JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO. 43/90

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (Ag.)

BETWEEN	GROVER POTTINGER	PLAINTIFF/APPELLANT
AND	RONALD HAWTHORNE	DEFENDANT/RESPONDENT

D. Scharschmidt, Q.C. for appellant

Karlene McFarlane for respondent

April 17 - 19 and May 31, 1991

WRIGHT, J.A.:

On April 19 last, we dismissed this appeal, affirmed the judgment of the Court below, awarded costs to the respondent fixed at $500 and promised to put our reasons for judgment in writing. This we now do.

This appeal disputes the judgments entered by the learned Resident Magistrate for the parish of St. Ann in three plaints which were, by consent, consolidated and tried together -

> Plaint No. 262/87 - Pottinger v. Hawthorne
> Judgment for defendant with costs to be agreed or taxed.
>
> Plaint No. 263/87 - Pottinger v. Hawthorne
> Judgment for defendant with costs to be agreed or taxed.
>
> Plaint No. 35/89 - Hawthorne v. Pottinger
> Judgment for plaintiff for $200 and costs to be agreed or taxed.

The facts reveal that what began as a lowly landlord and tenant relationship has been blown up into law suits

occupying several hearing dates. Mr. Pottinger owned five and one half square chains of land at Walkerswood on which stands an old three-apartment house in the parish of St. Ann. Indeed, Mr. Pottinger, who gave his age as sixty-six years, testified that that house was built before he was born.

Since September 5, 1980, the defendant, Ronald Hawthorne, became Mr. Pottinger's tenant occupying the house at a rental of $30.00 per month. Sometime in 1983, both parties entered into an agreement for the sale of one square chain of the land. One of the issues in this case was to identify that square of land. Mr. Hawthorne contends the house is included in that parcel of land but Mr. Pottinger says it is a different plot of land which he says he pointed out to Mr. Hawthorne.

The agreed selling price was $2,500 of which amount a deposit of $1,000 was paid on 2nd July, 1983, and a receipt (Exhibit 4) issued by Mr. Pottinger reflecting a balance of $1,500. This fact clearly contradicts Mr. Pottinger's evidence that the agreed price was $3,500. But of this price more anon. While there does not appear to have been any clear agreement as to the terms of payment, Mr. Pottinger expressed displeasure that the full price was not forthcoming, contending that he had given the defendant preference over another prospective purchaser. A further payment of $600 was made on 3rd March, 1984. The receipt (Exhibit 5), signed by Mr. Pottinger and witnessed by one "J. Pinnock", reflects the balance quaintly: "Balance $1000.900 total $1000.600". Interpreted, this seems to suggest total receipts as $1,600 and a balance of $1,900. Obviously a difference of $1,000 had crept into the calculations.

According to Mr. Hawthorne, four months after he had paid the $600, Mr. Pottinger told him he had to increase the price by $1,000. At first he demurred but later agreed to pay the extra $1,000 because he wanted the place. Of the house,

he said it was "maciated". Nevertheless, he had gone ahead and spent money patching up the house.

Even though there was this agreement to pay the increase, Mr. Pottinger took the decision that "he could not pay so I cancelled the sale and refunded the money". It was now October, 1984 and, not willing to accept Mr. Pottinger's unilateral decision, Mr. Hawthorne consulted Mr. Ernest Smith, attorney-at-law, who wrote the following letter to Mr. Pottinger:

"4th October, 1984

Mr. Grover Pottinger
Walkerswood P.A.
St. Ann.

Dear Sir,

Re: Land part of Walkerswood, St. Ann

I act on behalf of Mr. & Mrs. Ronald Hawthorne of Walkerswood, St. Ann.

My instructions are that sometime ago my Clients purchased 2½ square chains of land situated at Walkerswood from you. The Purchase Price agreed on was Two Thousand Five Hundred Dollars ($2,500.00), in respect of which, my Clients have todate, paid the amount of One Thousand Six Hundred Dollars ($1,600.00), leaving a balance of Nine Hundred Dollars ($900.00).

It has been brought to my Attention, that you have been making statements to the effect that you no longer wish to sell the said parcel of land to my Clients. This is to advise you that in the event that my instructions are correct, my Clients will immediately take steps to bring the matter before the Court, and therefore, to sue you for Specific Performance.

I am also to advise you, that of the Nine Hundred Dollars ($900.00) outstanding on the Purchase Price, my Clients intend to pay you the amount of Six Hundred & Fifty Dollars ($650.00), leaving the balance of Two Hundred & Fifty Dollars ($250.00) on account, until such time that Title has been obtained.

I am also to advise you, that my Clients have received instructions to contact a Commissioned Land Surveyor,

> "for the purpose of having the parcel of land purchased, surveyed, so that arrangements can be made and steps taken, for them to bring the said parcel of land under the Operation of The Registration of Titles Act.
>
> Yours faithfully,
>
> ERNEST A. SMITH
>
> EAS/ce
>
> cc. Mr. Ronald Hawthorne."

In pursuing his claim to the land, Mr. Hawthorne engaged a surveyor to survey the land on the 29th January, 1985, but Mr. Pottinger would have none of this because he maintained that Mr. Hawthorne had no land there. In describing the land, the subject-matter of the sale, Mr. Hawthorne said:

> "Mr. Pottinger and I agreed on boundaries: boundaries from Mr. Malachi Walters on bottom side right where house is. From house from Mr. Walters' line 8-10 yards away points indicate other side out to road. Mr. Walters road rest of land is for Mr. Pottinger. Mr. Walters own wire round. 3 sides of land fence bottom side not fenced - line with Mr. Pottinger land - grapefruit tree at roadside. Go to Mr. Walters corner tree dead - stumps is still there. Mr. Pottinger tell me he is going to sell land and since I am tenant I have first preference."

Mr. Pottinger's description of the land up for sale was as follows:

> "I showed him which square of land was for sale. I pointed out square of land in line to Mr. Walters in line to Mr. Hyde on my property down the bottom. No building on square that I agreed to sell. Not true that land I agreed to sell was piece with house."

In cross-examination, he said, "The defendant knows the four corners".

As a follow-up to his previous letter, Mr. Ernie Smith by letter dated 27th November, 1984, forwarded to Mr. Pottinger his cheque for $500 holding in reserve a balance of $400 -

"17th November, 1984

Mr. Grover Pottinger
Walkerswood P.A.
St. Ann.

Dear Sir,

Re: Land part of Walkerswood, St. Ann
Sale Yourself to Mr. & Mrs. Ronald Hawthorne

Kindly refer to previous correspondence in connection with the subject at caption ending with my letter of the 4th of October, 1984.

In keeping with the undertaking contained in the fourth paragraph of my letter of the 4th of October, 1984, kindly now find enclosed herewith, my cheque in the amount of Five Hundred Dollars ($500.00) paid towards the balance of the Purchase Price in this Cause, leaving a balance of Four Hundred Dollars ($400.00).

Kindly acknowledge receipt.

Yours faithfully,

ERNEST A. SMITH

EAS/ce

encl.

Regd."

From both Mr. Smith's letters it is obvious that if he was advised of the addition of $1,000 to the purchase price he did not countenance it. He may well have taken the view that it was unenforceable for want of consideration. The appellant contended that the cheque for $500 was returned to Mr. Smith but this seems questionable since it was he who tendered this cheque in evidence as Exhibit 2A. Relationships were souring. However, it was not until January 10, 1986, that Mr. Pottinger made his next move. He served Mr. Hawthorne one month's notice to quit and deliver up possession of the premises giving as the reason that the rent was in arrears for twenty-one months. The die was cast. Legal action followed. Plaint 262/87, filed 13th April, 1987, claimed from Mr. Hawthorne as follows:

"THE PLAINTIFF'S CLAIM against the Defendant is to recover the sum of SIX HUNDRED DOLLARS ($600.00) being the amount due and owing by the Defendant to the Plaintiff as and for rent of a dwelling house situate at Walkerswood in the parish of Saint Ann as set out in the Particulars hereunder:-

AND THE PLAINTIFF FURTHER CLAIMS costs and costs of his Attorney-at-Law. Costs of Plaintiffs Attorney-at-Law to date of filing suit $30.00.

PARTICULARS

Rent for period 5th May, 1984 4th January, 1986 20 months @ $30.00 per month $600.00"

Plaint 263/87 of equal date claimed:

"THE PLAINTIFF CLAIM against the Defendant is to recover:-

FIRSTLY: The sum of SIXTY DOLLARS ($60.00) being the amount due and owing by the Defendant to the Plaintiff as and for rent in respect of the premises described hereunder:-

SECONDLY: THE PLAINTIFF CLAIMS to recover the sum of THREE HUNDRED AND NINETY ($390.00) as and for Mesne Profit for use and occupation by the Defendant of the premises hereunder described.

THIRDLY: THE PLAINTIFF CLAIMS to recover from the Defendant possession of land with dwelling house thereon situate at Walkerswood in the parish of Saint Ann rented by the Plaintiff to the Defendant on a monthly tenancy which tenancy was terminated by Notice to Quit given by the Plaintiff to the Defendant and the Defendant has failed and/or neglected to deliver up possession of the said premises and continues to detain the same.

AND THE PLAINTIFF FURTHER CLAIMS to recover costs. Costs of Plaintiff's Attorney-at-Law to date of filing suit $25.00.

PARTICULARS

(1)	Rent for period 5th March 1986, to 4th March 1987 - 2 months @ $30.00 per month	$ 60.00
(2)	For use and occupation of the aforesaid premises for the period 5th March, 1986 to 24th March, 1987	390.00
		$450.00

The defendant's response was by Plaint 35/89 on 16th January, 1989, which claimed:

(a) $200 representing fees paid to the surveyor

(b) $4,800 damages for trespass

(c) Injunction restraining the defendant, his servants and agents from entering upon his said land which he had purchased.

At the commencement of the summary trial, as section 184 of the Judicature (Resident Magistrates) Act (The Act) requires, the defences were shortly stated. To Plaints 262/87 and 263/87, the defences were -

(a) Denial of rent as alleged or at all

(b) Denial of any sums due for rent or use and occupation.

To Plaint 35/89, the defence was -

(a) Denial of trespass as alleged or at all

(b) Denial of obstructing survey of land agreed to be sold to the plaintiff

(c) The land sought to be surveyed was never the subject of any agreement for sale between the respondent and the plaintiff.

In support of the judgments earlier recorded, the learned Resident Magistrate filed her Reasons for Judgment, which may conveniently be set out in full since they attracted so much attention from counsel for the appellant. But before

setting out these Reasons for Judgment, I make the comment that section 256 of "The Act", which requires "a statement of his reasons for the judgment etc." in civil cases, is separate and distinct from section 291 dealing with criminal cases and calling for "a statement in summary form of his findings of fact on which the verdict of guilty is founded". It is observed that Resident Magistrates incline more and more to treat both as a statement in summary form which is wrong. The reasons supplied are as follows:

"1. Plaintiff did not prove that a landlord/tenant relationship existed between himself and the defendant.

2. Plaintiff failed to show that agreement for sale of land was for land other than that occupied by defendant with house thereon. Receipts tendered as exhibits failed to clarify what parcel of land had been the subject of the agreement.

3. Court decided on a balance of probabilities that the tenancy agreement ceased when the land with house thereon became the subject of an agreement for sale. This decision was based on the following:-

(i) No supporting witness was called by the plaintiff or the defendant. It was a question of fact as to who the Court believed and the Court found that the defendant was a credible witness.

(ii) Defendant ceased paying rent after agreement was initiated between himself and the plaintiff.

(iii) Defendant sought to have land surveyed after he had paid most of the purchase price.

(iv) No attempt was made by Plaintiff to place defendant in possession of any other land other than that occupied by defendant.

" (v) Purchase monies were never returned to defendant himself. Only evidence of money returned was a $500 cheque, which was returned to defendant's Attorney after a demand was made for plaintiff to complete agreement.

4. Court found that surveyor had been obstructed but that there had been no trespass and so an injunction could not be granted."

Three sets of grounds of appeal containing fourteen grounds in all and occupying five pages were filed but in the end the appeal was not argued in conformity with any specific ground but represented an attack on the Reasons for Judgment. As to Reason Number 1 (supra), it was submitted that the learned Resident Magistrate had misdirected herself both as to the issue and as to the burden of proof. It was further submitted that since the respondent had admitted that in 1980 he became the tenant of the appellant and admitted as well the non-payment of the rent claimed but placed reliance on an agreement, it was for him to prove the agreement and not, as the Resident Magistrate stated, for the appellant to prove that the relationship of landlord/tenant existed between himself and the defendant. Obviously, this finding must relate to the period for which the rent is claimed.

Rent is defined in The Concise Oxford Dictionary as -

> "Tenant's periodical payment to owner or landlord for use of land or house or room."

To my mind, it is elementary that in order to establish his claim for rent for the twenty-one months set out in the plaints, the appellant is obliged to prove, not that at one time the respondent was his tenant but, that for the relevant period, he was his tenant. And it is not open to him in the circumstances of this case to invoke a presumption of continuance since the parties are free, by agreement, to alter the

status quo. The impugned finding is the result of considering conflicting evidence on the issue. As I have said earlier, both parties agree that there was an agreement for sale and that the greater part of the purchase price had been paid to the appellant. The dispute concerned the portion of land involved in the sale. The Resident Magistrate had to determine that issue as well as the issue of the relationship between the parties at the material time.

Both the appellant and the respondent live in the same district, Walkerswood, and it was the appellant's evidence that in 1984 the respondent paid him three months rent, which appears to have been due prior to the payment of the deposit, but that thereafter "I did not collect any rent in 1984 because I was waiting on him to bring it. So, too, I did not collect for 1986 and 1987". Against that, the learned Resident Magistrate had to consider the evidence of the respondent, who testified:

> "I bought house and land from Mr. Pottinger. I paid down $1,000 in July 1983. From July '83 I paid no rent -- We decided to pay no more rent. I ask him what about rent - he said 'Mr. Hawthorne I have to depend on you now' - meaning he has to depend on me for money I bought place for."

In addition, there was the evidence of the respondent that he resorted to repairing the house - patching it up since it did not allow for construction work to be done and will eventually have to be replaced. Accordingly, the learned Resident Magistrate had to decide whether the non-collection of rent and mesne profits for a period of thirty-five months was due to the reasons alleged by the appellant or was there a change of status plus an agreement as related by the respondent which precluded the payment of rent - a simple question of fact

which was resolved in favour of the respondent. That is what finding of fact number one is saying. But it was submitted that the respondent's claim to house and land as the subject-matter of the sale had been variously represented both as to the acreage and as to whether the house was included and that accordingly the respondent was not credit-worthy. Be it noted, however, that whatever acreage was given was mere estimate since there had been no measurement of the area in question. That is an issue which the learned Resident Magistrate, who saw and heard both parties, was better able to resolve in determining which she could not have failed to note how the appellant swore that the agreed sale price was $3,500 and not $2,500 as his own receipts proved.

Obviously overlooking the fact that the appellant's short statement of his defence to Plaint 35/89, in keeping with section 184 of The Act, was a "denial of trespass as alleged or at all". Mr. Scharschmidt submitted that the statement of the defence to Plaint 262/87, that is, "Defendant denies owing rent to Plaintiff as alleged or at all" was inadequate. Reliance was placed on **Wallace and others vs. Whyte** (1961) 3 W.I.R. 521. The gist of that case as stated in the headnote shows that case to be readily distinguishable and to be wholly inapplicable to the instant case -

> "At the commencement of the trial of an action claiming damages for trespass to land, the defendant's solicitor stated the defence as 'Denial of trespass'. In discussion with the court on a previous occasion the defendant's solicitor had stated that the title deed of both portions disclosed a right-of-way across the plaintiff's land.
>
> **Held:** the defence as stated was totally inadequate as it was impossible for the court or the plaintiff to have understood what defence was being set up; that the resident magistrate should have so ruled and should not have permitted the

> "defence to have been conducted without a proper plea. It is the defendant's duty to plead so that his defence is disclosed as if he was pleading to a statement of claim in the High Court."

Furthermore, for reasons stated earlier, it is difficult to accept that counsel's submissions in this regard could be taken seriously.

Concentrating his energies against the finding that the agreement for sale involved the land with the house thereon, Mr. Scharschmidt levelled the following criticisms against the finding of fact:

> There was no basis for finding that the agreement applied to land and house.
>
> No. 3(ii) not determinative of question whether it was one piece of land or two pieces involved, and, I may add, if one then which one?
>
> As to 3(iv) there was no entitlement to possession until completion. Hence this finding was plucked from the air - no supporting evidence as to time of possession.
>
> He, however, admitted that there was no refund of the money to the respondent himself but it was not correct that only $500 had been refunded.

This last submission certainly begs the question. The evidence was that the cheque for $500 was returned to the respondent's attorney, Mr. Smith, and that cheque was exhibited to the Court. As regards the amount of $1,600, the appellant testified that he had sent it to his attorney to be returned to the respondent although the latter resides close by in the same district and had paid him personally. There was no evidence that the money ever reached his attorney's hand or, if it did, what became of it. The uncontradicted evidence of the respondent is that he had not received any of the money which he had paid.

The claim for mesne profit goes out with finding number one because it is founded upon a tenant holding over. Accordingly, if the necessary relationship has not been established there can be no basis for such a claim.

One peculiar fact about this case, which relates to the question of the identity of the land, the subject-matter of the sale, is that the respondent having paid the greater portion of the purchase price for the piece of land which, if the appellant were to be believed he knew he was purchasing, did not attempt to assert any claim to that piece of land. Instead, he set about spending money to rehabilitate the appellant's property and then in what must have been a barefaced land-grabbing act he brought in a surveyor in broad daylight, knowing full well that the appellant was close by and could not be expected to acquiesce in such an act of dishonesty.

It is also true that neither of the two receipts, which the appellant issued to the respondent, described the land in issue. They merely state "for payment on land". Mr. Scharschmidt raised that question but he certainly would not expect his client to profit from his own default.

Submissions were made by Mr. Scharschmidt which, relying on citations from Odger's Principles of Pleading and Practice, would have proceedings in the Resident Magistrate's Court conform to the requirement governing pleadings in the High Court. But such submissions, if they do not betray ignorance of, at least, overlook the fact that the Resident Magistrate's Court has its own regimen. The legislature obviously recognises that the Resident Magistrate's Court is the Court to which many litigants resort who may not be able to afford legal representation but to whom justice is no less precious and must be secured. In other words, they are not to be driven from the judgment seat because of poverty. Provision

is made in The Act to ensure that substantive justice is meted out in this Court. Hence section 184, which provides:

> "On the day in that behalf named in the summons, the plaintiff shall appear, and thereupon the defendant shall be required to answer by stating shortly his defence to such plaint; and on answer being so made in Court, the Magistrate shall proceed in a summary way to try the cause, and shall give judgment without further pleading, or formal joinder of issue."

That is how The Act simplifies the issue of pleading. The hand of the Resident Magistrate is strengthened by the powers of amendment contained in section 190, which states:

> "The Magistrate may at all times amend all defects and errors in any proceeding, civil or criminal, in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made."

Finally, the Court of Appeal is given vast powers in dealing with appeals from the Resident Magistrate's Court but special provision is made to secure substantial justice between the parties. Such provisions are contained in section 251, which reads:

> "Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order, and also upon any ground upon which an appeal may now be had to the Court of Appeal

"from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury.

And the Court of Appeal may either affirm, reverse, or amend the judgment decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:

Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause:

Provided also, that an appeal shall not be granted on the ground of the improper admission or rejection of evidence; or on the ground that a document is not stamped or is insufficiently stamped; or in case the action has been tried with a jury, on the ground of misdirection, or because the verdict of the jury was not taken on a question which the Magistrate was not at the trial asked to leave to them, unless in the opinion of the Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and allow the appeal as to the other part only, or as to the other party or parties."

I am left in no doubt that in resolving the issues, as the learned Resident Magistrate did, she determined the

real question in controversy between the parties and in the final analysis did substantial justice between the parties. Hence my decision to dismiss the appeal.

GORDON, J.A. (Ag.):

I agree entirely with the judgment of Wright, J.A. which I have perused.

The evidence discloses that the respondent was interested in no other plot but that on which the house he occupied stood. When, therefore, he entered into an agreement for sale with the appellant to purchase land, the agreement for sale was in respect of that which he occupied. It is significant that the respondent ceased paying rent from the time of the agreement. This is consistent with his claim that it was a term of the agreement that rental ceased when he agreed to purchase the house and land and deposited $1,000. The appellant did not seek to collect or recover rent until when the respondent intimated an intention, through his attorney-at-law, to enforce his contract.

The learned Resident Magistrate had to resolve questions of fact on the evidence and accepted the defendant/respondent as a credible witness. Her conclusions were unobjectionable and inevitable.

CAREY, P. (Ag.):

I entirely agree.

These were three plaints which were tried together by Her Honour Mrs. Joan Joyner, one of the Resident Magistrates for the parish of St. Ann, sitting at Ocho Rios on 20th April, 1990. In the first two plaints, the appellant who was the plaintiff, sued to recover as to the first, the sum of $600.00 being rent for a dwelling house situate at Walkerswood in St. Ann for the period 5th May, 1984 to 4th January, 1986 being 20 months at $30.00 per month. As to the second plaint, the appellant claimed $60.00, being rent for the period 5th March, 1986 to 4th May being 2 months at $30.00 per month and $450.00 for use and occupation during the period 5th May, 1986 to 24th March, 1987 = $390.00 making a grand total of $450.00. There was also a claim for recovery of possession, the tenancy having been terminated by notice to quit. By his rival action, the respondent claimed damages from the appellant, who, he pleaded, had obstructed a survey and, for trespass. The learned Resident Magistrate dismissed the appellant's plaints and gave judgment for the respondent on his plaint. The appeal is taken by the plaintiff against those judgments.

At the trial, the respondent's defence as stated by his counsel, was a denial that he owed any rental, or mesne profits. The defence to the rival plaint by the respondent was a denial of the trespass held to be an impermissible defence in Wallace & Others v. Whyte [1961] 3 W.I.R. 521 or that he had obstructed any survey of any land he had agreed to sell the respondent.

Shortly stated, the facts were these. The respondent was a tenant of the appellant at a monthly tenancy of thirty dollars from September 1980. In 1983, there was an agreement for sale of land. According to the appellant, that land measuring a square, was a lot not being that covered by the tenancy. According to the respondent, the agreement related to the land he occupied as tenant. According to the appellant, the sale price was $3,500.00. According to the respondent, the original sale price was $2,500.00 but some months later, the appellant asked that the price be increased to $3,500.00. He made arrangements in 1985 to survey the land he bought but the appellant aborted it. He had also improved the house he had rented, expending some $2,000.00 on it. As to the rent, he said it was agreed that upon the sale, no further rent would be paid.

The learned Resident Magistrate made three findings which in my view, were fatal to the appellant's claims. She found as follows:

> "1. Plaintiff did not prove that a landlord/tenant relationship existed between himself and the defendant.
>
> 2. Plaintiff failed to show that agreement for sale of land was for land other than that occupied by defendant with house thereon. Receipts tendered as exhibits failed to clarify what parcel of land had been the subject of the agreement.

"3. Court decided on a balance of probabilities that the tenancy agreement ceased when the land with house thereon became the subject of an agreement for sale. This decision was based on the following:

(i) No supporting witness was called by the plaintiff or the defendant. It was a question of fact as to who the Court believed and the Court found that the defendant was a credible witness.

(ii) Defendant ceased paying rent after agreement was initiated between himself and the plaintiff.

(iii) Defendant sought to have land surveyed after he had paid most of the purchase price.

(iv) No attempt was made by Plaintiff to place defendant in possession of any other land other than that occupied by defendant.

(v) Purchase monies were never returned to defendant himself. Only evidence of money returned was a $500.00 cheque, which was returned to defendant's Attorney after a demand was made for plaintiff to complete agreement."

Mr. Scharschmidt contended that the Resident Magistrate misdirected herself as to the real issues and as to the burden of proof regarding the sale agreement. He complained that her findings were not warranted on the facts and that in determining credibility, she had not considered the issue of liability on the totality of the case.

There was no question but that on the evidence adduced, a relationship of landlord and tenant did exist between the parties, and also that there was an agreement for sale. A live

issue then was whether the tenancy agreement and the agreement for sale related to the same land in respect of which the respondent was a tenant. When therefore the learned Resident Magistrate found in (1) of her reasons that the plaintiff did not prove that a landlord/tenant relationship existed, she was holding that the appellant's claims in both plaints failed because the tenancy agreement had come to an end and a relationship of vendor and purchaser and replaced it. The onus on the appellant was to show the existence of a tenancy agreement at and during the material periods if he were to succeed on his claims. Evidence was given by both parties as regards this issue. The Resident Magistrate on that issue, plainly decided against the appellant. She stated her reasons in language which Mr. Scharschmidt maintains, demonstrates that her decision was based on placing the burden of proof on the wrong party.

In deciding between the rival versions, where or on whom the burden of proof lay, was not a factor. The ascertaining on whom the burden of proof lies in any given case is important when considering really, who will lose an issue unless he satisfied the tribunal of fact to the appropriate degree of conviction. The burden in that sense, was clearly on the appellant to show that the respondent was a tenant on the land i.e. not that covered by the sale agreement. That onus, the Resident Magistrate, held, had not been discharged.

The plaints having been consolidated, created a situation of shifting burdens, meaning, the evidential burden. When the respondent adduced evidence raising as a live issue, the determination of the subject matter of the tenancy, an evidential burden shifted to the appellant to show that the subject matter of the tenancy and the subject matter of the agreement were not one and the same. That is no different

from saying he had to show that there was a tenancy agreement in relation to the land in question during the relevant time frame. There was some argument by Mr. Scharschmidt that the respondent's defence amounted to a confession and avoidance which shifted the onus to the respondent to show that the sale agreement applied to the square of land which the appellant said he had sold to the respondent. I cannot agree. It was as the respondent's attorney stated at trial; the defence was nothing more than a traverse of the claim. There never was any admission that the respondent during the material time was a tenant of the appellant. By his evidence, which the Resident Magistrate accepted, he showed the relationship was that of vendor and purchaser. The Resident Magistrate's findings at (2) mean no more than this: the appellant did not show that the respondent was a tenant of the land on which the house stood. The effect of that failure was a finding that the piece of land on which the house stood, was the subject matter of the sale.

Mr. Scharschmidt's submission as to credibility amounted to this, that the respondent whether through his attorney or himself supplied varying versions of the purchase price and the size of the land which the respondent alleged he had bought. Although this evidence concerned a collateral matter, he said, it rendered the respondent an unreliable witness on the main issue.

In my view, the Resident Magistrate in determining whom she would believe, considered the probabilities on the evidence adduced before her. She set out the circumstantial factors which led to her determination that the tenancy ceased when the land and house became the subject of the agreement for sale. These have already been set out, but I repeat the four factors on which she relied.

"(i) .....

(ii) Defendant ceased paying rent after agreement was initiated between himself and the plaintiff.

(iii) Defendant sought to have land surveyed after he had paid most of the purchase price.

(iv) No attempt was made by Plaintiff to place defendant in possession of any other land other than that occupied by defendant.

(v) Purchase monies were never returned to defendant himself. Only evidence of money returned was a $500.00 cheque, which was returned to defendant's Attorney after a demand was made for plaintiff to complete agreement."

Learned counsel while arguing that findings (iv) and (v) were not warranted on the evidence, did not in any way challenge the other two findings which plainly, supported her determination. As to finding (iv), the argument was that there was no evidence to warrant that finding. It was said that there was no obligation based on principle of conveyancing for the appellant to place the respondent in possession of the land sold.

The Resident Magistrate in considering the probabilities, as she was bound to do, took account of the persons she saw before her. The parties were laymen involved in a sale of land agreement which had not been reduced into writing nor had they the benefit of legal advice. It should be pointed out that there was never any demand for rent over the entire period of nearly three years during which the rent was claimed to be due. Indeed it was true to say that the examination-in-chief of the appellant was directed at showing that there was a sale agreement relating to some other piece and very little, if anything was really said about rental owing. The learned

Resident Magistrate, it should be remembered, was calling attention to the circumstantial factors which led her to conclude that the tenancy agreement ceased when the sale agreement replaced it. She was not therefore concerned with any question of which party was obliged to prove the terms of the sale agreement. It is true she used the word "placed" in paragraph (iv). But in the context of her reasons, she could only be dealing with a discussion regarding possession. Possession of the land bought, was a very relevant factor. If the respondent was not in possession, then some discussion must have taken place in that regard. It was indeed the fact that the appellant never mentioned any discussion on the matter and in the context of the case, must have provoked some such discussion. The absence of a discussion she thought, was significant. In my view it was a relevant consideration and the absence of any discussion, significant.

With respect to paragraph (v), it was a fact that the purchase moneys were never returned to the respondent. She was in error as to the return of the $500.00 cheque to the Respondent: it was retained by the appellant's attorney. However that may be, that error cannot in my view, assist, because it remains the fact, that the appellant's attorney still has his hands on the entirety of the respondent's payment towards the purchase price. The significance of this fact was that it undermined the appellant's claim that the sale agreement was no longer in force.

I am satisfied that the Resident Magistrate having seen and heard the parties considered the real dispute between the parties and in an eminently commonsense way, came to the correct conclusion. The matters with which she dealt in her reasons, were those raised by the attorneys before her: she was neither on a frolic nor concerned with niceties of conveyancing practice. It was for these reasons I agreed that the appeal should be dismissed with costs fixed at $500.00.