(11)

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1984

BETWEEN:

JOSEPH CHARLES
ANNE CHARLES - Appellants

and

MARY AMBROISE
PRESTON AMBROISE
FRANKLYN AMBROISE - Respondents

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Williams (Acting)

Appearances: Mr. V. Cooper for Appellants
Mr. H. Deterville for Respondents

1985: Feb. 5,
May 6.

JUDGMENT

BISHOP, J.A.

On the 22nd February, 1984, in a written judgment delivered in the High Court, the learned trial Judge made the following order:-

> "Judgment for defendants on the counterclaim. Positive declaration granted to the defendant Mary Ambroise and her co-owners that she and her co-owners are owners of the land described in the second schedule of the defendant's counterclaim.
>
> An injunction is also hereby granted to the defendant Mary Ambroise and her co-owners restraining the plaintiffs Joseph Charles and Anne Charles, their servants, or agents or assigns from entering or using the land described in the schedule of the counterclaim.
>
> Damages to Mary Ambroise in the sum of $200.00 for her loss of two coconut trees.
>
> Costs to the defendants to be taxed."

The counterclaim therein mentioned was filed in the second of two actions brought by Joseph Charles and Anne Charles, in 1976, against Mary Ambroise, Preston Ambroise and Franklyn Ambroise, who sought, in their counterclaim a declaration that the plaintiffs are not the owners

/of the.....

of the portion of land described thus: "commencing at a point marked by an iron peg forming the North Western point of the lands described in the First Schedule hereto thence along a line bearing 62° 00' distance 60 feet along a line bearing 128° 00' distance 110 feet thence along a line bearing 44° 15' distance 210 feet to a point on the Moulin-a-Vent (Monchy) Road thence along the said road in a south westerly direction to a point along the western boundary of the lands described in the First Schedule hereto thence along a line bearing 17° 00' to the point of commencement". Now the description of land in the First Schedule read in part as follows: "all that piece or parcel of land comprising three carrès of the "Providence" Estate lands in the Quarter of Gros Islet..... and bounded on the north by Ravine Castagnet, south and east by the remainder of the said lands and west by lands formerly owned by Heirs Gervais Richelme, the whole as shown on Plan of Survey by Adrien Monplaisir, Land surveyor, dated 18th March 1929 and registered on the 15th April 1929 as Plan No. 3/1929".

The plaintiffs appealed against the decision of the trial Judge and asked this Court to find that the judgment was wrong and ought to be set aside, and more particularly that Joseph Charles and Anne Charles "did prescribe the use of the subject lands by the Deed of 1943".

Not all the grounds of appeal were argued, and those which were argued were not dealt with as presented in the notice of appeal. Therefore I shall not quote the grounds now but shall refer to them later.

On the 24th June 1918, Widow Louis Hippolyte Joyotte (Marie Luce Pamphile) made a declaration which was registered on the 5th July 1918 in Volume 72a No. 39079. Among other things, she declared that the late Louis Hippolyte Jojotte to whom she was married, died on 3rd October 1899, intestate; further, that at the date of his death he was owner in possession of a portion of the Moulin-a-Vent Estate in the Quarter of Gros Islet, of area about 13 carrès, and which formerly belonged

/to Christopher....

to Christopher Jean. The declaration also showed that Louis Hippolyte Jojotte left no relations within the heritable degree and so the said property became vested in her, as surviving consort; and she claimed that land. The boundaries of the land were stated in the Declaration which remained a valid and unchallenged Deed.

In a Deed of Sale recorded in Volume 86b No. 52594 on the 23rd March 1943, Marie Luce Jojotte born Pamphile (Widow Louis Hippolyte Jojotte) sold to Eugenia Jean born Faissal (widow Gilbert Jean), for £40.0.0 cash, on the 19th March, 1943, a portion of land comprising about 3½ carrés "being the remainder of a large portion of 13 carrés of the Moulin-a-Vent Estate" in Gros Islet. The boundaries were set out in the said Deed of Sale which remained an unimpugned Deed.

Also in the year 1943, as shown by a Deed of Sale registered on the 1st April 1943, in Volume 86B No. 52614, Eugenia Jean (born Faissal) widow of the late Gilbert Jean sold to Joseph Charles, and Anne Charles alias Julienie (nee Jean) wife common as to property of the said Joseph Charles, a portion of land comprising one carré to be dismembered from a larger portion of 3¼ carrés dismembered of the Moulin-a-Vent Estate in Gros Islet. The boundaries were described, but for the purposes of this case, it is necessary to recall only the southern boundary which was stated as "the remainder of the said vendor's lands". Part of these lands were later purchased by the same person.

Deed of Sale dated 19th June 1965 and registered on the 23rd June 1965 in Volume 105 No. 79923 showed that Eugenia Jean born Faissal, (widow of Gilbert Jean) sold to Joseph Charles and Anne Charles (born Jean), for $600.00 a portion of land comprising 1¼ carrés more or less, to be dismembered from a larger portion which was itself a dismemberment of the Moulin-a-Vent Estate in Gros Islet. The deed described the boundaries but only the northern and southern boundaries are important to this case. The former was stated as "a portion of one carré already sold by the vendors to the purchasers" and the latter boundary was

/stated....

was stated as "the Moulin-a-Vent Road". Thus the area was contiguous with the lands bought in 1943 and it was the southern boundary which became an issue in this matter.

Consequent upon their ownership of these two portions of land, Joseph Charles and his wife Anne brought two actions. The earlier one, brought in July 1974, was brought against Mary Ambroise only. The second one, brought in December 1976, was brought against her and her sons Preston Ambroise and Franklyn Ambroise.

Suit 203 of 1974 indicated in clear language that the claim by Joseph Charles and his wife was "for recognition of a right of way". It therefore seemed axiomatic that Joseph and Anne Charles were conceding that the portion of land over which the right of way was claimed, did not belong to them, but belonged to Mary Ambroise or someone else. There would be no need for such a claim as was made if the land belonged to the plaintiffs.

There seemed to be some confusion in the case as conducted on behalf of the plaintiffs and to explain why I say so, it is necessary to refer to the assertions that were made in each of the actions which were consolidated by order of a Judge in Chambers.

The facts pleaded in support of the claim for recognition of a right of way were, that at all material times, Joseph Charles and his wife were in <u>possession</u> of two contiguous portions of land which abutted lands alleged to be the property of Mary Ambroise; further, that they and their predecessors in title to the said lands, for a period in excess of 30 years, enjoyed as of right and without interruption, a right of way across a ravine from a point of entry on the Moulin-a-Vent Road (known as the Monchy Road)where the ravine passed closest to the said road. The right of way was for passing and repassing ON FOOT at all times and for all purposes. Joseph and Anne Charles also asserted that they themselves continued in exercise of their right from March 1943

/until .....

until about March 1974 when Joseph Charles bought a van for use in his business. In that year the passage of the van to and from their lands was blocked by a fence erected by Mary Ambroise at the entrance of the path leading from the road to his land. Then the claim (203 of 1974) reads:-

> "As a consequence the plaintiffs have been denied the right of passing and repassing to their lands across the ravine ON FOOT AND WITH THEIR VAN thus suffering damage."

The assertion was there made, for the first time, and by implication that they had a right to pass and repass WITH THEIR VAN for 30 years. There was no assertion of the plaintiffs driving a van or other motor vehicle, for the period of 30 years from 1943, over the ravine in order to reach their lands; and it must be recalled that in March 1943 the plaintiffs had purchased 1 carré of land which was separated from the ravine by lands of Eugenia Jean (from whom they had purchased the carré). The later purchase of 1½ carrés was made in 1965, and it was the southern boundary of that land which was stated in the deed of sale as the Mouilin-a-Vent Road.

In their first action against Mary Ambroise, the plaintiffs also sought an injunction to restrain her from erecting any barrier which would deny them their right to use the point of entry to their lands.

In their action filed in December 1976 against Mary Ambroise and her two sons Preston and Franklyn, the plaintiffs claimed special and general damages. They asserted their ownership of the contiguous portions of land and that Mary Ambroise purported to be owner in possession of lands adjoining the southern boundary of their lands. Then, after alleging that they and their predecessors in title enjoyed a right of way across a ravine for a period in excess of 30 years and that they themselves continued in the exercise of their right of way from March 1943 to March 1974 (as was claimed in the earlier action), Joseph and Ann Charles alleged facts which followed upon his purchase of a van. They alleged that during the raining season they encountered difficulty crossing the ravine in the van, at the point of entry which they used previously; so they built a concrete bridge over the ravine at that point. Then, according to the pleading, not long after doing so,

/Mary....

Mary Ambroise and/or her servants and agents caused a fence to be erected at the point of entrance from the Moulin-a-Vent Road and obstructed the plaintiffs' passage to their lands. The plaintiffs asserted that this was done by the defendants on the ground that the plaintiffs were committing a trespass on the lands belonging to the first defendant. The Statement of claim alleged further that around the 29th December 1975, the 26th September 1976 and the 23rd October 1976, Preston and Franklyn Ambroise damaged the concrete bridge built by the plaintiffs and that it had to be repaired.

Both of the actions were defended. The defences were not dissimilar. It was admitted that the plaintiffs owned land at Monchy in the Quarter of Gros Islet, but it was denied that the southern boundary of the land was the Moulin-a-Vent Road. The defendants claimed that the southern boundary of the land was the ravine known as Ravine Castagnet. It was admitted, (as the plaintiffs alleged) that the plaintiffs caused their land to be surveyed and that a plan of survey by Gerald Guard, dated 4th April 1975, was lodged in the office of the Commissioner of Crown Lands. Although the plaintiffs appeared, from the Statement of Claim, to be relying on the survey done by Gerald Guard at their instance, it was noticeable that he was not called in support of their case; he appeared as a witness for the defendants.

Paragraphs 2 and 3 of the Defence alleged:-

> "The defendants state that the area marked on the said plan as "area under dispute" has never been under dispute but has at all material times been the property of the heirs of David Ambroise as appears in Deed of Declaration of Succession registered in Vol. 89A No. 52958 and shown on Plan of Survey by Adrian Monplaisir dated 18th March 1929 and lodged at the office of the Commissioner of Crown Lands on the 15th April 1929.....
>
> 3. The first named defendant is a co-owner of lands bounded by a ravine adjoining the southern boundary of the plaintiff's lands.

/The...

> The plaintiffs do not own any lands adjoining the Moulin-a-Vent Road....."

The plaintiffs were put to proof of their assertions with respect to the user of a right of way across the ravine as they claimed and the defendants alleged that the plaintiffs unlawfully entered on a number of occasions on the lands of Mary Ambroise and constructed a bridge across the ravine that separated their lands from Mary Ambroise's lands. They built part of it on the lands of Mary Ambroise.

In both actions Mary Ambroise filed a counterclaim wherein it was alleged that all material times she was co-owner of 3 carrés of land in Gros Islet bounded on the north by Ravine Castagnet. The other owners were given as Agnes Augustin (born Ambroise) Henson Ambroise, Orion Ambroise (now deceased) and Davidson Ambroise.

In suit 203 of 1974 Mary Ambroise counterclaimed, among other things, that

> "the plaintiffs wrongfully claim that they have a right of way to use the bridge" (a bridge wrongfully erected on the defendants' lands) "and the defendants' land adjoining thereto for their motor vehicles";

and in suit 337 of 1976 the three defendants alleged in part that

> "the plaintiffs wrongfully claim to be owners of the portion of the lands of the defendant situate between the Moulin-a-Vent (now Monchy) Road and the ravine known as Ravine Castagnet....."

In the earlier action Mary Ambroise sought a declaration that the plaintiffs are not entitled to enter or use the defendants' land by driving motor vehicles or at all, an injunction to restrain the plaintiffs by themselves, their servants or agents or otherwise from entering or using the defendant's land or driving any motor vehicle thereon, damages and further or other relief. In the latter action the three defendants sought a declaration that the plaintiffs are not the owners of the portion of land in dispute, an injunction restraining the plaintiffs by themselves,

/their....

their servants or agents or otherwise from entering or using the said land. Damages and further relief were also sought.

As I said before the actions were consolidated before the hearing, and I have already related some of the facts which emerged from the documentary evidence admitted by agreement. I do not propose to recite the testimony which the trial Judge was invited to consider. It will suffice to say that it was made clear in the judgment that he was fully cognisant of all that had been adduced and that he analysed it before deciding what to accept and eventually making the order which I have quoted and which formed the basis of the appeal.

Learned counsel for the appellant argued the following ground of appeal:

> "The learned trial Judge adjudicated beyond the conclusions of the suit by granting a positive declaration of ownership when the defendants' Statement of Claim prayed for a negative declaration of a right of way and particularly having regard in the light of the appellant's witness..... Davidson Ambroise's evidence."

Learned counsel cited Article 2103A of the Civil Code of St. Lucia and submitted that for the trial Judge to have made the declaration which he made, the action by the defendants should have been brought under that Article. Counsel also relied on Rule 15 of the Supreme Court - Prescription by Thirty Years (Declaration of Title) Rules, and he contended that in order for there to be a declaration of title a separate and distinct action from that before the trial Judge was necessary; and such an action was not before the Court.

Learned counsel for the respondent submitted that Article 2103A of the Civil Code was not applicable and he urged that there was no necessity for there to be any contest between parties before Article 2103A could be invoked by a court. Mr. Deterville submitted further that what the trial Judge had in effect declared, was, that the plaintiffs were not entitled to use land that belonged to the defendant Mary Ambroise.

/The....

The relevant part of Article 2103A reads:-

> "Title to immovable property.....
> may be acquired by sole and undisturbed
> possession for thirty years if that
> possession is established to the satis-
> faction of the Supreme Court which may
> issue a declaration of title in regard
> to the property.....upon application in
> the manner prescribed by any statute or
> rules of court."

With respect, I do not share the view of learned counsel for the appellant. In my opinion the Article clearly does not contemplate or demand that there be litigation between opposing claimants before there can be an issue of a declarationof title by the Supreme Court. As I see it, when proper application is made by a claimant, if the Court is satisfied that he or she has enjoyed sole and undisturbed possession for thirty years, then that Court may issue a declaration of title in respect of the immovable property under consideration.

The provisions of section 17 of the West Indies Associated States Supreme Court (Saint Lucia) Act 1969 were brought to the attention of counsel for the appellant. They explained the extent of the remedies and powers available to the High Court, in order to avoid a multiplicity of proceedings. Counsel then contended that the trial Judge ought not to have gone further than to say, if the facts and circumstances allowed, that he was not satisfied that the plaintiffs had established a right of user, because, another cause of action was necessary in respect of the question of ownership.

As I said before, having claimed that a right of way should be recognised by the defendants, the plaintiffs were conceding or recognising that there was ownership by someone else. In any event, if ownership of lands the subject matter of the claims and counterclaims became an issue, from the evidence, then, in my view, it was proper for the trial Judge to determine that issue in order to conclude the matters which the parties raised. By so doing "a multiplicity of proceedings" was avoided

/and the.....

and the costs of such proceedings - in money and time - saved.

It seemed to me that there was an issue of ownership raised on the pleadings and from the evidence; and the granting of a positive declaration to Mary Ambroise and her co-owners (who were named in the counterclaim in 337 of 1976) as was done by the trial Judge, was not an adjudication beyond the conclusions of the suit as conducted. I would therefore say that the ground of appeal cannot succeed.

The next ground of appeal pursued was:-

> "The learned Judge took into consideration a conviction by the Magistrate in his consideration of the case and allowed his mind to be influenced thereby."

It is true to say that the learned trial Judge referred to a conviction of Joseph Charles in a case brought against him by Mary Ambroise who complained to the Magistrate that he had unlawfully entered on her land. The reference was no more than a part of the reference made by the Judge to the testimony of the individual witnesses who appeared before him. Mr. Cooper submitted that the reference showed that the trial Judge had allowed his discretion to be fettered by the fact of the conviction. However, counsel was unable to point out to this Court, any finding of fact in the judgment of the learned trial Judge which demonstrated that he had relied on or acted in any way on the evidence of the conviction, the admissibility of which was not opposed at the hearing.

It was not shown that the mind of the Judge was influenced as stated in the ground of appeal, and I must conclude that it is without merit.

The other grounds of appeal which were argued concerned the weight of the evidence and were dealt with together by counsel for the appellant.

/They.....

They were stated as follows:-

> "1. The learned trial Judge failed to address his mind to (1) the appellants' Deed of Sale of 1943 in his consideration of the appellants' claim of prescription having regard to their right to the land and to cross it was prescribed by ten (10) years under a written title (2) the Monplaisir Plan showng a tint in relation to the road in question and accepted Guard's some forty (40) years after Monplaisir's survey as being the correct interpretation of the appellants' deed without considering in any event the bona fide use by the appellants to that section of the land over which the appellants claimed to have prescribed the use."

I have quoted (1) and (2) above because I think that as worded they were little more than criticism of the judgment; and it was not well founded criticism to say that the trial Judge failed to address his mind to these aspects of the case. His judgment clearly showed the contrary.

The second ground of appeal which was dealt with at the same time was:-

> "that the dismissal of the appellant's case was entirely against the weight of the evidence and the learned Judge placed undue weight on Guard's evidence and insufficient weight on the prescriprive claim of the appellants aided by documentary proof and independent testimony, including that of a part owner with the respondents of a part of the subject lands."

In arguing these grounds of appeal together, learned counsel for the appellants submitted that (i) in his judgment the trial Judge ought to have dealt in greater detail with the evidence of the witness Davidson Ambroise, a co-owner with the defendant Mary Ambroise and wh was called, not by the defendants, but to support the case for the plaintiffs (ii) it was fatal to the decision that the trial Judge never dealt with the deeds relied on by the appellants (iii) in the judgment the Judge failed to analyse that part of the evidence dealing with the root title of the plaintiffs and if he had done so he may have reached a different conclusion.

/in the....

In the written judgment, Mitchell J. summarised the evidence of Joseph Charles, Davidson Ambroise, Moise Louis and Augustin Charles on the one hand, and that adduced by Mary Ambroise, Gerald Guard, Prester Ambroise, and Franklyn Ambroise on the other hand. His jury mind was clearly directed to the testimony of every witness in the case, and while counsel may have wished for greater analysis or analysis in greater detail, the fact that a judgment does not reflect that type of analysis is not, by itself, a reason to reverse a decision. The test to be applied by this Court will be referred to later.

Learned counsel cited Article 2057 of the Civil Code and contended that the six things therein mentioned were never dealt with by the learned trial Judge. He also cited Article 2112 and advanced the argument that if there was a deed and the provisions of Article 2057 were satisfied then the period of prescription was ten years whereas if there was no deed then the period was thirty years. It may be pointed out here that in the claim of the plaintiffs they relied upon "a period well in excess of thirty years" for user by the plaintiffs and their predecessors-in-title; and also that from 1943 until 1974 the plaintiffs themselves enjoyed the user alleged. The enjoyment asserted in each of the plaintiff's actions was "as of right and without interruption". In his argument Mr. Cooper asked this Court to find that the Deed of Sale in 1943 represented the point of commencement of the plaintiffs' user of the land, and that the Deed of Sale of 1965 served as confirmation of such user.

Finally, counsel for the appellant submitted that the fact that there was evidence of the existence of an alternative route in use by the plaintiffs did not in any material way defeat the prescriptive right exercised in accordance with the Civil Code of St. Lucia.

When learned counsel for the respondents dealt with the grounds of the appeal which were argued together, he referred to the evidence (including the documentary evidence) and he submitted that it was a portion

/of land....

of land lying between Ravine Castagnet and the Moulin-a-Vent (or Monchy) Road that was the subject of dispute between the parties and more particularly the southern boundary of the plaintiffs' lands or the northern boundary of the defendants' lands and he contended that this Court should apply the test referred to in EDWARDS & ANOTHER v BUXTON (1982) 30 W.I.R. 82 in deciding how to treat the findings and eventual decision of the trial Judge, as reflected in his judgment.

Mr. Deterville submitted also that possession was a question of fact and the burden of proving acts of possession would lie upon the appellants. He referred to parts of the evidence and cited from the judgment in the case - ARCHER v GEORGIANA HOLDINGS LTD. 21 W.I.R. 431.

Learned counsel for the respondent dealt with the issue of prescription and submitted that the following elements had to be satisfied before any claim thereunder could arise:

1. There must be effective possession;
2. there must be a certain interval of time; and
3. there must be absence of interruption.

In counsel's view if there was absence of any of these elements then that must put an end to any claim of prescription; and he contended that in this case there was lack of possession by the plaintiffs.

As far as concerned the Monplaisir Plan, counsel for the respondent submitted that it did no more than show that the Ravine was the southern boundary, and where the Ravine came so close to the road it could not assist.

I am satisfied that the learned trial Judge did address his mind to those aspects of the case which were referred to as aspects as he did not address his mind to, in reaching a decision. It is clear that the judgment showed what the plaintiffs claimed and what the defendants

/counterclaimed;....

counterclaimed; it showed also the facts which the trial Judge accepted; and it may be helpful to quote from the judgment insofar as is relevant to this appeal.

> "I find as a fact on the basis of the evidence in the testimony of the witnesses and the documents submitted for my consideration that the land in question up to the ravine was in the ownership and possession of the defendant Mary Ambroise and her predecessors in title."

After pointing out that the survey by Gerald Guard was carried out at the instance of the plaintiffs, Mitchell J. said:-

> "I accept the evidence of Mr. Guard that from his researches and his survey the Ravine Castigne" (I think it should be Castagnet) "forms the southern boundary of the plaintiff although his deed says a road."

On the issue of the period of possession by the plaintiff, the trial Judge said this:-

> "The evidence of the witnesses who testified as to the purported long period of possession by the plaintiff in my view lacked the probability on which my jury mind could rely and.....when taken in juxta position with the evidence of the defendants and particularly Mr. Guard's evidence and documentary evidence, I find that it is.....more probable than not that the plaintiff Joseph Charles was not in possession of that portion of land across the ravine unto the the road - and for the period of time which he claimed."

The learned trial Judge dealt with the plan of survey relied upon by the plaintiffs, and he said this:-

> "It is always a question of fact as to whether a plan gives an adequate and sufficient definition with convenient certainty of what is intended to pass.
>
> In the case of the plaintiffs, I am satisfied as a fact, that the plan which he produced did not give with certainty what land was intended to pass to him and what land could have lawfully passed to him at the time of his purchase."

The final finding made by the learned trial Judge, to which I wish to refer is this:-

/"I am....

> "I am satisfied also that the plaintiff did not occup the land in question nec vi, nec clam, nec precario. If the plaintiff used the land in question, he, in all probability, used it surreptitiously. I do not accept the evidence of his witness and himself that he used the land as they described."

Articles 2056 of the Civil Code read as follows"-

> "2056. Possession is the detention or enjoyment of a thing or of a right which a person holds or exercises himself or which is held or exercised in his name by another.
>
> 2057. For the purposes of prescription, the possession of a person must be continusus and uninterrupted, peaceable, public, unequivocal and as proprietor."

Counsel for the appellant criticised the judgment by saying that the Judge never dealt with any of the six things mentioned in the latter article. It is, in my view, inaccurate to say so particularly in the light of the last quoted passage from the judgment. In any event, the plaintiffs who were claiming by virtue of prescription had the onus of proving possession as required by article 2057; and if the trial Judge had in fact not dealt with those elements yet learned counsel failed to draw the attention of this Court to any evidence on which the trial Judge ought, as a matter of duty, to have found that the plaintiffs' possession was continuous and uninterrupted, peaceable, public, unequivocal and as proprietor. The trial Judge was either not satisfied with the evidence or he rejected the evidence relied on by the plaintiffs. He so indicated when he said in effect, that they had NOT established that they occupied the land "nec vi, nec clam, nec precario", and that it was more probable that Joseph Charles was not in possession of the portion of land between the ravine and the road at all or for the period which he claimed.

The question arises at this stage, what is the role of the Court of Appeal in a case such as this, where it is called upon to say that the decision ought to be set aside, on the evidence? The answer is to be found in the following extracts, which in my view, indicate the test to

/which....

which I alluded earlier. In BIRKETT v JAMES (1978) A.C. 297 Lord Diplock said:-

> ".....an appellate Court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided to take the matter. They should regard their function as primarily a reviewing function and should reverse his decision only.....where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account....."

In EDWARDS and ANOTHER v BUXTON (1982) 30 W.I.R. 82 a case heard by the Court of Appeal of the Eastern Caribbean States, Berridge J.A. referred to the findings of fact made in the Court below and then said (at page 87, letter g):-

> "The trial Judge had an advantage which this Court does not have and while the trial Judge is not infallible and may, on occasions, go wrong on a question of fact, this Court will only disturb a Judge's decision on facts where there is no evidence at all, or only a scintilla of evidence, to support it. The invariable practice of a court of review is to act on the principle that the judge was in a better position than the court to assess the credibility of the witnesses and the value of their evidence....."

When I apply the test contained in these extracts I am compelled to hold that the trial Judge was not shown to have erred in principle and that this Court ought not to interfere in any way with the order made by him.

I would dismiss this appeal with costs to be taxed.

E.H.A. BISHOP,
Justice of Appeal

/I... .

I agree.

L.L. ROBOTHAM,
Chief Justice.

I also agree.

L. WILLIAMS,
Justice of Appeal (Acting)