

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL No. 53/72

B E F O R E : The Hon. Mr. Justice Fox - Presiding  
The Hon. Mr. Justice Graham-Perkins - J. A.  
The Hon. Mr. Justice Robinson - J. A. (19.)

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Renatus Rattary - Plaintiff/respondent

v.

Wesley Hendricks - Defendant/appellant

Mr. Lloyd Williams for Defendant/appellant  
No appearance by Plaintiff/respondent

11th May, 1973

FOX, P.

This is another case concerning family land. Walter Hendricks and his wife Edith were the owners of about three acres of land at lower Christiana in Manchester. It contained the family house. There were children. As is not uncommon in Jamaica, as the years went by, particular and identifiable pieces of the family land came under possessory jurisdiction of the children. David Hendricks was one such child. He occupied a piece of the family land to the south of the dwelling house, half an acre in size on which he built a house. The family land was criss-crossed with tracks made by members of the family and perhaps also by persons without authority. David Hendricks reached to the parochial road north of his holding and north of the family house by way of a track. In September 1959, David Hendricks and his wife sold their piece of land to the appellant. The receipt for the purchase money was tendered in evidence as Exhibit 2. It shows the boundaries of the land. On the north, west and south, the half acre purchased by the appellant from David Hendricks was surrounded by Hendricks' family land; that on the west and on the south being in the possession of one Hubert Hendricks and that on the north being in the possession of Edith Hendricks, the mother of the Hendricks' family. To the east the land was bounded by land owned by Orvel Smith. She was also, apparently, a Hendricks.

.../2

When the appellant purchased from David Hendricks in September 1959, he was shown the road leading across the family land to the parochial road as the way to and from the house. Some time subsequent to 1959 the appellant purchased Orvel Smith's piece of land to the east of the piece he bought from David Hendricks. This purchase from Orvel Smith brought the appellant's land up to a reserve road on the east.

In 1968 the appellant's land was surveyed. The resulting plan was received in evidence, as Exhibit 3. It shows the reserve road on the east, the land of the estate Walter and Edith Hendricks on the north and on the west and on the south another reserve road which, however, does not join up with the reserve road on the east, as the land of one Violet Foster comes up to that corner into a point to separate the roads from each other. It is not known from the evidence when this reserve road to the south came into existence. Never-the-less it is not relevant to the issues in this case. The clear position is that when the appellant bought from David Hendricks, the only path which he could lawfully use was a way across the family land to the north-west of the plot he bought. The plan exhibit 3 shows the commencement of this way.

In August 1970, Doris Gayle (nee Hendricks), sold to the respondent the family land to the north and west of the piece bought by the appellant from David Hendricks. In August 1971 the respondent fenced the land he had purchased from Doris Gayle. In the course of doing this, he blocked up the way which had been used by the appellant ever since his purchase from David Hendricks in 1959. The appellant objected to this obstruction and cut the fence. The respondent successfully sued him for trespass. Hence this appeal.

The learned Resident Magistrate in her reasons for judgment said that the land bought by the respondent was not "a servient tenement to the land sold by David Hendricks the defendant", neither was there "any right of way over plaintiff's land". This finding is altogether contrary to the evidence. There is no evidence as to precisely when David Hendricks acquired the piece of land he sold to the appellant, but it is quite clear that when he so acquired it, he

.../3

was surrounded on all sides by remaining portions of the family land, and a way of necessity then arose as a matter of law over the land retained by his parents the owners of the land completely surrounding his land. On the acquisition of the land by the appellant from David, there would have passed to the appellant as an essential incident of his purchase the way previously enjoyed by David. It is clear from her reasons for judgment that this aspect of the matter escaped the attention of the learned Resident Magistrate.

The appeal must, therefore, be allowed. The judgment of the Resident Magistrate is set aside. Judgment is entered for the defendant/appellant with costs in the court below. The appellant is to have the cost of the appeal fixed at \$40.00.

GRAHAM-PERKINS, J?

I agree and have nothing to add.

ROBINSON, J. (Ag.)

I also agree.