DR CJ SEYMOUR-WILSON v MUSA ABESS

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Civil Appeal 5 of 1979, Hon Mr Justice Livesey Luke CJ, Hon Mr Justice CA Harding JSC, Hon Mr Justice OBR Tejan JSC, Hon Mrs Justice AVA Awunor-Renner JSC, Hon Mr Justice SMF Kutubu JA, 17 June 1981

[1] Land – Declaration of title – Onus on plaintiff to prove ownership of land – Documentary evidence – Registration of conveyances and statutory declaration insufficient to prove title – Requirement to prove that predecessor in title had passed good title – Evidence (Documentary) Act (Cap 26) s 3

[2] Land – Title – Registration – Fundamental difference between registration of title and registration of instrument – Registration of conveyancing instrument does not confer or prove title – Title is conferred by the instrument itself – *Davies v Bickersteth* overruled – Registration of Instruments Act (Cap 256) s 4

[3] Land – Trespass – Requirement to prove better right of possession – Better title may prove better right of possession but not necessarily a valid title – Mere possession sufficient to maintain trespass against a person who cannot show better title

[4] Courts – Re-trial – Court of Appeal should have dismissed appeal and not ordered a re-trial where plaintiff failed to discharge onus of proof as to ownership of land – Equivalent to giving plaintiff a second chance – Court ought not advise party on how to conduct its case

On 30 April 1974 the plaintiff (respondent) took action in the High Court against the defendant (appellant) seeking a declaration of title to land at Signal Hill, Wilberforce in the Western Area of Sierra Leone and damages for trespass. The plaintiff claimed that he had unchallenged possession of the land since 12 March 1952 and submitted in evidence the deeds of conveyance that were registered with the Registrar General as regards to sale of the land to him in 1952 and the sale of the land between the prior owners in 1951. In March 1974 he discovered that the defendant had erected a building on the land and claimed trespass. In his defence, the defendant submitted that he was the owner of the land by virtue of a deed of conveyance dated 23 March 1968, which was also registered with the Registrar General.

On 8 March 1977 Short J, at first instance, dismissed the plaintiff's claim, finding that the land conveyed to him in 1952 and the land in dispute were completely different parcels of land, and awarded the defendant general damages on the basis that the plaintiff had failed to identify the land with any degree of certainty, had not proved good title and that the defendant was at all times the owner and in possession of the land in dispute. On 25 May 1979, the Court of Appeal allowed the plaintiff's appeal on the basis that there was insufficient evidence as to whether the dispute related to the same piece of land and remitted the case to the High Court for retrial. On appeal to the Supreme Court, the main issues were whether the plaintiff had proved title to the land in dispute; whether the prior registration of deeds in 1951 and 1952 conferred a better title than the 1968 registration; which of the parties were entitled to damages for trespass; and whether the Court of Appeal was right to order a retrial.

Held, per Livesey Luke CJ, allowing the appeal:

1. In in an action for a declaration of title the plaintiff's case must be based on the strength of his title and not on the weakness of the defendant's title. The onus is on the plaintiff to prove that he is the fee simple owner of the land in dispute. *Dunford v McAnulty* (1883) 8 AC 456, *Kodilinye v Odu* (1935) 2 WACA 336, *Mansaray v Williams* (1968-69) ALR (SL) 326 and *John & Anor v Stafford & Ors* (Supreme Court Civil Appeal No 1/75, 13 July 1976) applied.

2. In order to succeed, the plaintiff had to prove that the previous owners had a fee simple title in the land when it was conveyed in 1951, prior to the conveyance to him in 1952. The only evidence produced in support of this were his title deeds and a statutory declaration as to ownership by the previous owner. There was no attempt by the plaintiff to fulfil the requirements

of s 3 of the Evidence (Documentary) Act (Cap 26) which deals with the admissibility of evidence of a statement made by a person in document tending to establish a fact. Therefore the statutory declaration and the statements made therein were inadmissible. *Bright v Roberts* (1964-66) ALR (SL) 156 applied.

3. There is a fundamental and important difference between registration of instrument and registration of title. The Registration of Instruments Act (Cap 256) deals with registration of instruments but makes no reference to, and makes no provision for, registration of title. Registration of title is dealt with in the land registry legislative framework.

4. Registration of an instrument under s 4 of Registration of Instruments Act (Cap 256) confers priority over other instruments affecting the same land which are registered later. Registration of an instrument under the Act does not confer title on the purchaser, lessee or mortgagee, nor does it render the title of the purchaser indefeasible. What confers title (if at all) in such a situation is the instrument itself and not the registration thereof. So the fact that a conveyance is registered does not ipso facto mean that the purchaser thereby has a good title to the land conveyed. In fact the conveyance may confer no title at all for example, where the vendor had no title to pass. If two deeds are registered in respect of the same land, one may take effect before the other under s 4, but that does not mean that the prior registered deed confers a better title. The prior registered deed may confer an imperfect title or no title at all. But its prior registration would not ipso facto perfect an imperfect or invalid title.

5. Prior to 1964, registration of instruments was not compulsory in Sierra Leone. It was the Registration of Instruments (Amendment) Act 1964 that made registration of instruments compulsory. There are possibly hundreds of unregistered pre-1964 conveyances. If the construction put upon s 4 by the Court of Appeal in *Davies v Bickersteth*, was upheld, it would mean that any person taking a conveyance of a piece of land after 1964 from a person having no title to the land and duly registering the conveyance would automatically have title to the land as against the true owner holding an unregistered pre-1964 conveyance. The legislature could not have intended such absurd consequences. *Davies v Bickersteth* (1964-66) ALR (SL) 403 overruled.

6. In a case of trespass, the plaintiff has to prove a better right of possession than the defendant. One of the ways that he may do this is to prove that he has a better title to the land than the defendant. But "better" title in the context of an action for trespass is not necessarily a "valid" title. In a case of trespass the court is concerned only with the relative strengths of the titles or possession proved by the rival claimants. The party who proves a better title or a better right to possession, succeeds, even though there may be another person, not a party, who has a better title than him. But in a case for a declaration of title, the plaintiff must succeed by the strength of his title. He must prove a valid title to the land. So if he claims a fee simple title, he must prove it, to entitle him to a declaration of title. The mere production in evidence of a conveyance in fee simple is not proof of a fee simple title. The document may be worthless. As a general rule the plaintiff must go further and prove that his predecessor in title had title to pass to him. If there is evidence that the title to the same land vests in some person other than the vendor or the plaintiff, the plaintiff would have failed to discharge the burden upon him. As there was no evidence that the vendor in the 1951 conveyance was the fee simple owner of the land, the plaintiff's claim for a declaration of a fee simple title failed. *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 distinguished.

7. Mere possession is sufficient to maintain trespass against anyone who cannot show a better title. The plaintiff had proved possession from about 1964 or 1965 and defendant had proved possession from January 1967. Therefore, the plaintiff had proved better possession and the defendant was liable to the plaintiff in trespass and was entitled to Le500 in general damages. *Bristow v Cormican* (1878) 3 AC 641 applied.

8. The fact that the Court of Appeal could not determine whether the dispute related to the same parcel of land meant that the plaintiff had failed to discharge the onus on him. In these circumstances, the court should have dismissed the appeal and not ordered a re-hearing and, in

effect, given the plaintiff a second opportunity to discharge the onus which he had failed to discharge in the first place. Furthermore, the Court of Appeal ought not to expressed its opinion that the plaintiff seek evidence from the Director of Surveys and Lands. It is not the business of the court, especially in a civil case, to give the parties gratuitous advice as to how they should conduct their cases or what witnesses to call. Otherwise the impression might be created that the court is taking sides in the dispute instead of holding the scales evenly which is its proper role. There was sufficient material before the Court of Appeal to determine the issues one way or another and the order for a re-trial was wrong. *Kodilinye v Odu* (1935) 2 WACA 336 applied.

Cases referred to
Benmax v Austin Motors Co Ltd [1955] 1 All ER 366
Bright v Roberts (1964-66) ALR (SL) 156
Bristow v Cormican (1878) 3 AC 641
Cole v Cummings (No 2) (1964-66) ALR (SL) 164
Davies v Bickersteth (1964-66) ALR (SL) 403
Dunford v McAnulty (1883) 8 AC 456
El Nasr Export and Import Co Ltd v Mohie Eldeen Mansour (Supreme Court Civil Appeal No 3/73, unreported, 25 April 1974)
England v J Mope Palmer (1955) 14 WACA 659
John & Anor v Stafford & Ors (Supreme Court Civil Appeal No 1/75, 13 July 1976)
Kodilinye v Odu (1935) 2 WACA 336
Mansaray v Williams (1968-69) ALR (SL) 326
Ocean Estates Ltd v Pinder [1969] 2 AC 19
Performing Right Society Limited v London Theatre of Varieties Limited [1924] AC 1
Portland Managements Ltd v Harte [1976] 2 WLR 174
Watt (or Thomas) v Thomas [1947] AC 484

Legislation referred to
Evidence (Documentary) Act (Cap 26) s 3
High Court Rules O XII r 11, O XVIII r 20
Land Registration Act 1925 [UK]
Land Registry Act 1862 [UK] s 20
Land Transfer Act 1875 [UK]
Land Transfer Act 1897 [UK]
Law of Property Act 1922 [UK]
Limitation Act 1961
Middlesex Registry Act 1708 [UK]
Registration of Instruments Act (Cap 256) s 4(1), (2)
Registration of Instruments (Amendment) Act 1964 s 2
Rules of Court 1875 O XIX r 15 [UK]
Yorkshire Registries Act 1884 [UK]

Appeal
This was an appeal against the decision of the Court of Appeal on 25 May 1979, which set aside a decision of the High Court awarding damages to the defendant in a land dispute, and instead ordering a retrial. The facts appear sufficiently in the following judgment of Livesey Luke CJ.

Dr VS Marcus-Jones & Mr Garvas J Betts for the appellant.
Mr JW Davies and Mr Luseni Massaquoi for the respondent.

LIVESEY LUKE CJ: This appeal concerns the ownership of land at Wilberforce in the Western Area of Sierra Leone. By writ of summons dated 30 April 1974 and issued in the High Court by the respondent herein (hereinafter called the plaintiff) against the appellant herein (hereinafter called the defendant) the plaintiff claimed: (i) declaration of title to land situated at Signal Hill, Wilberforce in the Western Area of Sierra Leone and bounded on the north by private property 210 feet, on the south by a private property then or previously in the possession or occupation of JBS King 210 feet, on the west by an access road to Aberdeen 66 feet, and on the east by Signal Hill Road 80 feet; (ii) an

injunction restraining the defendant his servant or agent from erecting a building on the land and (iii) damages for trespass.

Pleadings were filed in due course. It is not necessary to set them out. A summary of the salient issues raised therein should suffice. In the statement of claim the plaintiff pleaded inter alia that the land was conveyed in fee simple to one Assad Joseph Yazbeck by one Gershon Theophilus Cole by deed of conveyance dated 28 June 1951 and duly registered in the Books of Conveyances in the office of the Registrar General; that by deed of conveyance dated 12 March 1952 and duly registered in the office of the Registrar General the said Assad Joseph Yazbeck conveyed the land to him in fee simple; that since 12 March 1952 he had been in open and unchallenged possession of the land; that in March 1974 he discovered that the defendant was trespassing on the land by erecting a building thereon and that notwithstanding several requests and demands the defendant persisted in trespassing on the land. The defendant filed a defence and counterclaim.

In his defence the defendant inter alia denied that he had trespassed on any land belonging to the plaintiff; averred that he was the fee simple owner of the land in dispute by virtue of a deed of conveyance dated 23 March 1968 and expressed to be made between one Ellis Leslie England as vendor and himself as purchaser and duly registered in the office of the Registrar General; pleaded the Limitation Act 1961 and alleged that the plaintiff had interfered with his possession of the land and had obstructed his building operations thereon. In his counterclaim the defendant claimed special damages for loss a result of the plaintiff's obstruction of his building operation and general damages. The plaintiff filed a reply and defence to the counterclaim. In the reply the plaintiff denied the several allegations in the defence and joined issue with the defendant. In the defence to the counterclaim the plaintiff inter alia alleged that the defendant did not acquire any valid title from Ellis Leslie England and also pleaded the Limitation Act 1961.

The trial was by Short J (as he then was). The trial lasted several days and both parties were represented by learned counsel. Each party gave evidence on oath, called witnesses including surveyors and tendered documents including maps and their respective documents of title. The learned judge delivered judgment on 8 March 1977 dismissing the plaintiff's claim and awarding the defendant Le1000 as general damages. In dismissing the plaintiff's claim the learned judge after reviewing the evidence found "as a fact that the plaintiff has failed to identify with any degree of certainty the land that he bought from Assad Joseph Yazbeck as being the land claimed by the defendant and also held that the plaintiff had "failed to prove that Gershon Theophilus Cole had a good title to pass to Assad Joseph Yazbeck" and that therefore Assad Joseph Yazbeck could not have passed a good title to the plaintiff.

In deciding in favour of the defendant the learned judge said inter alia "It is manifestly clear that two completely different parcels of land are involved. I find as a fact that the defendant is, and was at all times material to this action, the fee simple owner and in possession" of the land in dispute.

The plaintiff, being dissatisfied with the decision of Short J, appealed to the Court of Appeal. The appeal was heard by the Court of Appeal (consisting of SB Davies, Ken During and CS Davies JJA) on 9, 10 and 11 May 1978. Both parties were represented by learned counsel. The Court of Appeal delivered judgment on 25 May 1979 allowing the appeal, setting aside the judgment of the High Court and remitting the case to the High Court for a retrial before another judge. In their judgment the Court of Appeal said inter alia:

> "We have experienced considerable difficulty owing to the absence of any clear evidence as to whether the contention between the parties relate to one and the same land. That is the first point on which a court has to satisfy itself before it can consider other matters. We would have thought that in a situation like the present one evidence from an independent source like the Director of Surveys and Lands was desirable. It was absent."

It is against that decision that the defendant has appealed to this court. The plaintiff has also filed a notice of cross-appeal. The issues raised in this appeal and cross-appeal may be summarized as follows:

1. Do the plaintiff's title deeds relate to the land in dispute?

2. Did the plaintiff prove title to the land, and is he entitled to a declaration of title to the land?
3. Who is entitled to damages for trespass to the land – the plaintiff or the defendant?
4. If trespass was found in favour of the plaintiff, what amount should be awarded by way of general damages?
5. Was the Court of Appeal right in ordering a retrial?

As indicated earlier, issue was made in the High Court as to whether the plaintiff's title deeds related to the land in dispute. The defendant contended and called evidence to establish that the land conveyed to the plaintiff in 1952 was not the land and was in fact situated some distance from the land in dispute. The learned trial judge found that the land conveyed to the plaintiff in 1952 and the land in dispute were completely different parcels of land. The Court of Appeal stated that they had experienced considerable difficulty in determining whether the land conveyed to the plaintiff in 1952 and the land in dispute were one and the same land. The Court of Appeal could have evaluated the evidence before them to determine the issue one way or the other. But this they declined to do and instead remitted the case to the High Court for a retrial. Learned counsel for the plaintiff strenuously argued before us that on the evidence the land in dispute is the same land as that conveyed to the plaintiff in 1952. Learned counsel for the defendant, on the other hand, argued with equal force that on the evidence the two lands were not the same. So while learned counsel for the plaintiff would have us reverse the finding of fact of the trial judge, learned counsel for the defendant urged that we should uphold the finding of fact of the trial judge. There is no doubt that an appellate court has power to evaluate the evidence led in the court below, reach its own conclusions and in a suitable case to reverse the finding of fact of a trial judge. But those powers are exercisable on well-settled principles, and an appellate court will not disturb the findings of fact of a trial judge unless those principles are applicable. The principles have been frequently stated both locally and in other commonwealth jurisdictions. They were authoritatively stated by the House of Lords in *Watt (or Thomas) v Thomas* [1947] AC 484. It will be sufficient to quote the headnote of that report, which succinctly states the principles. It reads:

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

See also *Benmax v Austin Motors Co Ltd* [1955] 1 All ER 366 where Lord Reid said inter alia at p 329:

> "But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

See also *El Nasr Export and Import Co Ltd v Mohie Eldeen Mansour* (Supreme Court Civil Appeal No 3/73, unreported, 25 April 1974).

In view of what follows hereafter, I am of the opinion that in the instant appeal it is unnecessary to evaluate to evidence with a view to determining whether or not the trial judge's finding of fact that the plaintiff's title deeds did not relate to the land in dispute was right. I shall assume for the purpose of this judgment (unless otherwise stated) that the land in dispute is the same as the land conveyed to the plaintiff in 1952.

On the basis of that assumption, the first issue calling is whether the plaintiff proved title to the land in dispute. This issue is relevant to the plaintiff's claim for a declaration of a fee simple title. I think that it is trite law that in an action for a declaration of title the plaintiff's case must be based on

the strength of his title and not on the weakness of the defendant's title. See *Kodilinye v Odu* (1935) 2 WACA 336 where Webber CJ (Sierra Leone) in delivering the judgment of the West African Court of Appeal said inter alia at pp 337-338:

> "The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness or the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him, and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration."

See also *Mansaray v Williams* (1968-69) ALR (SL) 326 and *John & Anor v Stafford & Ors* (Supreme Court Civil Appeal No 1/75, 13 July 1976). Quite apart from the rule just stated, it is relevant to mention that the defendant pleaded in his defence that he was in possession of the disputed land. That plea is in accordance with Order XVIII rule 20 of the High Court Rules. The effect of such a plea is a denial of the allegations of fact in the statement of claim. In interpreting Order XIX rule 15 of the Rules of Court 1875 (with which our Order XVIII rule 20 is identical) the House of Lords held in *Dunford v McAnulty* (1883) 8 AC 456 that in an action for recovery of land a statement of defence alleging that the defendant is in possession operates as a denial of the allegations in the plaintiff's statement of claim, and requires the plaintiff to prove them. So in this case, the plaintiff having averred that he is the fee simple owner of the land in dispute, the onus is on him to prove that averment.

So the question that arises is whether the plaintiff discharged the burden cast on him to prove that he was the fee simple owner of the land in dispute. The plaintiff based his claim to a declaration of a fee simple title on the conveyances of 1951 and 1952. The evidence relied on by the plaintiff was purely documentary. His case was that Gershon Theophilus Cole (hereinafter called Gershon Cole) was the fee simple owner of the and which he conveyed to Assad Joseph Yazbeck (hereinafter called Assad Yazbeck) in 1951 and that on the strength of that conveyance Assad Yazbeck had a fee simple title in the land which he conveyed to him in 1952. In my opinion to succeed the plaintiff had to prove that Gershon Cole was the fee simple owner of the land at the time (in 1951) when he conveyed it to Assad Yazbeck. A statutory declaration was produced as a proof of Gershon Cole's title. The statutory declaration was sworn to by Gershon Cole, one Geoffrey Vidal Smart King and one Charles Bell in June 1951.

But none of the declarants was called at the trial nor was any attempt made to account for their absence. Section 3 of the Evidence (Documentary) Act (Cap 26) makes provision for the admission in evidence of any statement made by a person in a document tending to establish a fact if direct oral evidence of that fact would be admissible. But the section stipulates certain conditions for the admissibility of such documentary evidence. Among the conditions are that the maker of the statement has personal knowledge of the matters dealt with by the statement and that he is called as a witness unless he is dead, or unfit to attend as a witness, or he is out or the jurisdiction, or if all reasonable efforts to find him have been made without success, or if the court having regard to all the circumstances and being satisfied that undue delay or expense would otherwise be caused orders that the statement shall be admissible in evidence. No attempt was made to fulfil any of the conditions laid down in the section. In my opinion there could be no doubt that a statutory declaration is "a statement made by a person in a document" and is therefore governed by the provisions of the Act (Cap 26). In my judgment the plaintiff having failed to fulfil any of the conditions stipulated in s 3 of the Act, the statutory declaration and consequently the statements made therein were inadmissible in evidence. See *Bright v Roberts* (1964-66) ALR (SL) 156. So the plaintiff was left with only his title deeds. No other evidence was led to prove Gershon Cole's title.

Before departing from this aspect of the appeal, it is necessary to deal with one or two matters raised by learned counsel during argument before us. Mr Davies, learned counsel for the plaintiff, placed much reliance on s 4 of the Registration of Instruments Act (Cap 256). He argued that since the plaintiff's title deeds were respectively registered in 1951 and 1952 and the defendant's in 1968, the fact of prior registration ipso facto conferred a better title on the plaintiff than on the defendant. He submitted that that was the legal position by virtue of the provisions of s 4 of (Cap 256). He

claimed to derive support for this submission from *Davies v Bickersteth* (1964-66) ALR (SL) 403 a decision of the Court of Appeal. Mr Garvas Betts, learned counsel for the defendant, submitted in reply that s 4 of Cap 256 does not deal with title. He added that Cap 256 was a statute regulating the registration of instruments and not the registration of title, and that therefore the fact of the registration of a conveyance does not thereby confer an indefeasible title on the purchaser.

In view of the contending submissions of learned counsel, I think that it is necessary to set out s 4 of Cap 256. The section, so far as relevant, reads:

> "4(1) Every deed, contract, or conveyance, executed after the ninth day of February, eighteen hundred and fifty-seven, so far as regards any land to be thereby affected, shall take effect, as against other deeds affecting the same land, from the date of its registration. Provided that every such instrument shall take effect from the date of its execution, if registered within any of the periods limited for registration, as follows, that is to say:
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> (a) if such instrument be executed in Freetown if registered within ten days from its date;
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> (b) if such instrument be executed elsewhere in the Colony [now Western Area] or Protectorate [now Provinces], if registered within sixty days from its date;
>
> (c) if such instrument be executed elsewhere than in the Colony or Protectorate, if registered within one year from its date."

It will be convenient at this stage to refer to the case of *Davies v Bickersteth*, supra, relied on by counsel for the plaintiff. The relevant part of the judgment in that case is at pp 405-406 of the report. It reads:

> "From this it seems quite clear that each party alleged ownership of the land in dispute and they both based their respective claims on deeds of conveyance. The simple issue therefore before the court was which of them had a better title. The position therefore was this, namely, that the appellant had traced his title back to a deed of conveyance which was registered on December 12 1944, whereas the respondent had traced his own title back to a deed of conveyance which was registered on November 271945. Of the two therefore, it would appear that the appellant had a better title: see s 4 of the Registration of Instruments Act (Cap 256), which reads [s 4(1) was then set out]. Judgment should therefore have been given in favour of the appellant."

The question then arises: was that a correct application of s 4 of Cap 256? The long title of Cap 256 states clearly the intention of the legislature in enacting that statute i.e. to amend and consolidate the law relating to the registration of instruments. Nowhere in the Act is any mention made of registration of title. There is a world of difference between registration of instrument and registration of title. The difference can be illustrated by reference to the position in England. In England the first attempt to introduce registration of title, as opposed to registration of deeds, was made by the Land Registry Act 1862. Prior to the passing of that Act, a few counties had a system of registration of deeds. The registration of deeds and other instruments was designed to give publicity to dealings with land and to prevent frauds upon purchasers and mortgagees. The Middlesex Deed Registry was established in 1708 by the Middlesex Registry Act 1708. It was in 1891 transferred to the Land Registry, and it has since then formed part of that office. Under the 1708 Act all deeds and conveyances, whereby any lands or hereditaments in Middlesex could be affected at law or in equity were registrable. The omission to register an instrument under the Act did not invalidate it, but by reason of such omission, it will be adjudged "fraudulent and void" against a subsequent purchaser or mortgagee for valuable consideration. Instruments rank in order of date of registration and not of date of execution. But this was only a prima facie rule, and it was held to be subject to certain exceptions. Deed registries were established in Yorkshire by statutes passed in the eighteenth century. The system of registration under those statutes was substantially the same as that of the Middlesex Registry. The Yorkshire Registries Act 1884 repealed and replaced the earlier statutes. Under the 1884 Act all assurances including conveyances, and wills, by which any lands within the three Ridings of North, East and West Yorkshire are affected were made registrable.

All assurances entitled to be registered have priority according to the date of registration and not according to the date of the assurance or of their execution. Thus a subsequent purchaser or

mortgagee who registers first has priority over an earlier unregistered assurance, notwithstanding that he took with actual notice of it.

I shall now turn my attention to the registration of title. The object of registration of title to land is to simplify the means of transferring the ownership of land, by avoiding the necessity of investigation of title to it on every successive purchase, and by provision of simplified forms of assurance. The object of the Land Registry Act 1862 (referred to above) is spelt out in the long title and the preamble thereof. The long title reads:

"An Act to facilitate the proof of title to, and the conveyance of Real Property."

And the preamble recites:

"Whereas it is expedient to give certainty to the title of real estate and to facilitate the proof thereof, also to render the dealing with land more simple and economical."

The 1862 Act made elaborate provisions for the registration of title including the examination of title by the registrar and examiners of title, reference by the registrar of questions as to title to a Chancery judge, the establishment of the identity of the land, the holding of preliminary inquiries by the registrar, the public advertisement of notice of intention to register, the showing of cause against registration by any interested person before the registrar with a right of appeal by either party, the completion of registration, and the effect of registration. What is registered under the Act is not the conveyance or other instrument, but a memorial of it giving particulars and providing other data and material specified in the Act. The Act was on a voluntary basis, and provided that before registering (i) a marketable title must be shown; (ii) the boundaries must be officially determined and defined as against adjoining owners; and (iii) partial interests had to be disclosed and registered. With regard to the effect of registration of title, s 20 of the Act is both relevant and instructive. The section provides:

"20. Subject to any exception, qualification, or condition mentioned in such record of title, and to any registered charges or incumbrances, and to such charges and interests (if any) as are therein declared not to be incumbrances, the person originally and from time to time named and described in such record of title as aforesaid shall, for the purposes of any sale, mortgage, or contract of valuable consideration by such persons respectively, be and be deemed to be as from the date of registering such record by the registrar, or from such time as shall be fixed by him therein, absolutely and indefeasibly possessed of and entitled to such estates, rights, powers, and interests as shall be defined and expressed in such record, against all persons, and free from all rights, interests, claims and demands whatsoever, including any estate, claim or interest of Her Majesty."

This section quite clearly shows that it is the registration of an absolute title – after all the formalities of registration have been gone through – and not the registration of title deed that entitles the person concerned to an indefeasible title to the land affected.

Subsequent Acts dealing with registration of title were passed by the UK Parliament i.e., the Land Transfer Act 1875, the Land Transfer Act 1897, the Law of Property Act 1922 and the Land Registration Act 1925. But it is not necessary to refer to them in detail. Suffice it to say that they all provided for a system of registration of title as distinct from registration of instruments.

From the foregoing, it should be abundantly clear that there is a fundamental and important difference between registration of instrument and registration of title. Cap 256 does not provide for, nor does it pretend to contemplate, the registration of title. It states quite clearly in its long title that it was passed to provide for the registration of instruments.

What interpretation then is to be put on s 4 of Cap 256? In my opinion registration of an instrument under the Act confers priority over other instruments affecting the same land which are registered later. Registration of an instrument under the Act does not confer title on the purchaser, lessee or mortgagee etc., nor does it render the title of the purchaser indefeasible. What confers title (if at all) in such a situation is the instrument itself and not the registration thereof. So the fact that a conveyance is registered does not ipso facto mean that the purchaser thereby has a good title to the

land conveyed. In fact the conveyance may confer no title at all e.g., where the vendor had no title to pass. The effect of the section may be illustrated thus:

If A conveys Blackacre to B on 1 January, and then to C on 2 January (of the same year) both conveyances being executed in Freetown, and C registers his Conveyance on 14 January, and B registers his on 15 January, C's conveyance will take effect as against B's conveyance by virtue of prior registration. But if A conveys Blackacre to B on 1 January and the conveyance is duly registered on 15 January, and if Y (who has no title to the land) conveys Blackacre (the same land) to Z on 1 January, and it was duly registered on 14 January, according to s 4, Z's conveyance would take effect before B's conveyance. But that does not mean that it would take effect to confer title on Z, for the simple reason that Y had no title to pass to Z or to anyone for that matter, the maxim being *nemo dat quod non habet* [*Ed: no one can give away what they do not have*]. B's title to Blackacre would remain intact, unaffected and undisturbed by the conveyance to Z, notwithstanding the prior registration of Z's conveyance. In such a situation Z would be left with a valueless document on his hands and his remedy would be against the fraudulent vendor Y, and not against B the true owner of the land. (This illustration is subject to the provisions of s 4(2) of the Act enacted by s 2 of the Registration of Instruments (Amendment) Act 1964 providing that instruments not registered within the prescribed time shall be void and also making provision for registration out of time.)

From the above illustration, it must be evident that the mere registration of an instrument does not confer title to the land affected on the purchaser etc., unless the vendor had title to pass or had authority to execute on behalf of the true owner, nor does it thereby render the title of the purchaser indefeasible. In other words, if two deeds are registered in respect of the same land, one may take effect before the other under s 4, but that does not mean that the prior registered deed confers a better title. The prior registered deed may confer an imperfect title or no title at all. But its prior registration would not ipso facto perfect an imperfect or invalid title.

I think that it is necessary to point out that until 1964, registration of instruments was not compulsory in Sierra Leone. It was the Registration of Instruments (Amendment) Act 1964 that made registration of instruments compulsory. So there are possibly hundreds of unregistered pre-1964 conveyances. If the construction put upon s 4 by the Court of Appeal in *Davies v Bickersteth*, supra is upheld, it would mean that any person taking a conveyance of a piece of land after 1964 from a person having no title to the land and duly registering the conveyance would automatically have title to the land as against the true owner holding an unregistered pre-1964 conveyance. The legislature could not have intended such absurd consequences. Quite apart from this, it is a matter of common knowledge that most of the lands in the Western Area outside the City of Freetown are based on possessory title and most of them are not covered by title deeds. That situation is the result of the history of land holding established in the Western Area about two centuries ago. The system which has been in operation in the Western Area since the founding of the Colony (now the Western Area) is that land passes within the same family from one generation to another in many cases without the existence of any document of title. The question then arises; does the mere registration of a deed conveying any such land confer title on the purchaser as against the true owner who may have an indefeasible possessory title but no document of title? In my opinion such a result could not have been intended by the legislature in enacting Cap 256, and in particular s 4 thereof.

Indeed the courts in Sierra Leone have on innumerable occasions decided in favour of owners of a possessory title without documents of title as against the holders of registered conveyances. See for example *Cole v Cummings (No 2)* (1964-66) ALR (SL) 164. For examples of cases where the rival titles were based on possessory non-documentary titles, see *Mansaray v Williams*, supra, and *John & Anor v Stafford & Ors*, supra.

In my judgment therefore the fact that the plaintiff's conveyance was executed and registered before the defendant's conveyance does not ipso facto confer a better title on the plaintiff. In view of the foregoing, it follows that *Davies v Bickersteth*, supra, was wrongly decided and should be over-ruled. And it is hereby over-ruled.

In view of the present trends and practices in dealings relating to land in the Western Area it-may be desirable to introduce a system of compulsory land registration in the Western Area. Such a

measure may have the effect of putting an end to or of discouraging undesirable speculation and fraudulent dealings in land. It would protect innocent purchasers against fraudulent and unscrupulous dealers in land. It would also simplify conveyancing and create certainty and security in the ownership of land. And it would relieve potential purchasers from the risk of buying lawsuits.

To return to the facts of this case, the important question that arises is whether the plaintiff discharged the burden on him to prove that he had a fee simple estate in the land. To succeed he had to prove that he acquired a fee simple title from his predecessors in title, namely Assad Yazbeck and Gershon Cole. In other words did Assad Yazbeck acquire a good title from Gershon Cole in 1951 which he in turn passed to the plaintiff in 1952. No evidence was led to prove that Gershon Cole had any title to the land which he purported to convey to Assad Yazbeck in 1951.

Any possessory title that may have been acquired by the plaintiff after he purchased the land from Assad Yazbeck must be ruled out, because that was not the case put up by him. His case for a declaration of title stands or falls on his documentary title. In my opinion in view of the fact that no evidence was led to prove that Gershon Cole was the fee simple owner of the land in 1951 when he conveyed it to Assad Yazbeck, the plaintiff's claim for a declaration of a fee simple title must fail.

In an endeavour to prove that the defendant had no title to the land the plaintiff tendered in evidence a certified copy of a registered conveyance dated 27 November 1963 and expressed to be made between Vivian Victor Thomas and Vidal George Solomon Tsukuma Bickersteth whereby Vivian Victor Thomas (hereinafter called Vivian Thomas) conveyed the land in dispute to Vidal George Solomon Tsukuma Bickersteth (hereinafter called Vidal Bickersteth) (Exhibit K). According to the evidence led by the defence, Vivian Thomas conveyed the same land to Ellis Leslie England by conveyance dated 6 January 1967 (Exhibit N). Ellis Leslie England (hereinafter called Ellis England) in turn conveyed the land to the defendant by conveyance dated 23 March 1968 (Exhibit M). Learned counsel for the plaintiff contended that Exhibit K proved that when Vivian Thomas conveyed the land to Ellis England in January 1967, he had no title to pass because he had already divested himself of the title to the land when he conveyed it to Vidal Bickersteth in November 1963. Therefore, according to Mr Davies' argument, the Vivian Thomas title now vests in Vidal Bickersteth or his successors in title. That argument conceded, it means that there is some other person, not before the court, who has a rival claim to the title of the land and whose title may be superior to that of the plaintiff. In my opinion, that evidence (Exhibit K) having been introduced by the plaintiff, it was incumbent upon him to take steps to join Vidal Bickersteth or his successor in title, if he was to succeed in his claim for a declaration of fee simple title in himself. In the face of that evidence (Exhibit K) and in the absence of Vidal Bickersteth or his successor in title, I am of the opinion that it would be futile to make a declaration of title in favour of the plaintiff. In the circumstances, the proper course is to dismiss the plaintiff's claim for a declaration of title.

Although not cited by counsel, I am of course aware of the dicta of Lord Diplock in delivering the opinion of the Privy Council in *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 at pp 24-25 to the following effect:

> "At common law as applied in the Bahamas, which has not adopted the English Land Registration Act 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strength of the title proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act."

It must be pointed out that that case was a case of trespass, and there was no claim for a declaration of title. So the above quoted dicta must be taken to be relative to a case of trespass. Indeed it states the correct principles relative to a claim for trespass. In a case of trespass, what the plaintiff has to prove is a better right of possession than the defendant. One of the ways that he may do this is to prove that he has a better title to the land than the defendant. But "better" title in the context of

an action for trespass is not necessarily a "valid" title. In a case of trespass the court is concerned only with the relative strengths of the titles or possession proved by the rival claimants. The party who proves a better title or a better right to possession, succeeds, even though there may be another person, not a party, who has a better title than him. But in a case for a declaration of title, the plaintiff must succeed by the strength of his title. He must prove a valid title to the land. So if he claims a fee simple title he must prove it, to entitle him to a declaration of title. The mere production in evidence of a conveyance in fee simple is not proof of a fee simple title. The document may be worthless. As a general rule the plaintiff must go further and prove that his predecessor in title had title to pass to him. And of course if there is evidence that the title to the same land vests in some person other than the vendor or the plaintiff, the plaintiff would have failed to discharge the burden upon him.

I have not lost sight of Order XII rule 11 of the High Court Rules which provides that no action shall be defeated by reason of the misjoinder or non-joinder of any party. But as pointed out by Viscount Cave LC in *Performing Right Society Limited v London Theatre of Varieties Limited* [1924] AC 1 at p 14, this does not mean that judgment can be obtained in the absence of a necessary party to the action.

I shall now turn to the issue of trespass – that is, the third issue formulated above. For this part of my judgment, I shall not assume that the plaintiff's title deeds relate to the land in dispute. In an action for trespass the important consideration is possession. The important issue who has proved a better right to possession. A mere possession is sufficient to maintain trespass against anyone who cannot show a better title; see *England v J Mope Palmer* (1955) 14 WACA 659. See also *Portland Managements Ltd v Harte* [1976] 2 WLR 174 where Scarman LJ said inter alia at p 180:

> "Possession is, of course, a very important matter to be considered in an action of ejectment, or the action for trespass."

In *Bristow v Cormican* (1878) 3 AC 641 Lord Hatherley said inter alia at p 652:

> "There can be no doubt whatever that mere possession is sufficient against a person invading that possession without himself having any title whatever, as a mere stranger; that is to say, it is sufficient as against a wrong doer. The slightest amount of possession would be sufficient to entitle the person who is so in possession or claims under those who have been or are in such possession, to recover as against a mere trespasser."

So the question for determination is whether the plaintiff or the defendant proved a better possession of the land in dispute. Taking first the evidence for the plaintiff, and assuming that his title deeds do not relate to the land, then there is evidence that at some stage he exercised acts of possession over the land.

Even if the evidence of his visit to the land in 1952 is ignored, there is evidence that in 1961 or 1965 he exercised rights of possession over the land by warning off a Mr Lewalley whom he considered a trespasser, therefrom. In the case of the defendant he relies on his title deeds and other acts of possession. The conveyance from Vivian Thomas to Ellis England was in 1967 and the conveyance from Ellis England to the defendant was in 1968. But as stated earlier evidence was led that in 1963 Vivian Thomas had conveyed that same piece of land to Vidal Bickersteth. That evidence went uncontroverted and unrebutted. Learned counsel for the defendant suggested in argument before us that the land may have been re-conveyed to Vivian Thomas or he may have re-entered. But there is no evidence on which such a suggestion can be founded. In my opinion the only evidence of possession that the defendant can rely on is his possession and the prior possession of Ellis England commencing in January 1967. So the relative position of the parties as to proof of possession is that the plaintiff has proved possession from about 1964 or 1965 and the defendant has proved possession from January 1967. In those circumstances, the plaintiff has, in my judgment, proved better possession which has been invaded by the defendant. In my judgment therefore the defendant is liable to the plaintiff in trespass.

I shall now consider what general damages are to be awarded to the plaintiff for the trespass found against the defendant. According to the evidence the plaintiff has not made any use of the land and he has certainly not developed it. In all the circumstances, I think that Le500 would be reasonable

and adequate compensation to the plaintiff by way of general damages for the trespass by the defendant. This disposes of the fourth issue formulated above.

I now come to the last issue formulated above, and that is whether the Court of Appeal was right in ordering a re-trial. As stated earlier the Court of Appeal said in their judgment that they had experienced considerable difficulty "owing to the absence of any clear evidence as to whether the contention between the parties related to one and the same land." With respect, if the Court found itself in such a difficulty it meant that the plaintiff had failed to discharge the onus upon him. In those circumstances they should have dismissed the appeal. As was pointed out by Webber CJ in *Kodilinye v Odu* (supra) if the plaintiff in an action for a declaration of title has failed to discharge the burden cast upon him the proper judgment should be for the defendant. In other words the plaintiff's claim for declaration of title should be dismissed. It is certainly not the proper course in such a situation to order a re-trial and thereby give the plaintiff a second opportunity to discharge the onus which he had failed to discharge in the first place.

The Court of Appeal went further and added that:

> "We would have thought that in a situation as the present one evidence from an independent source like the Director of Surveys and Lands was desirable."

Assuming that evidence was desirable, who should have called it? Quite clearly the plaintiff, on whom the onus rested. And if he failed to call that evidence, I would have thought that that was further proof that he had failed to discharge the onus on him. And if he failed to discharge that onus the proper course open to the court in such circumstances was the dismissal of his claim and not an order for a re-trial. It is of interest to note that a surveyor and senior member of the staff of the Surveys and Lands Department in the person of Mr RE Boston-Mammah was called by the plaintiff as PW5. And yet no questions were put to him to assist in solving the problem of the identity of the land.

Indeed judging from his recorded evidence, it is surprising that he was called as a witness at all. One would have thought that Mr Boston-Mammah was competent to give the "evidence from an independent source" which the Court of Appeal thought was desirable. If the plaintiff who called him failed to elicit that "desirable" evidence from him I would have thought that that was further reason why the appeal against the dismissal of the claim for a declaration of title should have been dismissed.

As indicated above, the Court of Appeal having decided to order a re-trial proceeded to express an opinion as to what evidence it was desirable to call. That means that the Court of Appeal was advising the plaintiff what evidence to call at the re-trial. I think that it is necessary to state that it is not the business of the court, especially in a civil case, to give the parties gratuitous advice as to how they should conduct their cases or what witnesses to call. Otherwise the impression might be created that the court is taking sides in the dispute instead of holding the scales evenly which is its proper role.

In my opinion there was sufficient material before the Court of Appeal to determine the issues raised in the appeal one way or the other. In my judgment therefore the Court of Appeal was wrong in ordering a re-trial.

In view of the foregoing, I would allow the appeal to the extent of setting aside the order for a re-trial and restoring the trial judge's order dismissing the plaintiff's claim for a declaration of title. I would also allow the cross-appeal to the extent of setting aside the trial judge's order of general damages for trespass against the plaintiff and substituting therefore an order of' Le500 in favour of the plaintiff by way of general damages for trespass by the defendant.

Hon Mr Justice CA Harding JSC: I agree. **Hon Mr Justice OBR Tejan JSC**: I agree. **Hon Mrs Justice AVA Awunor-Renner JSC**: I agree. **Hon Mr Justice SMF Kutubu**: I agree.

Reported by Anthony P Kinnear