

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1974/M132

BETWEEN

MARTINA ROBINSON
(Administratrix of the Estate of
Albertha McBright)

PLAINTIFFS

&
LYDIA MORGAN

A N D

MALCOLM MINERALS OF JAMAICA, Inc.

DEFENDANT

Heard: January 15, 16, 17, 18,
and 19, 1979

Appearances: Mr. E.C.L. Parkinson, Q.C. for the Plaintiffs

Mr. Enos Grant and Mr. W.K. Chin-See instructed by
Miss Ethlyn Norton of Dunn, Cox & Orrett for the
Defendant.

J U D G M E N T

May, 1979

Malcolm, J:

This is but one of a plethora of actions between the parties that have been coming before the courts starting as far back as 1957. On the 18th September, 1974 one Albertha McBright (now deceased) and Lydia Morgan the 2nd named plaintiff filed a Writ of Summons in this court claiming from the defendant inter alia, damages for trespass to certain lands, "part of Dirty Pit" Halse Hall in the parish of Clarendon. Subsequent to the filing of the action McBright died and the proceedings were continued in the name of Martina Robinson her Administratrix to whom Letters of Administration were granted on the 11th June, 1976.

Before referring to the evidence I think it necessary to detail some aspects of the pleadings. In the Statement of Claim the first named plaintiff stated that she "was at all material times in possession of 15 acres of land" part of Halse Hall. She claimed that "on or about the 8th day of July, 1974 and on divers days thereafter the defendant wrongfully entered her land and fenced in approximately 13 acres". The second named plaintiff

claimed that she on her part was at all material times in possession of 10 acres of land part of the said Halse Hall and that the defendant on or about the 8th July, 1974 and on divers days thereafter wrongfully entered her land and cut off and fenced in 7 1/4 acres.

Thereafter the pleadings and proceedings took on the nature of what can best be described in boxing parlance as "in fighting". Paragraph 5 of a Defence filed stated "The Defendant further says that it is not the registered proprietor of the lands in question, but that it is the holder of the shares of Halse Hall Limited which is the registered proprietor of the lands registered at Volume 35 Folio 5 which includes the lands fenced off at the area known as Dirty Pit, on the 8th of July, 1974." Hot on its heels came the reply that Paragraph 5 "is an admission that the defendant is merely a shareholder in a Company which it alleges is the registered proprietor of the land in question and is not in possession nor has a right to possession of the said land, but is merely entitled to the interest of a shareholder in the company measured by a sum of money. It is an admission that the defendant has no interest in the land in question, and has no Defence known to the law in an action of Trespass".

The Order on the summons for Directions stated that this "preliminary point of law be set down for hearing and disposed of at any time before the trial".

An objection by the defendant to the hearing of the preliminary point was overruled on the 28th September, 1977.

On the 16th February, 1978 there was the following minute of order "Point of Law decided in favour of the plaintiffs - Leave granted to the defendants to amend the Defence etc". An amended Defence was filed in due course stating inter alia that lawful entry was made by the defendant's agent on lands known as Dirty Pit belonging to Halse Hall Limited to fence off land and to keep out

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trespassers with the express authority and consent of the said Halse Hall Limited. The Reply to the amended Defence stated in part "the Defence of ^{tertii} jus pleaded by the defendant is not a defence known to the law and Halse Hall Limited was not in possession of the said land, had never been in possession, is not entitled to the said land and cannot authorise the defendant's agent to enter on the said land to fence off approximately 15 acres of the same". A Rejoinder was filed by leave after arguments were heard on the first day of trial and so the stage was set.

Martina Robinson, the substituted plaintiff, testified that her mother Albertha McBright bought the land, the subject matter of her claim from one Samuel Thomas. This was a surprising and unexpected departure from what was pleaded in the Reply. That document read in part - "the first plaintiff says that Albertha McBright, her mother, was all her life in exclusive and undisturbed possession of the land which was previously owned and in the possession of Mary Davis". Robinson further stated that the land was 15 acres in size and that her late mother had occupied it "from I was a child". McBright had cultivated the land and no one had ever disturbed her. Then on the 8th July, 1974 the defendants came on the land, surveyed it and fenced it around. About half the land was fenced in. Then mention is first made of the "Great House" which is on land owned by Halse Hall Limited. Robinson stated that the land fenced in was in front of the Great House. One Alfred Pyne gave evidence for the defence, I shall refer to it in greater details later. For the present, suffice it to say, that he stated that he knew the "Great House" and the land opposite to it, the land fenced off by Alcoa. He knew Mrs. McBright and he had never seen her on this piece of land.

The plaintiff Robinson was shown a plan [✓] prepared by one W. Silvera and this was tendered by consent as Exhibit 1. It has on more than one occasion, been the subject of judicial scrutiny.

on the 14th February, 1965 it was tendered in evidence as Exhibit 2 in the case of Halse Hall Limited vs. Martina Robinson. On the 15th February, 1978 it was again tendered coincidentally again as Exhibit 2 in the case of Martina Robinson vs. Halse Hall Limited. Now for the third time ^{it} made its appearance, I for one doubt that we have seen the last of it. The plan was prepared at the request of Martina Robinson and represents the forms and boundaries of approximately 38 acres of land. The lands were subsequently adjudged to be owned by Halse Hall Limited. Robinson stated "we plant cane and cassava on the land below the line on the plan Exhibit 1". By "the line" she was referring to the Southern boundary of the plan. Below this line too appears the name "Mary Davis". In cross-examination the plaintiff stated, inter alia, "my mother never bought land from Mary Davis", a departure from the pleadings which I have already referred to. She went on to say "the land across from the Great House is not Halse Hall land".

The second named plaintiff Lydia Morgan also claimed land at Dirty Pit, Clarendon. She laid claim to ten acres of land there and stated that it had once belonged to her grandfather James Mason who died in 1927. Eventually the land came to her through her mother in 1941 or put more precisely she said "she died in 1941, I then took possession". On the 8th July, 1974 Alcoa fenced off part of the said land. In the pleadings it had been averred on her behalf that this land had been previously owned by and in the possession of Mary Davis. For one who owns and is claiming land Lydia Morgan evinced a disinterest and lack of knowledge that is to say the least of it surprising

∠ This was some of her testimony - "I have never surveyed my land, I was told by elderly people that it was 10 acres - my mother never showed me the boundaries - I cultivated the land - not all of it - less than 2 acres - I limited cultivation to a small area - The area where the land is fenced off is near the

Main Road. I don't know if any one cultivated the land in front of the Great House - the part of the land that was fenced off. On Main Road side I plant no field - only cur wood". She stated that she was not saying that her land was owned by Mary Davis and went on to add "I don't know much about the inside of my land". In the light of many of her replies in cross-examination it came as no surprise when Attorney for the Defence suggested to her that she had indulged in "land grabbing".

Aubrey Green a farmer, gave evidence in support of the plaintiffs' claim. He knew Albertha McBright and was familiar with the land on which she had lived. Prior to her death she had farmed the land. He stated that one Elipilet Powell the son of Martina Robinson now occupies the land, rears animals on it but has no cultivation. Of Lydia Morgan he had this to say - "Mrs. Morgan's land grew up in bush - no one living on it ". He said he had never seen Mrs. Morgan living on the land" she come and go". Of the boundaries to the lands the subject matter of this suit the witness said "there is a Main Road also a Parochial Road to Dirty Pit. McBright's land bounded by Parochial Road and runs to the Main Road. Morgan's land runs in similar position". He said he had seen people cultivating on land by the Main Road about 1952 but went on later to say that he did not know if these persons he saw were in anyway connected with Mrs. Morgan. He did not see the fence put up by the defendant Alcoa and not surprisingly when asked did not know the area that was fenced in.

The plaintiffs called Claudius Newell builder and farmer and he like Aubrey Green claimed knowledge of the lands at Dirty Pit. He knew Albertha McBright and he knew the "fifteen acre piece" "A small portion "looked like it was cultivated but the rest was bush - woodland". Of Lydia Morgan's ^{land} / (the description is the witness's not mine) he said " it was more

or less ten acres a portion of this land was fenced in". He had never seen Morgan living on the land. Her land on the Main Road was not flat land - "trees and stones" people tied animals there "but not used for rearing animals, same for McBright's land - never seen these lands cultivated - stony with trees".

This witness stated, inter alia, "I saw that the fence fenced in land with Albertha McBright's grave". I was and still am in some doubt as to the value of this evidence and the point sought to be made. It could be that in death McBright has acquired possession, title and right that in her lifetime she failed to do. One does not become the owner of land by being buried on it.

Before he closed his case Attorney for the plaintiffs sought to produce and tender in evidence two Supreme Court files - C.L. H022 of 1976 Halse Hall Limited vs. Martina Robinson and E 70 of 1973 Martina Robinson vs. Halse Hall Limited. The purpose, he explained, was for the Court to look at the pleadings and see the falsity of the defendant's case, (both matters incidentally are part-heard). The application was unsuccessful.

Defence

The defendant called six witnesses. Norman Lewis, Clerk attached to the office of the Registrar of Titles produced Volume 35 Folio 5 of the Register Book of Titles (Exhibit 2) Halse Hall Limited are shown as the Registered proprietors of the lands contained therein. It consists of well in excess of 2,000 acres.

Terrence Casserley, Commissioned Land Surveyor identified and put in evidence (Exhibit 3) prechecked plans prepared by Howard Brandon another Commissioned Land Surveyor. There were three plans one of which consisted only of boundary notes. He testified that in 1974 he opened some boundaries in the Halse Hall area. He was opening the boundaries for fencing purposes. Having opened the boundaries he walked with one Mr. Cecil Campbell (the defendant's Farm Manager) and showed him all the relevant marks.

He referred to Section 3 of the plan prepared by Mr. Brandon and stated that the opening of the boundary was part of Volume 35 Folio 5. The area was a little over 14 acres and the land was opposite the "Great House" to which I have already referred. He stated that the land was rocky and steep and he saw no cultivation.

In Cross-examination he said "the lands are part of Halse Hall, Exhibit 1 is not included in the plan", and further "I had no idea who was occupying these lands previous to the time I went there".

I depart from the strict chronological order and allude now to the evidence of Cecil Campbell, Farm Manager of Alcoa. I have already made passing mention of him. He stated that in July, 1974 he supervised the fencing of Section 3. The boundaries were shown to him by Mr. Casserley the Commissioned Land Surveyor. He is familiar with this section, and stated "It is hilly, rocky and woodland. There was no cultivation there before I fenced it nor people tying their animals there". A Mr. Golding gave him instructions to carry out the acts he did. As will appear later this is a pivotal point in the defence's contention.

Mr. Campbell stated that the Main Road is not the boundary of the Halse Hall property and he was only then learning that the plaintiffs were contending that the road is the boundary.

Earl Golding, Manager of Finance, employed to the defendant gave evidence. He stated that in July, 1974 he was attached to Alcoa Minerals of Jamaica Incorporated and was General Manager of the Halse Hall property. He stated - "Halse Hall Limited a wholly owned subsidiary of Alcoa Minerals - Alcoa had authority to lease land to plant and to cultivate and farm land; the authority extended to the piece of property before the Great House - I know Mr. Campbell - he had full authority to fence off land. I was Director of Alcoa Limited. I was in charge of Halse Hall Limited."

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The witness admitted in cross-examination that he had only come to Jamaica in June, 1974 and did not know to what use the land was being put before he came here. The land could be cultivated, trees could be cut and stones gathered.

In this case there were charges and countercharges of what the attorneys on both sides described as "land grabbing". I understood them to mean what we have come to know in less sophisticated language as "capturing". Such an accusation was made against Eli Sampson to whose evidence I shall now refer. He stated that he grew up in Halse Hall district and he knew the lands known as Dirty Pit. It lies between the Parochial Road and the Main Road. He said "land in possession of McBright and Morgan does not go from Parochial Road to main road".

He referred to a piece of land across from the Great House and said this had been fenced in by Alcoa. He asserted that this was a part of a larger area acquired by him from Halse Hall for Halse Gardens Limited - some 65 acres. He was shown a plan prepared by Mr. Arthur Foreman Commissioned Land Surveyor (tendered by consent as Exhibit 4). It was a plan of 65 acres - part of Halse Hall registered at Volume 35 Folio 5. He denies the suggestion put by Mr. Parkinson that he had got Mr. Foreman to omit the names of Davis and Morgan. He denied that he had had the plan changed. Then we had the grave suggestion - "All Mr. Foreman did was to take in lands that were not the property of Halse Hall Limited". The answer was "No". The witness said there was an action brought by Halse Hall and Halse Gardens for 65 acres and that this included the 38 acres already referred to and shown in Exhibit 1.

While this witness was testifying, the final Judgment of Mr. Justice Small dated the 22nd July, 1965 in Halse Hall Limited vs. Martina Robinson (C.L. 409/57) was tendered by consent as Exhibit 5. As a matter of interest and for what it is worth the Judgment declared (inter alia) that the plaintiff was the owner of that parcel of land containing 38 acres as appears by Mr. Silvera's plan (Exhibit 1). Of the 65 acres Mr. Sampson says "I have not got Title for it". He denies that the piece of land opposite the Great House

had ever been occupied by Mrs. McBright. It was never occupied by anyone except Halse Hall.

In brief the evidence of Alfred Pyne who stated that he had lived at Halse Hall for 48 years was to this effect - he had often been on the land opposite the Great House the land that had been fenced in, to cut lumber and posts. Mr. Cecil Campbell had given him permission to do so. He knew Mrs. McBright, Elipilet Powell and Lydia Morgan and he had never seen these persons on this piece of land. He said he knew where Martina Robinson lives and that the land she is trying to claim goes to the Main Road. He had never seen her collecting stones and cutting wood on the land - "I live beside it" he said. To Mr. Parkinson he admitted, however, she can come on the land and I don't see her.

Main Submissions of Counsel

Mr. Grant for the defendant contended:

- (a) That the plaintiff, on the evidence, were clearly trespassers.
- (b) The defendant had entered the land with the express authority of Halse Hall Limited and that if the lands form part of Volume 35 Folio 5 the Registered owner being Halse Hall Limited - the defendant had the authority to fence in the land.
- (c) As to whether the plaintiffs were ever in possession of lands one of 15 acres and the other of 10 acres - Robinson had presented no survey so the court could not determine "where on earth" - a surveying term - the land is or, put another way the plaintiff Robinson had not identified where this 15 acres of land was.

- (d) The evidence as to how both plaintiffs got the land is contrary to the pleadings.

Mr. Grant referred to Halsbury's Laws of England, 3rd Edition, Volume 38 at page 749. Paragraph 1226 "claim of right" reads:

"A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right; but he cannot set up the title of a third person unless he claims under or by authority of such a person".

Mr. Parkinson prefaced his submissions thus:-

"Trespass is based on possession. We are not talking about Title here". The first part is trite law and I have no quarrel with it. With the second part I do not agree.

He went on to submit:-

- (a) Halse Hall had no authority to give orders or permission to have the land fenced
- (b) In equity Halse Hall has acquiesced to the acquisition of the land.
- (c) Or the subject of *jus tertii* he contended that Halse Hall had no legal right in 1974 having purported in 1969 to sell the lands to Halse Hall Gardens Limited.
- (d) Acts of possession can be very small but still enough to show *de facto* possession.

Counsel for the plaintiffs' referred me to Pollock and Wright 1887 an ancient but still useful and authoritative work on "Possession"

At page 28 the learned author Pollock (Parts I and II were written by him alone) had this to say:-

"The rights of a possessor belong to him who is in possession, but one who relies on *de facto* possession as investing him with those rights and entitling him to the appropriate

remedies has to satisfy the Court that he rather than any other person was at the time of the wrong he complains of, in a certain relation to the thing of which the use or enjoyment is in question. He must prove a state of facts which will be sufficient in law to support his claim".

In the instant case have the plaintiffs proved such a state of facts?

My answer is NO. Both sides have branded their opponents trespassers. Who are the real trespassers on the lands fenced off?

In the light of the evidence adduced on behalf of the defence, both parol and documentary, I find that the plaintiffs were the true trespassers.

Counsel for the plaintiffs in his opening had said that the two parcels of land one of 15 acres and the other of 10 acres belonged to Mary Davis. As I have earlier said this too was pleaded. It was not borne out by the evidence. The evidence as to how both plaintiffs came by the land was not only contrary to the pleadings but was uncertain, confusing and lacking in credibility and conviction.

Counsel for the plaintiffs cited the well known case of Chisholm v. Hall [1959] W.I.R. 413. This case dealt with Limitation of actions and concerned a boundary dispute between the registered proprietors of adjoining plots of land. It is easily distinguishable from the instant case and I did not find it helpful.

Conclusions

- (a) The preponderance of evidence proves that the part of land fenced off is part of Volume 35 Folio 5.
- (b) At the time of the alleged trespass in July, 1974 Halse Hall Limited were the registered proprietors of the lands at Volume 35 Folio 5 and as such had a legal right to give the defendant permission and authority to fence in the

land.

(c) The evidence of Earl Golding and Cecil Campbell is accepted and I find that such authority was duly given.

(d) The contention that "Halse Hall had no authority to give orders or permission to have the land fenced" cannot be maintained in the light of the evidence.

I accordingly hold that Alcoa Minerals of Jamaica, Incorporated were not trespassers and the claim of both plaintiffs must fail.

There will be Judgment for the defendant with costs to be agreed or taxed.

V.O. Malcolm
Judge