IN THE COURT OF APPEAL

R. M. CIVIL APPEAL NO. 5/68

Before: The Hon. Mr. Justice Shelley, Presiding
The Hon. Mr. Justice Luckhoo
The Hon. Mr. Justice Smith

ERNEST WHITELOCKE vs. MARGARET CAMPBELL

Dr. Lloyd Barnett and Mr. W. C. Waters-McCalla for the Appellant

Mr. R. N. A. Henriques for the Respondent

21st April, 1970 & 12th June, 1970

SMITH, J.A.:

This is an appeal from an order and judgment of the learned Resident Magistrate for Westmoreland in an action in which the appellant Whitelocke was the defendant and the respondent Campbell the plaintiff. The plaintiff sued as administratrix of the estate of Ulick Edward Campbell and, in that capacity, as owner of lands in Westmoreland which adjoin lands owned by the defendant. In her particulars of claim she asked the Court to decide the correct boundary line between hers and the defendant's lands. On 26th September, 1966, with the consent of the parties and their respective solicitors, the "action" was referred by the Resident Magistrate to Mr. B. M. Alexander, a commissioned land surveyor. A formal order of reference was drawn up and signed by the Resident Magistrate, the parties' solicitors signifying their consent to its terms by their signatures. The surveyor was required "to make a survey of the plaintiff's land known as 'Delve' and the defendant's land known as 'Moreland', both in the parish of Westmoreland in order to ascertain ir (sic) the boundary between the plaintiff's and defendant's land as shown: (a) on a diagram exhibited in Plaint No. 605/1950 prepared by the said B. M. Alexander and duly confirmed in the said action; (b) the remainder of the boundary line as shown by a diagram of the said Moreland made by George Cunningham and J. Manderson and dated 9th August, 1897." He was required, further, to make a plan

or diagram of the boundary lines as claimed by the plaintiff and the defendant respectively "as well as the true boundary line". In due course, the surveyor, Mr. Alexander, submitted a written report to the Court accompanied by a diagram on which was shown the respective lines claimed by the plaintiff and the defendant and the true line as found by him. The report was in the plaintiff's favour.

On 11th September, 1967, the surveyor's report came up for confirmation before the same Resident Magistrate. The plaintiff's solicitor's motion that the report be confirmed as filed was opposed by the defendant's solicitor, who was not the solicitor who acted for him when the matter was referred to the surveyor. The record shows that the confirmation of the surveyor's report was opposed on two grounds, viz:-

(1) that the survey showing the boundaries is wrong, and

(2) that the defendant is in a position "to adduce evidence to show that not boundary dispute but title involved".

The learned Resident Magistrate heard arguments on the opposition and then adjourned further consideration of the matter on the application of the defendant's solicitor to enable the defendant to call a surveyor to give evidence. On 30th October, 1967, a commissioned land surveyor, Mr. Lester Edwards, gave evidence on behalf of the defendant. The defendant and Mr. Alexander (whose report was under consideration) also gave evidence. The report was, however, confirmed by the learned Resident Magistrate and as a consequence, judgment was entered for the plaintiff with costs. It is from the order confirming the report, and the judgment, that the defendant now appeals.

The first of two grounds of appeal argued was that the learned Resident Magistrate erred in finding that because the appellant agreed that the matter be referred to a surveyor he thereby pretermitted his right to lead evidence as to title. Before the learned Resident Magistrate it was contended that the matter should not have been referred to a surveyor but that evidence ought to have been taken to say whether a question of title was involved. Reliance

was placed on McNish v. Murry, Adrian Clark's Reports 161. It is clear from the record that the question of title was being raised for the first time when it was mentioned in opposition to the confirmation of the surveyor's report. The terms of the formal order of reference and the conduct of the parties up to the time of the survey by Mr. Alexander left no room for doubt that it was common ground that the sole question to be determined was, simply: what is the true boundary line between the lands of the plaintiff and defendant, according to the two diagrams referred to in the order of reference? It is to be observed that the 1897 diagram was in the possession of the defendant and the other formed part of the record of the Court in an action in which the defendant was a party and the plaintiff was not.

The action was brought by virtue of the provisions of section 97 of the Judicature (Resident Magistrates) Law, Cap. 179, which are as follows:

> "97. - (1) Whenever a dispute shall arise between the "occupiers of adjoining lands or hereditaments respecting "the boundary line between the same, either of the parties "may lodge a plaint in the Court, and thereupon a summons "shall issue to the other party; and if the defendant shall "not, on a day to be named in such summons, show cause to "the contrary, then on proof of the respective occupation "of the plaintiff and defendant, and of the dispute,..... "the Magistrate may hear and determine the matter in "dispute."
>
> " (2) The jurisdiction of the Magistrate shall not "be ousted by reason of the fact that either party shall "at the hearing raise a question of title to the land "involved in the dispute and in the case of title to the "lands being involved the Magistrate shall take all the "evidence offered; and shall have power if he thinks "desirable and without the consent of the parties to "refer the matter to a surveyor or surveyors to make such "survey or surveys and lay down such boundary line as the "evidence and the law shall justify and in his final "judgment shall lay down and determine the boundary in "settlement of such dispute."

Sections 98 and 99 make provisions similar to section 97 (1) for resolving disputes relative to rights or easements affecting land. Then section 101 provides as follows :-

> " In any suit under sections 97, 98 and 99, or in any other suit where it may be desirable for the purpose of determining the matter in issue, the Magistrate, if he thinks it expedient so to do, may make an order that the matter in controversy shall be referred to a commissioned surveyor, or, with the consent of both parties, to some

> "other fit person or persons whom he shall nominate;
> "and the person or persons so appointed shall, under
> "the control and direction of the Court, make a survey
> "of the lands in question, so far as the same may be
> "necessary to ascertain and settle the boundary line
> "between the said lands, or the right of way or other
> "easement in dispute, or such other matter at issue as
> "aforesaid, and shall ascertain and settle the said
> "boundary line or right of way, or other easement or
> "matter as aforesaid, and shall, if necessary, make a
> "plan or diagram of the said lands, indicating the boundary
> "line, or the right of way, or other easement or matter
> "as aforesaid, and shall make a report thereof to the
> "Court, and shall file the report in Court; and the Court
> "shall, on a day to be appointed for that purpose, take
> "the said report into consideration; and it shall be
> "competent for either of the parties to take exceptions to
> "the said report, and the Court shall hear argument upon
> "such exceptions, and shall allow or disallow such
> "exceptions, or confirm the report, as the justice of the
> "case may appear to require:
>
> " Provided that the Court may refer back the report to
> "the persons who made it, or to any other surveyor or
> "person nominated as aforesaid, for a further report, with
> "such instructions as the Court may think fit to give,
> "and on the making of such further report the Court may
> "proceed as it might have proceeded on the first report."

In his reasons for judgment the learned Resident Magistrate stated that it was in exercise of his powers under section 101 that the reference to the surveyor was made.

In his argument of the defendant's appeal, counsel also relied on McNish v. Murray (supra) and submitted that once a dispute as to title is raised the party raising it is entitled to have it ventilated whether an order of reference has been made or not. In McNish v. Murry (supra) proceedings were taken under section 100 of Law 28 of 1904 (now section 97 (1) of Cap. 179). Evidence was heard in order to determine whether the dispute was one of boundary or title. The Resident Magistrate came to the conclusion that the facts of the case disclosed a boundary dispute only and ordered that the matter be referred to a commissioned surveyor under section 104 of Law 28 of 1904 (now section 101 of Cap. 179) to ascertain and settle the boundary line. On appeal against the order of reference, it was held that on the facts of the case the matter in controversy was not one of boundary merely and that the procedure under section 100 could not, therefore, be adopted. The appeal was allowed, the order of reference set aside and the plaint dismissed. In the judgments, the case of Holmes v. Ricketts (20th December,1879) was referred to

and followed. DeFreitas, J. (at p. 163) quoted the following passage from the judgment of Lucie-Smith, C.J. in Holmes v. Ricketts:

> "The first question to be determined was, whether the "matter in controversy was one merely of boundary. It is "only where this is the sole question between the parties "that according to my apprehension the District Court is "authorised to call in a Commissioned Surveyor to ascertain "and settle the boundary line and in this way to decide "summarily the dispute. In this case I understand the "evidence to have been tendered in order to establish that "the matter in controversy was not really a question of "boundary, but that the defendant had acquired by long "adverse possession a title to the land in dispute what-"ever may have been the original boundary line between "the two pens. He had a right to give this in evidence "in the first instance and to show if he could that the "matter was not one to be determined in this special "form of proceeding but should be the subject of an "ordinary action of ejectment."

The result of the decisions in the cases cited above was that once a question of title was genuinely raised in an action brought under section 100 of Law 28 of 1904, the Resident Magistrate had no jurisdiction to determine the matter under that section and could not, therefore, refer the matter under section 104 of that law to a commissioned surveyor. As DeFreitas, J. said in McNish v. Murray (supra), at p. 163:

> "The decision in Holmes v. Ricketts is that the "jurisdiction arises only when the sole question "is a boundary dispute and that it does not arise "when one of the parties raises a question of title "by possession."

Subsequent to the decision in McNish v. Murray (supra) in 1924 (and no doubt as a result of the decision in that and earlier cases) the law was amended and the provisions which now appear as sub-section (2) of section 97 of Cap. 179 were added as sub-section (2) to the provisions contained in section 100 of Law 28 of 1904 (see Law 39 of 1927, section 102). It will be seen that in the new sub-section separate provisions were made for reference to a surveyor or surveyors. So that, as the law now stands, when in an action brought under sub-section (1) of section 97, the question of title is raised and it is deemed desirable to refer the matter to a surveyor, the authority for making the reference is sub-seetion (2) of that section and not section 101. A comparison of sub-section (2) with section 101 reveals that the provisions

differ in procedure and in purpose. Sub-section (2) expressly requires the Resident Magistrate to "take all the evidence offered" where a question of title is raised and goes on to give him power to refer the matter to a surveyor or surveyors if he thinks it desirable "to make such survey or surveys and lay down such boundary line as the evidence and the law shall justify." The Resident Magistrate is then required in his final judgment to lay down and determine the boundary line in settlement of the dispute.

Here, in my view, the purpose of the reference is merely to assist the Resident Magistrate in resolving the dispute between the parties. The duty is his to decide the matter on the evidence he has taken and applying such law as is relevant. Then, if necessary, and, clearly, to enable him to lay down and determine the boundary line with precision in his final judgment, he refers the matter to a surveyor or surveyors to lay down the boundary line in accordance with his findings on the evidence and on the law. Compare these provisions with those of section 101, which, as has been stated, may be resorted to only where the sole question is one merely of boundary. Here it is "the matter in controversy" that is referred to a surveyor.

The surveyor appointed is required to make a survey of the lands in question and to ascertain and settle the boundary line between the lands; if necessary, he is to make a plan or diagram of the lands indicating the boundary line found and settled by him. He must make a report to the Court and file the same in Court. Now observe the procedure that follows. The Court is required to appoint a day for the purpose of considering the report. On that day either of the parties may take exceptions to the report. The Court is required to hear argument upon the exceptions and "shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require." Here there is no provision made for the hearing of evidence. Even in relation to the exceptions taken, what the Court is required to hear is arguments, not evidence. There is power in the proviso to refer the report back to the surveyor who made it or to any other surveyor for a further report, when the procedure to be followed is the same as on the first report.

In my opinion, it is clear beyond question that the purpose of a reference under section 101 is to settle the dispute between the parties. The decision is the surveyor's. The confirmation of the report fixes the boundary lines as ascertained and settled by him. As Lucie-Smith, C.J. said in the passage in Holmes v. Ricketts quoted above, this is a summary way of deciding the dispute. It seems to be the sensible and only way of deciding such disputes where the only question is the true boundary line and there are plans and/or diagrams from which this can be ascertained.

In the case under consideration, the question of title was not raised by the defendant when the action came on for hearing in September, 1966. That was the proper time to raise it if he had a genuine claim. I have no doubt at all after reading the record that at that stage the defendant was not making any such claim. This, clearly, was put forward when it was, in order to have the surveyor's report rejected because it had gone against the defendant. The seed which germinated this idea of title is, in my view, to be found in the evidence of the defendant's surveyor, Mr. Edwards, who apparently being unable himself to discover the true boundary line, said in evidence that if a surveyor is unable to find the line between persons on documents he (the surveyor) determines boundaries according to length of possession.

I agree with the learned Resident Magistrate that having consented to the reference, the defendant could not, at the late stage at which he did so, raise the issue of title. Both the defendant and the solicitor then acting for him consented to the dispute being referred for determination under the provisions of section 101. In my judgment, in doing so they did not only admit that the sole matter in issue was the question of what was the correct boundary line according to the plan and diagram referred to in the order of reference but impliedly undertook to be bound by the findings of the surveyor, subject to any exceptions to the report as may properly be raised. I hold that in a case which is properly referred under section 101 it is not competent for either party to raise the

question of title as an exception to the surveyor's report. In my opinion, the learned Resident Magistrate was right in disallowing the exception based on the statement that the defendant was able to adduce evidence to show that a dispute as to title was involved.

The other ground of appeal argued was that the learned Resident Magistrate erred in refusing the appellant's advocate the right to cross-examine the witness Alexander, he having been called to testify by the Court. On 30th October,1967, after the defendant's surveyor, Mr. Edwards, had given evidence in support of the defendant's contention that Mr. Alexander's survey was wrong, the defendant was called to give evidence. His evidence was to the effect that Mr. Alexander had told him some three years before that it appeared that the boundary line fixed by him (Alexander) and appearing on the diagram exhibited in Plaint No. 605 of 1950 (one of the diagrams used to fix the boundary line in this case) was wrong. In cross-examination he said that he accepted the boundary as laid down on land (in the 1950 action) as correct. In the addresses which followed the evidence of these two witnesses, the solicitor for the defendant made the comment that he would have thought that Mr. Alexander would be put in the witness box. Mr. Alexander was apparently then sitting in Court and when the defendant's solicitor had concluded his address, the learned Resident Magistrate directed that Mr. Alexander be sworn to give evidence and examined him. Mr. Alexander's evidence was that he had carried out a survey in accordance with the order of reference dated 8th November, 1966; that he had heard the evidence given by Mr. Edwards that point A2 on his diagram had been transported 250 feet west; that he could hardly make any comment because the material at his (Mr. Edwards') disposal was inadequate; that the spring was vital to the survey and all boundary marks are still on the land. Then Mr. Alexander appears to have volunteered this statement: "I would like to say that I never told Mr. Whitelocke (the defendant) about any plan being wrong." This concluded his evidence. The defendant's solicitor then asked leave to question the witness and the application was refused.

It is this refusal about which complaint was made before us.

I do not think it was right to call Mr. Alexander as a witness. Section 101 of Cap. 179 does not, in my view, contemplate the calling of a surveyor, or other person nominated, to give evidence in order to justify his report. However, there was power in the Court to call him because if the parties do not object, the Court may call a witness in a civil case. The Court having called him, he could not be cross-examined without leave. Leave should, however, have been granted if the evidence given was adverse to the defendant or material to the decision the Court had to make. (See Coulson v. Disborough, (1894) 2 Q.B. 316 at p. 318). So the question to be decided here is the effect of Mr. Alexander's evidence. It is to be observed that he said nothing at all in support of his report. He was asked to comment on Mr. Edwards' evidence criticising his survey and findings and he said he could not comment as the material at Mr. Edwards' disposal was inadequate. The following is an extract from Mr. Edwards' evidence under examination by defendant's solicitor:

> "Question: Are you able to correlate lines shown on Exh. 1 to 2 as being true boundaries?
>
> "Answer: I would have to plot this out to see if they correlated.
>
> Plans have no notes to guide me so I would not be able to plot. If I had Alexander's notes, I think I could plot. For any surveyor to look at this plan and guide Court, would be guesswork."

(Exhibits 1 and 2 were the diagrams prepared by Mr. Alexander in this action and that prepared by him in 1951 in the 1950-action, respectively). At the end of his cross-examination, Mr. Edwards said: "Without field notes, I am unable to say whether survey done by Alexander is wrong." So, in saying that the material at Mr. Edwards' disposal was inadequate, Mr. Alexander was saying nothing that Mr. Edwards himself had not said. The bare statements that "the spring is vital to the survey" and "all the boundary marks are still there" can hardly be said to be either adverse to the defendant or material.

It is said that Mr. Alexander's denial of what the defendant said Mr. Alexander had told him about the 1951 plan being wrong was

adverse to the defendant. This is probably true. But this aspect of the evidence was not really material to anything which the learned Resident Magistrate had to decide. Apart from the fact that there was no reference to it in the Resident Magistrate's reasons for judgment, the defendant said, as indicated above, that he accepted the boundary laid down on the land as correct. And he could hardly say otherwise as his surveyor, Mr. Edwards, (who was present in 1951 when the survey in the 1950-action between the defendant and one Clarke was carried out) said in evidence that he had seen a wire fence along the line laid down dividing Clarke's and Whitelocke's land and that the line as laid down was that claimed by Whitelocke. There is nothing in Mr. Edwards' evidence, that I can find to suggest that the 1951-plan was wrong. Indeed he said he used the line laid down in the 1951-plan as the basis for his protraction. So the accuracy of this plan was evidently not in dispute.

It was contended in the argument on this ground of appeal that the defendant's solicitor should have been permitted to cross-examine Mr. Alexander not only on the evidence he had given but on his report as well since the report was against the defendant. This, no doubt, was the real reason for the application to cross-examine, especially as the evidence of Mr. Edwards seemed unlikely to convince the Court that Mr. Alexander's boundary line was wrong. On the view I have already expressed, it would have been wrong to allow Mr. Alexander to be cross-examined on his report. There was nothing said in his evidence which materially affected the contention the defendant was putting forward. Leave to cross-examine him was, therefore, in my opinion, rightly refused.

I would dismiss the appeal.

LUCKHOO, J.A.:

For the reasons I have set out in the judgment which I will not read, I also would dismiss the appeal with costs to the respondent.

SHELLEY, J.A.:

I agree with the decision reached by my learned brethren. This appeal is therefore dismissed with cost to the respondent fixed at thirty dollars.