no pronouncement upon that aspect of the matter.

The appeal is dismissed with costs to the defendants/respondents fixed at fifty dollars and we express the hope that there will be early action taken by the body or bodies responsible for law reform in Jamaica to correct a situation which prior to its abolition in England in 1925, was regarded as troublesome.