NMLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 5/99

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH, J.A. (Ag.)

BETWEEN: **ANDREW WRIGHT** **APPELLANT**

AND **ERIC MIGHTEN**
(by his lawful attorney Muriel Shaw) **RESPONDENT**

Dorrell Wilcott for appellant

Raphael Codlin and Co. for respondent

March 20 and 21 2001 and July 31, 2002

HARRISON, J.A:

This is an appeal from the judgment of Mrs Norma McIntosh, Resident Magistrate for the parish of Clarendon, (as she then was) on July 8, 1997, ordering that the defendant/appellant Andrew Wright give up possession of premises at Cornpiece, Hayes, in the parish of Clarendon, to the respondent, on or before September 30, 1997. On the conclusion of the arguments of counsel on March 21 2001, we dismissed the appeal with costs of $2,000.00 to the respondent. These are our reasons in writing.

The facts are that one Eric Mighten was the owner of the said property at Cornpiece, Hayes, in the parish of Clarendon, where he lived and continued to live when his common-law wife, the mother of Muriel Shaw, died in 1978. Muriel Shaw, the daughter of Eric Mighten and her brother were born on and grew up on the said land. Muriel Shaw got married and ceased residing there in 1965. The appellant came and resided on the property with Eric Mighten from 1981. The learned Resident Magistrate found that:

> "... the plaintiff (Mighten) brought the defendant (Andrew Wright) to his premises as a hired hand in about 1981, when the defendant was in his teenage years. His duties were to run errands and to tend the plaintiff's cows and he was paid for his services. At one point, on his own admission, he left and went to live with his sister, Dotlyn Wright, 'because the work was so hard that I ran away'."

There was ample evidence on which the learned Resident Magistrate could justifiably base such findings.

The appellant left the premises in 1991 but returned in 1992. He then resided there occupying a room to the back of the premises, as a tenant, with his girlfriend, one Angella.

Eric Mighten, who was accustomed to have breakfast at his daughter Muriel Shaw's house, became ill there on one such morning in October 1994. As a consequence he remained at his daughter's house until October 1995. During the period of one year, from October 1994 to

October 1995, the appellant expanded his occupation from one room to the entirety of the premises.

In October 1995, the respondent Mighten returned to his house accompanied by Muriel Shaw and his son and two police officers. The appellant refused to allow the respondent to occupy his house. The respondent on his second attempt in October 1995 to occupy his house, forcibly hit off the lock barring him entry and re-entered with the police officers and his daughter Shaw and his son. The appellant forced them out of the house.

The appellant had been served on March 24 1995, with a notice dated the said date to deliver up possession of the premises,

> "... on or about 26th day of May 1995 ... which you presently hold as a tenant."

Previously, in 1994, the appellant had been served with notice to quit the said premises. He had been given two months' notice by the respondent, having complained that one month's notice was too short a period for him to find other accommodation.

Having failed to vacate the said premises, in keeping with the notice dated May 24 1995, a plaint was filed on February 13 1996, in the Resident Magistrate's Court, (No.181/96), by the respondent Eric Mighten, through his attorney Muriel Shaw for recovery of possession of the said

premises. Muriel Shaw was appointed by means of a power of attorney executed on September 19 1995.

The appellant filed a statutory defence resisting this suit and claiming his entitlement to the premises, on the bases, variously, of a gift, adverse possession, section 25 & 30 of the Limitation Act and the principle of part performance.

This trial commenced on November 7 1996, was part heard and adjourned to November 18 1996. The hearing resumed on July 8 1997, on which date evidence was given of the execution of the power of attorney, exhibit 21, by the attorney-at-law, Mrs Nicola Scott-Bonnick thereby concluding the case for the plaintiff\respondent. Exhibit 2 was objected to by the attorney-at-law for the appellant on July 8 1997, when it was sought to be tendered.

The respondent Eric Mighten died on February 2 1997. Judgment was given by the learned Resident Magistrate in favour of the respondent on July 8 1997. Mr. Wilcott for the appellant argued before us the grounds following:

> **"(1)** That the learned trial judge erred in law in finding that the NOTICE TO QUIT (Exhibit 1) was a proper notice as required by section 85 of the Judicature (Resident Magistrate's) Act as the NOTICE (a) failed to specify on whose behalf it was given in that it did not name the "Landlord". and (b) failed to specify or describe the premises for which it was given, in the body of the NOTICE; as such the said NOTICE was uncertain and invalid.

(2) That the learned trial judge's findings were inconsistent and incorrect in law as she finds on one hand that the NOTICE TO QUIT is proper (and it refers to "the premises" and not portion) and on the other hand finds that the plaintiff/respondent is entitled to possession under section 89 of the Judicature (Resident Magistrate's) Act which deals with an action by an owner against a person in possession without title or right of possession.

(3) That the learned trial judge erred in law and purported to make a finding of fact on an issue not before her in the action, in that she states that the defendant/appellant is not the plaintiff/respondent's son and erred in basing her finding that he was not entitled to an interest by virtue of a gift on this finding.

(4) That the learned trial judge erred in law in finding that the donee of the Power of Attorney was entitled to continue prosecuting the action as the authority of an agent/attorney is terminated by the principal's death.

(5) That the learned trial judge erred in law in interpretation of the written deed entitled "Power of Attorney" in finding that there was no revocation as there was no evidence that "notice in writing" was "actually received by" the donee as revocation was stated therein to occur on "notice of my death" and the attorney as the daughter of the plaintiff/respondent Eric Mighten, and at whose house he was residing at the time of his death, must be fixed with "notice" of his death and thereby revocation of the powers and authorities given to her under the power of attorney.

(6) That the learned trial judge erred in law in finding that the plaintiff/respondent's attorney Muriel Shaw was entitled to proceed with the trial

> as her authority had ceased with the revocation of her powers under the power of attorney and as she was not the sole executor named nor sole beneficiary under Eric Mighten's will and the action should have been adjourned to allow the plaintiff/respondent to be substituted by someone or others clothed with the proper lawful authority to continue or recommence the action."

A notice to quit premises occupied by a tenant is valid as long as it contains the basic essentials, namely, (1) states the correct date of termination, (2) is unconditional and (3) relates to the entirety of the premises occupied by the tenant. The said notice reads:

> "NOTICE TO QUIT
>
> Mr. Andrew Wright
> Cornpiece District
> Hayes
> Clarendon
>
> The undersigned Scott, Bhoorasingh & Bonnick of 55 Main Street, May Pen, in the parish of Clarendon, Attorneys-at-law for and on behalf of the landlord HEREBY GIVE NOTICE TO QUIT AND DELIVER up possession of the premises which you occupy on or about 26th day of May 1995, and which you presently hold as a tenant and that before giving up such possession thereof you pay all bills (light, water and rent) and correct any damage that might have been done to the premises since your occupancy as at the delivering of possession thereof.
>
> Reason being;
> 1. that the landlord desires the property for own use.
>
> AND FURTHER TAKE NOTICE THAT if you do not comply with the aforesaid mentioned

> provisions an action will be commenced against you according to law.
>
> Dated the 24th day of March 1995
> Yours truly,
> Nicola Scott-Bonnick
>
> Served by: Granville Frazer
> Private Investigator Office
> at Hayes on the 24th day of March 1995
>
> Time: 5:30 p.m."

This notice was read to the appellant at his request by the witness Granville Frazer, at the time of service. The appellant could not have been misled as to the premises referred to, nor of his landlord because of the reference in the notice to "... the premises which you occupy ... and which you presently hold as a tenant."

In response to the suit against him, the appellant's statutory defence at the trial, in challenging the contention of the respondent, expressed no uncertainty as to the identification of the said land nor of the "real owner". Instead, he was claiming the said premises in his own right, based on his having extinguished the rights of the real owner. As to the test to determine the validity of a notice to quit, Goulding J. in ***Carradine Properties*** *v* ***Aslam*** [1976] 1 WLR 442, said:

> "I would put the test generally applicable as being this: 'Is the notice quite clear to a reasonable tenant reading it? Is it plain that he cannot be misled by it?'."

The learned Resident Magistrate said:

> "I find that the notice to quit served on the defendant was a proper notice as required by section 85 of the Judicature (Resident Magistrate's) Act since there was in existence a relationship of landlord and tenant between the parties with regard to one room of the premises. In relation to the remainder of the premises, however no notice was really required as the plaintiff's entitlement to possession is in accordance with the provisions of section 89 of the said Act. In both instances the defendant had refused to deliver possession to the plaintiff, even pushing him out of the house on one occasion and the plaintiff was therefore entitled to take action to recover possession."

The said statutory defence of the appellant did not confine itself to defending the claim by the respondent to recover possession of "... accommodation rented ... at Cornpiece, Hayes ...," that is, the single room rented and occupied, but extended his alleged claim of right to the entire premises, relying on the provisions of the Limitation of Actions Act.

The learned Resident Magistrate was quite correct to state her findings, as she did, to demonstrate that, the appellant as a tenant of the single room, received a valid notice as required by section 85 of the Judicature (Resident Magistrate's) Act and that as to the remainder of the said premises, he was a mere trespasser as contemplated by section 89 of the said Act. Ground 1 and 2 are therefore without merit.

The unchallenged evidence before the learned Resident Magistrate was that from the first occasion when the appellant came to the premises in 1981, the respondent Eric Mighten was in occupation until

he became ill in 1994 when he went to his daughter's home. The appellant was therefore never in occupation to the exclusion of the respondent except for one year, that is, October 1994 to October 1995. His occupation was, even then restricted to the single room he occupied. In the case of **Harris v Johnson et al** (1971) 17 WIR 84, the defendants claimed that the title of the plaintiff to a cottage was extinguished by the adverse possession of their predecessor in title, X, who had been employed as a cattleman and coachman to the predecessor in title of the plaintiff, Y. The predecessor in title of the plaintiff, Y, had given X permission to reside in a cottage on the property while he performed his employment as coachman and cattleman. It was held, allowing the appeal of the plaintiff, that no adverse possession arose in favour of X, in his lifetime, and consequently the defendant's claim failed.

In the instant case no claim of the appellant could therefore arise on the basis of long undisturbed possession under the provisions of the Limitation of Actions Act. Such a defence was wholly misconceived. In that respect, the learned Resident Magistrate found:

> "The defendant failed to show that he was in 'quiet peaceful and undisturbed possession and occupation of the premises for sixteen (16) years' or at all. On his own evidence he acknowledged that the plaintiff maintained the premises as his residence and brought him to live there with him. According to the defendant he was living there with the plaintiff doing the plaintiff's business. He spoke often of 'the place where me and Mr. Mighten was living'. The only time he was in

> exclusive occupation was from October 1994 to October 1995, and it was hardly quiet, peaceful and undisturbed. Within five months of that period he had been served with a second notice to quit and he claimed that Miss Shaw came there and took away some of the cows. The plaintiff's legal title to the premises was in no way extinguished and the defendant's claim to title by virtue of the provisions of sections 25 and 30 of the Limitation of Actions Act fails'."

The learned Resident Magistrate in her reasons further stated:

> "I find on a balance that the defendant was an untruthful witness. He was not the plaintiff's son that is why he bears the surname of his mother's other children and not that of the plaintiff. At no time did the plaintiff acknowledge him as his son and no promise was ever made to him that the premises were to be his. He did not take care of the plaintiff he worked for him and was paid for his services.
>
> His witness Sheryl Mighten did not assist him in any material respect. She did not support him in his claim to have been brought to the premises as the plaintiff's son and at no time did she ever refer to him as her brother."

The said Resident Magistrate was merely expressing her opinion on the improbability that the respondent would have made a gift of his premises to a stranger who was a mere employee, in preference to a child of his, such as Muriel Shaw. The said Resident Magistrate was perfectly entitled to do so, as the rationale of the relevant finding.

Furthermore, the Statute of Frauds (1677), section 4, makes unenforceable any action for the enforcement of an oral agreement for the disposition of any land or interest therein. Accordingly, in the absence

of any documentary proof, the claim by the appellant that the respondent made a gift to him of the said premises is without basis and must fail. The evidence of the appellant himself that the respondent said: '... he was going to see to it that I get it. He never saw to it,' is a clear indication that no gift was in fact made. The learned Resident Magistrate found that:

> "The defendant's claim to have become entitled by virtue of a gift to him by the plaintiff also fails. According to the defendant the plaintiff spoke about leaving the premises to him but, he admitted that that gift was never actually given. No action was taken by the plaintiff in furtherance of that promise. As he put it, the plaintiff said 'he was going to see to it that I get it. He never saw to it'."

The finding of the learned Resident Magistrate in this respect cannot be faulted. Ground 3 also fails.

Grounds 4, 5 and 6 attacked the conduct of the learned Resident Magistrate in continuing the trial after the death of the respondent in that, the power of attorney granted to Muriel Shaw giving her authority to initiate and pursue the action was effectively revoked by the death of the donor of the power. The learned Resident Magistrate in her reasons said:

> "Before the close of the plaintiff's case there was evidence to suggest that the plaintiff had died and the defence contended that the Court ought to discontinue the trial as the attorney's authority had ceased. This was at a point where the plaintiff had already given evidence through his attorney. His witness Granville Fraser had also given evidence but the plaintiff was obliged to

call a second witness to give evidence concerning the preparation and execution of the power of attorney as the defence had objected to its admission into evidence otherwise. The matter was thereafter delayed by the death of the defendant's then attorney-at-law. By section 134 of Title XVI in appendix D to the Resident Magistrate's Court Rules

'... a cause or matter shall not become abated by reason of the marriage, death or bankruptcy of the parties if the cause of action survive or continue'.

If indeed the plaintiff had died in February 1997, as the witness Sheryl Mighten claimed, the cause of action undoubtedly survived. Further the donee of the power was entitled to continue as there was no evidence that the provision for revocation of the power, contained in the declaration on page 2 of the power of attorney (exhibit 11), had been met in that there was no evidence that 'notice in writing was' actually received by the donee as required.

Further, paragraph 3 of the said Power of Attorney also provided that the donee 'is authorized to commence, carry on or defend all actions or other proceedings touching my estate'. The Court did not therefore deem it necessary for the complete settlement of the issues involved in this action to add any other party (section 135).

Indeed, if the plaintiff's attorney had not continued the action the defendant was entitled to take steps to compel its continuation (section 141).

As the acknowledged daughter of the plaintiff and the person to whom he entrusted the conduct of his business affairs, Miss Shaw may well be regarded as a successor in interest and a person otherwise entitled to proceed with the

> trial, bearing in mind her evidence of the plaintiff's intention to transfer the property to a brother and herself and of his having even taken steps in that regard. The action was therefore continued to its conclusion."

The action was that of the respondent Eric Mighten. The power of attorney granted to Muriel Shaw on September 19 1995, was his authority to her to initiate and continue the action on his behalf. The said power, in paragraph 10, provided , inter alia:

> "AND I HEREBY DECLARE that the powers hereby given to my attorney shall be given the widest interpretation and shall be construed as an express authority to her to act in and deal with my affairs as fully as effectually in all respects as I myself could do and that this power of attorney shall be irrevocable and continue in force from time to time and at all times until notice of my death or other revocation thereof in writing shall be actually received by my attorney ..."

In so far as the learned Resident Magistrate found the power was not revoked because there was "no evidence that notice in writing was actually received by the donee as required", the absence of evidence in the case supports that finding. However, that provision relates to the fact of the donor's death not coming to the knowledge of the donee, immediately on the donor's death. In the circumstances of this case, it is quite unlikely that Muriel Shaw would not have known immediately of her father's death. He was then living with her. In any event, she would have been personally aware of his death for several months before the

resumption of the trial on July 8 1997. No notice in writing was probably necessary.

Although the power of attorney was probably effectively revoked, the action itself survived for the benefit of the estate of Eric Mighten. The Resident Magistrate's Court Rules specifically deal with the effect on an existing action in court, by reason of the death of one of the parties. Title 16 entitled, "Change of Parties by death etc.," provides in section 134:

> "S. 134 – A Cause or Matter shall not become abated by reason of the marriage, death or bankruptcy or any of the parties if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution, of any estate or title pendente lite ..."

It was certainly desirable that, on the continuation of the trial on July 8 1997, the name of the plaintiff was changed to reflect the fact that the new plaintiff was "the executors of the estate of Eric Mighten". The inclusion of both executors, was required to regularize the proper title of the suit. Significantly, Muriel Shaw, the donee of the power of attorney was one of the executors of the will of Eric Mighten. The sole beneficiary of the premises in question under the will of Eric Mighten was the said Muriel Shaw. Unlike an intestacy, where it is only on the grant of letters of administration that the administrator may act, a will operates from the moment of death. Muriel Shaw, the donee of the power of attorney was notionally entitled to the said premises, the subject of the suit, on the death of Eric Mighten. There was no prejudice to the estate nor to the

appellant. The argument in respect of grounds 4, 5 and 6 therefore fails.

For the above reasons we dismissed the appeal.