JAMAICA

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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS Nos. 36 OF 1972 AND 21 OF 1974

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

BETWEEN:- No. 36 of 1972

Mr. & Mrs. BENJAMIN PATRICK - Defendants/Appellants

and

BEVERLEY GARDENS DEVELOPMENT CO. LTD. - Plaintiff/Respondent

No. 21 of 1974

Mr. & Mrs. BENJAMIN PATRICK - Plaintiffs/Appellants

and

BEVERLEY GARDENS DEVELOPMENT CO. LTD.

XDOL MIGNOTT - Defendants/Respondents

Mr. E.C.L. Parkinson Q.C. with Mr. J. Kirlew Q.C., for the Appellants.

Mr. W.K. Chin See with Mr. Thomas Ramsay for Respondents.

14th, 15th, 16th and 17th October 1974
20th December 1974

EDUN, J.A.:

Appeal No. 36 of 1972 is against the judgment of Chambers J., in which on a preliminary point of law he decided that the question of ownership of the land in dispute (referred to as "the land") was already determined by a court of competent jurisdiction, that is, the adjudication on Information No. 4479/62 before the magistrate of the Parish of Clarendon under the Recovery of Small Tenements Law, Chapter 206, s. 54. Appeal No. 21 of 1974 is against the judgment of Vanderpump J.(ag.) who struck out the statement of Claim in suit No. P 005 of 1974 as being frivolous and vexatious.

At the hearing of these appeals, Mr. Chin See attorney for the respondents submitted that this court is entitled to look at the facts and reasons for judgment on Information No. 4479/62, not to decide if the findings were correct but to see if they establish the same issues as in suit C.L. 371/1972 against which there is the appeal No. 36 of 1972. Mr. Parkinson, attorney for the appellants, in the course of his

submissions was discussing the evidence led in the information proceedings and was urging that the magistrate's conclusions were wrong when objection to such arguments was taken by Mr. Chin See. A majority of us held that Mr. Chin See was correct but Mr. Parkinson was allowed to continue such submissions because of the difference of opinion between us. From the various submissions in these two appeals, a very simple question arose as to what is the effect of the decision of the magistrate in Information No. 4479/62 when he granted a warrant of possession of the land against Benjamin Patrick (conveniently referred to as "appellants").

Let me begin by referring first to R. v. Bolton (1835-42) A.E.R. Rep. p.71. In addition to the proceedings in that case, the parties on each side brought before three judges of the Court of Queen's Bench, affidavits disclosing evidence affecting the merits not adduced before the justices. In that case, an order was made by the justices for possession of a parish house occupied by the defendant as a pauper. The defendant stated on affidavit that he had not occupied the house as a pauper but had paid parish rates, done repairs and that he had not been chargeable to the parish during the time of his occupation. Those facts, if true, would disentitle the justices to make the order for possession. A rule nisi was made for a writ of certiorari to remove the order and all things touching the same, into the Court of Queen's Bench. Two points were made in support of the order: (1) that the proceedings all being regular on the face of them and disclosing a case within the jurisdiction of the magistrates, the Court could not look at the affidavits for the purpose of impeaching the magistrates' decision; and (2) even if the affidavits were looked at, the case would be found to be one of conflicting evidence in which there was much to support the conclusion to which the magistrates had come. The Court decided that the enquiry must be limited as to whether the magistrates had jurisdiction to enquire and determine, supposing the facts alleged in the information be true for it was not contended that there was any irregularity on the face of the proceedings. The Court discharged the rule because the justices had jurisdiction and the proceedings were regular on the face of them.

Lord Denman C.J., in delivering the judgment of the Court, said at p.73:-

"..... Where the charge laid before the magistrate as stated in the information does not amount in law to the offence over which the statute gives him jurisdiction, his finding that the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction. The conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had misstated it in drawing up the proceedings so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to be insufficient, we should quash the conviction. In both these cases a charge has been presented to the magistrate over which he had no jurisdiction; he had no right to entertain the question, or commence an inquiry into the merits; and his proceeding to a conclusion will not give him jurisdiction. But, as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the enquiry. In this sense, therefore, and for this purpose, it is true that the affidavits are receivable.

Where, however, a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry. .....
....
The question of jurisdiction does not depend on the truth or falsehood of the charge, but on its nature; it is determinable on its commencement, not at the conclusion, of the enquiry; and affidavits, to be receivable, must be directed to what appears at the former stage and not to the facts disclosed in the progress of the enquiry."

R. v. Bolton (supra) has been considered and referred to in many later cases, the most recent of which is in Anisminic v Foreign Compensation (1969) 1 AER 208, where the order of Browne J. declaring that the provisional determination of the Foreign Compensation (Egypt) Commission was made without, or in excess of jurisdiction and was a nullity, was restored by the House of Lords.

In the case of The Colonial Bank of Australasia v Robert Wilan (1874) L.R.5 P.C. 417, it was held that objections on the ground of defect of jurisdiction may be founded on the character and

constitution of the inferior Court, the nature of the subject-matter of the enquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court. R. v Bolton (supra) was recognised and followed. In the judgment of the Privy Council, Sir James W. Colville, had this to say at pp. 444-445:-

> "There is a third class of cases, in which the judge of the inferior Court, having legitimately commenced the enquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject-matter of the enquiry beyond it. To this category belong such cases as Thomson v Ingham [14 Q.B.710], which was much relied upon in the argument; Pease v Clayton [3 B & S 620] and R v Stimpson [4 B & S 301]. In all these cases the inferior Court, being incompetent to try a question of title, was bound to hold its hand when a bona fide dispute as to title arose before it. And the general rule in such a case is that stated in the passage from the judgment of the Exchequer Chamber in Bunbury v Fuller [9 Ex III] which is cited by Mr. Justice Blackburn in Pease v Clayton. 'It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit of its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary enquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to enquiry in the superior courts.' And, accordingly, the cases shew that the decision of the inferior Court on such a point is examinable either on formal proceedings in prohibition, as in Thomson v Ingham, or in an action of trespass, as in Pease v Clayton, or on certiorari, as in Reg. v Stimpson. Whether the Court, in the latter case, would have exercised its summary jurisdiction by quashing the order if there had been evidence on which the magistrates might have reasonably concluded that the question of title was not raised bona fide, may be doubtful." (underlining mine).

In the instant case:-

1, the application before the magistrate, was for the issue of a warrant of possession under S.3 Law 18 of 1912 (Recovery of Small Tenements) same as section 54 of the Landlord and Tenant Law, Ch. 206.

2. The magistrate had jurisdiction to issue the warrant of possession, if

    (a) there was proof of personal service of the summons,

    (b) the holding over of the premises at the determination of the tenancy,

    (c) where the title of the landlord accrued since the letting of the premises, proof of the right by which he claimed possession, and

    (d) neglect or refusal of the defendant to quit and deliver up the premises.

On such an application for a warrant of possession it is incompetent for the magistrate to try a question of title. He was bound to hold his hand when a bona fide dispute of title arose before it. "The general rule of law applicable to justices exercising summary jurisdiction is, that they are not to convict where a real question as to the right to property is raised between the parties: (then their jurisdiction ceases, and the question of right must be settled by a higher tribunal; for the justices by convicting would be settling a question of property, conclusively and without remedy, if their decision happened to be wrong." Blackburn J. in R. v Stimpson (1863) 4 B & S p. 301 at p. 309. "I agree that there are many cases in which the justices may properly decide upon the evidence before them that a claim of title is not bona fide set up; but in all cases it is for this court to say whether they were justified in their decision .....; the prosecutor gave proof of enjoyment under a paper title; but the defend... asserted that he could prove a case to the contrary, and supported his assertion by some evidence. That shewed that there was a question of title to be tried; and the justices, in convicting the defendant, took upon themselves to try it, which the legislature intended that they sh... not do. I think that there was no reasonable evidence on which the justices could say that there was not a bona fide claim or dispute;

on the contrary, the circumstances stated in the affidavits shew that there was such a claim." (underlining mine) Crompton J. in the same case at pp. 308 & 309.

In my view there is ample authority for saying that in the instant case a superior Court must examine the decision of the magistrate to ascertain whether he has given himself jurisdiction by a wrong decision on a point collateral to the merits of the application for the warrant of possession. The collateral issue before the magistrate, was whether there was a bona fide claim of title set up by the defendant, if there was not then he would proceed to hear and determine the merits of the application, that is, whether the landlord should be given possession in accordance with section 54 of the Landlord and Tenant Law, Ch. 206. If there was evidence raising a bona fide dispute of title, he should have stayed his hands. By proceeding wrongly to hold that he regarded the evidence of the defendant as a mere fictitious pretence of title, he was giving himself jurisdiction by such wrong conclusion on a collateral matter. It is most important therefore to examine the evidence before the magistrate, to ascertain whether or not there was a bona fide dispute of title raised.

It is not correct to hold as Mr. Chin See submitted that this Court is entitled to look at the facts and reasons for judgment in Information proceedings No. 4479/62, not to decide if the findings were correct but to see if they establish the same issues as in CL 371 of 1972. In my view that approach would result in any superior Court holding the magistrate's decision as conclusive even if he was wrong in giving himself jurisdiction. I, therefore, proceed now to examine the evidence led before the magistrate.

Evidence led on Information No. 4479/62 proceedings.

Frederica Walker (nee Lyons) niece of Fredericka Goode, daughter of Rebecca Lyons and complainant in the recovery of tenement proceedings claimed that the defendant had been paying her rent in respect of the disputed land at £6 per year. She said he paid her rent in 1952, 1955. She said she gave him receipts and in evidence produced three counterfoils from a receipt book of hers. Since April 1960 the defendant paid her no more monies. Under cross-examination

she said: "My mother leased lands to Defendant in 1944. I don't know that Defendant paid my mother £125 as part payment for lands in July 1944. I don't know of payment of £100 to my mother by Defendant in 1945, July ..... Defendant erected a house on that land. The 1951 hurricane blew away that house." She gave evidence that her mother died in 1946. She denied receiving £25 in 1946. The land was registered land.

Her solicitor gave evidence that in 1960 he made application on behalf of Mrs. Goode to the Resident Magistrate for Clarendon for a vesting Order of the lands in question in Mrs. Goode. The defendant at an appearance was represented by Counsel. But there was nothing on the record that when the vesting order was made the defendant personally attended court. The solicitor said that the defendant was tenant of Mrs. Goode of the land from 1944 for a period of 5 years and then the defendant held over as tenant from year to year since expiration of the lease. The defendant was served with a notice to quit the land.

The defendant gave evidence that he leased the lands from Rebecca Lyons from August 1942 and paid rent of £6 in that year; he produced receipt, Ex.8. He paid £6 in 1943 but only £3 in 1944 for half-year because he paid Mrs. Lyons £125 on June 8, 1944 on account of the purchase price of £250 for the lands. He got a receipt. In August 1945, he again paid Rebecca Lyons £100, he also got a receipt. He paid the complainant the balance of £25 and also got a receipt. After the payment of £3 in 1944, he never paid any rent nor did he pay the complainant any monies as rent as she claimed. He was in possession of the land since 1944 and he cultivated it. In 1960, he received a notice to quit. He did not produce any of the receipts for the purchase of the land because of his house, clothes and everything being blown away by the 1951 hurricane.

Ivan Lawrence, his witness said on oath that in July 1944 he went with the defendant to Mrs. Lyons' home and defendant paid Mrs. Lyons £125 and she gave him a receipt. In July 1945, he again went with the defendant and he paid her £100 and he got a receipt. The defendant, he said was paying money for the land in dispute. Counsel for Benjamin Patrick did submit to the magistrate that so long as there were conflicting rights as regards the land, the jurisdiction of justices

was ousted.

After reserving his decision, the Magistrate on February 10, 1963 said he accepted the evidence of Complainant and witnesses as truthful and regarded that of the Defendant as being a mere fictitious pretence of title.

In examining the evidence, attorney for the appellants submitted, that:-

1 the three counterfoils purporting to be receipts for rent paid by the appellants were self-serving evidence and the weight of it - worthless.

2. If that were true, the appellants were in possession of the land from 1944 until 1962 when they were seeking to eject him. So too, it would go to show that he must have bought the land if he remained in possession for over 18 years without payment of rent.

3. Though it can be said that the appellants produced receipt Ex.8 which was received in 1942, yet no receipts were produced for the purchase price of the land. That may well be so, but it cannot be denied as the Complainant did support the evidence that the house and belongings were blown away in 1951.

4. The vesting order was a mere transmission of title without a conveyance of the land and it has not been denied that Rebecca Lyons was rightfully possessed of a registered title to the land.

5. Ivan Lawrence testified that he was present when the appellants paid Mrs. Rebecca Lyons in all £225 for the purchase of the land. It is true he claimed that the monies were paid in months of July 1944 and 1945 whereas the appellants claimed that those monies were paid in the months of June and August respectively. However that may be, that was evidence which supported the appellants' assertion.

6. No matter how the facts were viewed, it cannot be dispute that the complainant has not proved that for the years 1945 to 1952, that is for 7 years, the appellants paid any rent. Though Rebecca Lyons died in 1946, it was not until 1954, that the first counter-foil in the receipt book disclosed that the appellants paid complainant £12 for 2 years' rent. The complainant's evidence as to the payment of rent by the appellants was obviously "trumped-up".

7. The circumstances of the case were such that by the device of a summary and less expensive procedure though a real question as to right of property has been raised between the parties yet the magistrate by granting the warrant of possession has by his wrong decision on a collateral point given himself jurisdiction and denied justice to the appellants.

Attorney for respondent, as I have stated, by a majority ruling of this court, did not discuss those criticisms of the evidence. Nevertheless, the question which remains to be decided was whether on a reasonable view of the entire proceedings, the evidence raised a bona fide dispute of title.

Bona fide dispute of title.

In the local case of Perris Bailey v Ivan Brown R.M.C.A. No. 25 of 1973, the defendant was alleging in a civil case of recovery of possession, sale to him of part of the land in dispute. The question was gone into as to whether his allegations gave rise to a dispute as to title so as to oust the jurisdiction of the magistrate. Several cases were discussed:

The Warrior (1828) 2 Dods 288.
Mountenoy v Collier (1853) 1 E & B 630.
Re Marsh v Dewes (1853) 17 Jur. P.I. 558.
Sewell v Jones (1850) L.J. Q.B. 372.
Howorth v Sutcliffe (1895) 2 Q.B. 358.

In this appeal, the last two cases were referred to, and discussed by the attorneys. In my view, the principles involved in a matter like this, have been succinctly stated by Sir William Scott in The Warrior (supra) at p.289:

"It cannot be laid down that the Court is to decline its jurisdiction ... on the mere averment of one of the parties that there is a conflicting claim of title. If the mere averment of title, without any examination as to its foundation, would be sufficient to arrest the progress of a cause, the jurisdiction of the court would be ousted altogether. It would be idle to say that the court retained its jurisdiction if the moment a warrant was extracted by one party, the other was at liberty to put an end to the suit by asserting a title, resting, perhaps, on no foundation whatever. The nature of the title must be shown before it can be permitted to have the effect of arresting the cause. It must

> be made to appear that it is not a mere cobweb title that is set up, but that it is such to raise a real and substantial doubt to whom the property belongs; and, in that case, the Court would certainly decline to interfere as to the possession until the title should have been determined upon by the courts in which such questions have been more usually agitated in the modern practice of the law." (underlining mine).

In the instant case,

1 the defendant has not on a mere averment stated that a conflicting claim of a title arose. He has led in evidence the supporting witness of Ivan Lawrence.

2. On the complainant's own case, there was no evidence of the payment of rent by the defendant for about 7 years.

3. The defendant's title rested on the foundation that he had purchased the land for £250 and although he was unable to produce receipts for same, he gave a reasonable account for the absence of same and for what it is worth, he produced a witness to verify the foundation of his claim.

4. If his side of the story were believed, he had been in possession of the land in dispute from 1944 without the payment of rent for over 18 years.

In those circumstances, it is my view that the Magistrate should have stayed his hands. He was wrong to proceed to regard the evidence of the complainant and his witness as truthful and to regard the evidence of the defendant as a mere fictitious pretence of title. By adjudicating as he did where it appeared on a reasonable assessment of the evidence that there was a bona fide dispute as to title, the magistrate on a collateral issue was giving himself jurisdiction. Even if it appeared to him doubtful whether or not there was a bona fide dispute as to title - and it is not without significance that he took time to consider his decision - he should have stayed his hands, that is, dismissed the information for want of jurisdiction.

Litigation after the Magistrate's decision.

The question must now arise, if my view is correct that the magistrate was wrong, whether after all these years, from February 10, 1963 to this date, over 10 years, the defendant can now succeed in

having his rightful claims litigated - in other words, be successful in these appeals.

7. By Equity Suit No. 11 of 1963, the appellants filed a claim on January 29, 1963 for a declaration that they were entitled to the land and that Frederica Walker had no right, title, estate or interest in the said land. They also claimed an injunction restraining her from taking possession of the said land, and asking for an order setting aside the magistrate's order for possession. On February 11, 1963, Frederica Walker took out a summons praying that in the inherent jurisdiction of the Court, it will stay all proceedings of Suit E 11 of 1963 on the ground that it was frivolous or vexatious or an abuse of its process. After hearing arguments, the trial judge held that the relevant issues were investigated and adjudicated upon in the magistrate's Court - a court of competent jurisdiction. He said that the first action (proceedings before the magistrate) the question of ownership of land was the essential issue and it seemed elementary that the plea of res judicata would apply in a second action which sought to canvass the same question on substantially the same evidence as that in the first action. He entered judgment for Frederica Walker with Costs.

Much argument was directed to the fact that there was no appeal from the magistrate's decision and suit E 11 of 1963 could not then challenge the findings of the magistrate. Section 54 of the Landlord and Tenant Law Chap. 206 has this proviso:-

> "Provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession where such person had not at the time of granting the same lawful right to the possession of the premises, "

By suit No. E 11 of 1963, the appellants were claiming that at the time when the warrant of possession was authorised by the magistrate to be issued, Frederica Walker had no right to possession of the said land. In my view, they were entitled by that suit to ask a superior Court to examine the evidence in the inferior Court as to whether or not it had jurisdiction to adjudicate upon a bona fide dispute of title.

The Landlord and Tenant Law Ch. 206 was enacted in 1838. The Justices of the Peace (Appeals) Law Ch. 187 was enacted in 1857. So that, the right of action conceded by the proviso to section 54 of Chap. 206 until 1857 was the exclusive means of challenging proceedings before the justices on a grant of a warrant for possession. After 1857, it is my view that there is even now concurrent jurisdiction in an action in the Superior Court to challenge such proceedings and such an action or suit cannot be vexatious or an abuse of its process.

In Sivyer v Amies (1940) 3 AER 287 a landlord brought ejectment proceedings under the Small Tenements Recovery Act 1838 but because the evidence of an aged man could not be taken on commission, justice could not be had before the justices. It was held that it was only right where the landlord refused to bring proceedings in the County Court, the tenant should be allowed to bring proceedings in the High Court claiming a declaration that the premises in dispute were held on a yearly tenancy and not on a weekly tenancy as claimed by the landlord. The landlord asked for an order that the action might be dismissed as vexatious and an abuse of the process of the Court. It was held that in the circumstances, the action was properly brought, and was neither vexatious nor an abuse of the process of the Court.

The circumstances of the instant case are that (1) the tenant was asserting by credible evidence that there was a bona fide dispute of title and that the landlord was not entitled to a warrant of possession; (2) that at the time of the granting of the warrant of possession, the tenant had a lawful and/or equitable right to remain in possession of the land. Having decided that there was a bona fide dispute of title to the land, I am of the view that the appellants had a lawful right to bring suit No. E 11 of 1963 for a declaration that they were entitled to the fee simple of the land and that their suit was neither frivolous nor vexatious nor an abuse of the process of the court.

An appeal No. 33 of 1963 was filed against the decision of the judge in E 11 of 1963 but it was dismissed with costs to Frederica Walker; it is stated the ground for dismissal was that the appeal was interlocutory and filed before leave was granted by the Court of Appeal. However that may be, the fact remained that the decision to strike out

suit E 1? of 1963 was wrong.

2. Action C.L. 371 of 1972

Beverley Gardens Development Co. Ltd. (referred to as the "company") who had by the year 1972 become the registered owner of the land filed the above-numbered suit on March 23, 1972 claiming possession of the land from the appellants and an injunction restraining the appellants from erecting any further buildings of any type whatsoever. The appellants filed defence stating that they were in possession since 1944 and that the right to recover possession was barred by sections 2 and 30 of the Limitation Law, Chapter 222. Also, that the company's predecessors in title wrongfully obtained an order against the appellants for possession. The appellants counterclaimed a rectification of the Certificate of title and, in the alternative, compensation in the sum of $26,700 for improvement of the said land.

By summons of the same date, the company asked that the appellants be restrained from erecting any further buildings and that they demolish buildings already on the land. On April 26, 1972 Parnell J., made an order under section 236 of the Civil Procedure Code Ch. 177, as amended by section 72 of the Civil Procedure Code (Amendment) Rules 1960 that as a point of law arose on the pleadings, the question of ownership of the land as between the company's predecessors in title and the appellants be set down for hearing and in the meantime the hearing of the summons on the merits be stayed.

The appellants sought leave to appeal from that order. It would appear that an application for leave to appeal in the Court of Appeal was pending when Chambers J., heard arguments and determined the point of law. Chambers J., adjudged that the question of ownership of the land, the subject-matter of the suit was already determined by a court of competent jurisdiction. He entered judgment for the company for possession, granted an injunction and ordered the appellants to pull down, dismantle and demolish any buildings erected on the land within two weeks from the date of his order. The "court of competent jurisdiction" referred to in his judgment, are obviously:-

1, the Magistrate's court which heard Information 4479 of 1962; and

2, Supreme Court of Judicature hearing suit No. E 11 of 1963.

The appellants have appealed against the order of Chambers J. and that is one of the two appeals No. 36 of 1972, now before us.

3. Action C.L. P 005 of 1974

The appellants applied for a stay of execution of the order of Chambers J., who refused such an application. The appellants then applied to the Court of Appeal for a stay of execution and whilst that application was pending, the company and its agent, Xdol Mignott, on December, 15, 1972 demolished the appellants' house and out-buildings, took and carried away goods, furnitures and utensils belonging to the appellants. On January 24, 1974, the appellants brought the above-numbered action against the company and its agent, claiming damages for wrongful entry and injury to their house, goods, furniture and utensils; special damages they claimed amount to $5606.00.

On March 24, 1974, the company took out a summons to strike out that action. The summons was heard by Vanderpump J., and on May 24, 1974 although he stated that the action was a reasonable cause of action, i.e., one known to the law, yet he struck out the Statement of Claim as being frivolous and vexatious and dismissed the action against the company and its agent with costs to Xdol Mignott.

Against that order is the appeal No. 21 of 1974 which is also before us and together with appeal No. 36 of 1972 have been heard.

Consideration and conclusions as to appeal No. 36 of 1972

In my view, the trial judge in considering the summons to strike out suit No. E 11 of 1963 should not have misdirected himself that the issue of ownership of the land was already determined by the magistrate. He had jurisdiction to examine the evidence led before the magistrate or which was sought to be led before him for his consideration and adjudication.

Crossman J., in Sivyer v Amies (supra) discussed the procedure involved in the recovery of possession under the Small Tenements Recovery Act 1838 and the right of a party to obtain a declaration in the High Court. He said at p. 287, thus:-

> "...... It is a very interesting procedure, because it apparently contemplates giving the tenant something in the nature of a right of appeal if the justices grant the warrant against him, and the appeal would depend upon whether or not the tenant was in a position to show that the landlord was not entitled to possession, which would be a question to be determined here, because the tenant does not admit that the landlord is entitled to possession."

Valdecote L.C.J. in R. v Droxford Justices (1943) 1 A.E.R. p. 209, said at p.210:-

> "I respectfully agree with what Crossman J., we are informed said in Sivyer v Amies at p.287, namely that section 3 seems to provide something of the character of an appeal from the decision of the magistrates; but, whether it is to be described as an appeal or not, the only thing with which we are here concerned is first whether the magistrates did their duty and secondly, whether, in the circumstances, this court should issue an order of mandamus to them to do their duty, if they have not already done it."
> Humphrys J. and Tucker J. agreed with him.

The second proviso to section 54 of the Landlord and Tenant Law Ch. 206 has given the tenant a right of action in the High Court where he is alleging that at the time when a warrant of possession was granted, the landlord was not entitled to possession. Hence action E 11 of 1963 was lawfully instituted and was not vexatious. In my view the judge in suit No. E 11 of 1963 should have gone on to consider whether the magistrate hearing the proceedings on Information No. 4479 of 1962 had done his duty having regard to the evidence led before him. The trial judge should not have misdirected himself that the appellants were trying to litigate again a matter already heard by the magistrate.

Chambers J. also misdirected himself on the issues involved in the application before him. That is, that the ownership of the land had already been adjudicated upon by court or courts of competent jurisdiction.

For the reasons, I have given, I would allow this appeal with costs to the appellants.

Consideration and conclusions as to appeal No. 21 of 1974

If there was evidence of a bona fide dispute before the magistrate in Information proceedings No. 4479 of 1962, then there is no question that this appeal must be allowed without any further arguments because the ownership of the land was never decided. But irrespective of the fact as to whether or not the proceedings, before the magistrate, before the judge in suit No. E 11 of 1963, before Chambers J. in action No. 371 of 1972 and before Vanderpump J., in action No. P 005 of 1974, were wrongly decided, throughout the years and among all the issues involved, two undisputed facts emerge:-

1. The company on December 15, 1972 demolished the appellants' house and the appellants alleged that it had taken away their goods, furniture and utensils and they have suffered special damages to the extent of $5606.00. And,
2, the house and outbuildings and goods were the property of the appellants.

In an affidavit dated April 9, 1974 the solicitor for the company in action C.L. P 005 of 1974, stated that the appellants were trespassers and that in his opinion the pleadings in that action disclosed no reasonable cause of action, or alternatively, the action was frivolous and vexatious, and further amounted to an abuse of the process of the Court. The company never applied to the Registrar for a writ of possession and delivery of the land in question in pursuance of the judgment or order of Chambers J., and in accordance with section 648 of the Civil Procedure Code, Chap. 177. If the company had done so, the officers entitled to execute the writ of possession must in law have seen to it that no more force than was reasonably necessary to obtain possession for the company was in fact exercised. The company assumed that appellants were trespassers despite the fact that at all times the appellants were setting up a right or title to remain in possession. Xdol Mignott, the second named defendant in an affidavit dated May 13, 1974 stated that upon the instructions of the company, he entered the land and proceeded to demolish the buildings thereon. He claimed he removed all items of furnitures belonging to the appellants and he was aided in such removal by Mrs. Patrick Benjamin. Subsequently he effected delivery of those items save for a sewing machine which was levied by a bailiff for moneys owing by

the appellants. He concluded that at the time of such delivery all items of furnitures were in exactly the same condition as when they were first removed. The appellants claimed otherwise. However, that was a triable issue raised in action C.L. P 005 of 1974.

Apart from any question as to the company being entitled to possession of the land on the basis of the orders of the magistrate "the person entitled to possession can enter or re-enter the premises, but the Statutes of Forcible Entry beginning with one of A.D. 1381 require him to do so in a peaceful manner, otherwise he commits a crime punishable by imprisonment. But whatever his criminal liability may be, he is not civilly liable if he uses no more force than is necessary. After some conflicting opinions this was finally settled by the Court of Appeal in Hemmings v Stoke Poges Golf Club [1920 1 K.B. 720]. The plaintiff, a tenant of a cottage owned by the defendants, refused to quit it after notice had been duly given to him. The defendants thereupon entered the cottage and removed the plaintiff and his furniture with no more force than was necessary. He sued them for assault, battery and trespass, and they were held not liable:" Winfield on Tort, 8th Ed. p.347. But the judgment in that case recognises this qualification, as per Bankes L.J.: "... A person who makes a forcible entry upon lands and tenements renders himself liable to punishment, and he exposes himself as to civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods." And Scrutton L.J., puts it thus: "Indeed the fact that while Newton v Harland was taken as preventing a person entitled to possession from using force to expel a trespasser Jones v Foley allowed such a person to pull the roof down over the trespasser's head, showed that the law was in a ridiculous state, from which I hope our decision may release it. It will still remain the law that a person who replies to a claim for trespass and assault that he ejected a trespasser on his property with no more force than was necessary may be successfully met by the reply that he used more force than was necessary, if the jury can be induced to find it. The risk of paying damages and costs on this finding, and the danger of becoming liable to a prosecution under the

statutes of forcible entry, may well deter people from exercising this remedy, except by order of the court. But I see no reason to add to the existing privileges of trespassers on property which does not belong to them, by allowing them to recover damages against the true owner entitled to possession, who uses a reasonable amount of force to turn them out."

In Jones v Foley (1891) 1 Q.B. 730 referred to in the above case, application was made to the justices under the Small Tenements Recovery Act 1838 and a warrant of possession was granted for possession to be given up within 21 days from the date of the order. On the same day, the defendant's workmen acting under instructions pulled down a cottage adjoining to the plaintiff's and in doing so took some tiles from the plaintiff's roof over a bedroom thus exposing the room to the sky and damage was done to the plaintiff's furniture by falling tiles and mortar. The men, however, desisted on being spoken to by the plaintiff. On the next day, the defendant commenced digging the foundations of new cottages in the plaintiff's garden, and in so doing pulled up some fruit trees and cabbages. About 17 days later the plaintiff vacated the cottage but early in the morning of the same day the defendant and his workmen pulled off some tiles from the roof of the plaintiff's cottage. The cottage was the landlord's property. The plaintiff brought an action for £504 damages for trespass at a cottage and garden in the occupation of the plaintiff, and damage to the plaintiff's furniture, pictures, garden produce and other effects. It was held that the claim failed because the removal of the roof and the circumstances of the case did not amount to forcible entry. Day J., in the judgment of the court said: "The magistrate's order did not extend the tenant's right to remain in possession, but merely fixed a time when the landlord might have the assistance of an officer to take possession. The tenant had no right to be in the house; he was a trespasser, and the injury to his furniture was the result of his obstinacy in remaining on the premises. The magistrate's order in no way affected the common law rights of the defendant."

However, in the instant case;-

1. The house and outbuildings belonged to the appellants and were claimed to value $4,010.00. The special damages to goods and furniture were claimed at $1,356.00.
2. The appellants brought suit No. E 11 of 1963 which in the view of Sivyer v Amies (supra) was not vexatious.
3. The appellants entered defence and counterclaim to suit C.L. 371 of 1972, but these were struck out without a hearing.
4. The facts and circumstances of the taking of possession of the land by the company, if true, amounted to a flagrant and high-handed case of forcible entry. Especially, having regard to the fact that an application for a stay of execution, to the knowledge of the company was pending in a court of competent jurisdiction. At least the question of a forcible entry was a triable issue far removed from ownership of the land.
5. The appellants were persistent in the pursuance of their lawful rights; they were not contumacious, or obstinate.

But what has the judge in action C.L. P 005 of 1974 done? Under the misdirection of deciding that the allegations in that action were based upon the same subject-matter as before, he has denied justice to the appellants on a totally different cause of action even on the assumption that the appellants were trespassers on the company's land. He heard no evidence, made no findings. He followed so many judges so mistakenly.

For the reasons, I have given, I would also allow the appeal in this matter with costs to the appellants.