

should be disciplined, I would quote the words of Lord Mansfield in *Ex p. Brounsall* (2) (2 Cowp. at 829-830; 98 E.R. at 1385):

"But the question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion It is not by way of punishment; but the court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not." 5

Before proceeding to make any order, I should like to hear the acting Solicitor-General as to whether he has anything to say which may assist the court in assessing punishment. Counsel for the respondent will of course be given an opportunity to say anything he may deem fit in mitigation of the respondent's misconduct. 10

[The acting Solicitor-General gave the court details of the respondent's two previous suspensions from practice in 1940 and 1941. The learned Chief Justice then continued:] 15

I order that the Master do strike the name of Cyril Bunting Rogers-Wright off the Roll of the Court. The respondent will pay the costs of these proceedings to the Attorney-General. The application for a stay of execution is refused. 20

Order accordingly.

SOLOMON and SOLOMON (trading as A. AND E. SOLOMON) v. ABOUD 25

SUPREME COURT (Beoku-Betts, J.): March 17th, 1950
(Civil Case No. 100/49)

[1] **Civil Procedure—parties—plaintiffs—trespass to land—person in possession proper plaintiff—reversioner can recover only for injury to reversion:** If land is in the possession of a tenant, he is the proper plaintiff to sue for trespass committed in respect of the land; but where the trespass is not merely of a temporary nature, and is injurious to the reversion, the reversioner, although he cannot sue in trespass, may sue for the injury done to his interest (page 24, lines 24-29). 30 35

[2] **Injunctions—mandatory injunctions—balance of convenience to be considered—inconvenience to defendant disregarded where injunction only remedy to ensure adequate justice or defendant's conduct unconscionable:** A mandatory injunction will not as a rule be granted without taking into consideration the comparative con- 40

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venience and inconvenience caused to the parties: but where the injury cannot be estimated and sufficiently compensated for by damages, or is so serious that the restoration of things to their former condition is the only remedy whereby justice can be adequately done, or where the defendant has acted unconscionably, a mandatory injunction will be granted irrespective of any inconvenience caused; and this is so even though the act sought to be restrained has been nearly or entirely completed before the action is commenced, when it will be granted to prevent extreme or very serious damage but not otherwise, though in a case of trespass it may be granted to prevent the defendant gaining an unfair advantage even though the damage is slight (page 26, line 18—page 27, line 16).

[3] **Injunctions—mandatory injunctions—discretion to grant to be exercised with caution:** In granting a mandatory injunction the court exercises its discretion with caution and in the light of all the circumstances of the case (page 27, lines 20–23).

[4] **Injunctions—mandatory injunctions—granted where only remedy to ensure adequate justice or defendant's conduct unconscionable:** See [2] above.

[5] **Injunctions—mandatory injunctions—trespass—may be granted to prevent defendant gaining unfair advantage even though damage slight:** See [2] above.

[6] **Land Law—conveyancing—deeds—interpretation—plan annexed to conveyance but not referred to cannot be used to explain conveyance:** A plan annexed to a conveyance and not referred to in it cannot be used to explain the conveyance (page 25, lines 14–17).

[7] **Landlord and Tenant—trespass to land—tenant in possession proper plaintiff—landlord can recover only for injury to reversion:** See [1] above.

[8] **Tort—damages—injury to reversionary interests in land—reversioner can recover for injury to reversion but not in trespass:** See [1] above.

[9] **Tort—trespass—injunctions—mandatory injunction may be granted to prevent defendant gaining unfair advantage even though damage slight:** See [2] above.

[10] **Tort—trespass—trespass to land—who may sue—person in possession proper plaintiff in action for trespass:** See [1] above.

The plaintiffs brought an action against the defendant in which they claimed a mandatory injunction for the removal of a wall erected by the defendant on the plaintiffs' land, an injunction restraining him from continuing or repeating the trespass and any further or other order.

The plaintiffs owned property adjacent to the defendant which

had been leased to another person. A dispute arose concerning a boundary wall built by the defendant on what he alleged to be his property. The plaintiffs claimed that the wall encroached on to their land to such an extent that they were unable to go ahead with building plans which they had for the land. They brought the present action seeking a mandatory injunction for the removal of the wall and a further injunction against any continuation or repetition of the trespass. 5

The defendant denied the encroachment, and further maintained that since a fence had been built in the same position as the wall for some years, even if there had been some encroachment the situation had existed for such a long time that he had acquired a statutory title to the land within the present boundaries. 10

Cases referred to: 15

- (1) *Goodson v. Richardson* (1874), 9 Ch. App. 221; 30 L.T. 142, applied.
- (2) *Lawrence v. Horton* (1890), 59 L.J.Ch. 440; 62 L.T. 749, *dictum* of Chitty, J. applied.
- (3) *Marriot v. East Grinstead Gas & Water Co.*, [1909] 1 Ch. 70; (1908), 99 L.T. 958. 20

R.B. Marke for the plaintiffs;
Miss Wright for the defendant.

BEOKU-BETTS, J.:

This is an action in which the plaintiffs claim to be the owners of premises situate at Little East Street, numbered 536 in the public register and plan of town lots of land for Freetown, and numbered 14 by the Municipal Corporation of Freetown. They allege that the defendant is the owner of premises adjacent to their property and numbered 16 Little East Street. 25 30

The plaintiffs allege that in March 1949 the defendant unlawfully entered into the plaintiffs' premises and by himself and servants or workmen erected a concrete wall on a portion of the plaintiffs' premises, and that he persists in maintaining that the portion of land on which the wall is erected is his. The plaintiffs allege that unless the wall is demolished they cannot erect the substantial building they propose erecting on their land. They therefore claim: 35

- (i) that the concrete wall be removed;
- (ii) an injunction restraining the defendant, his servant or agent, from continuing or repeating any of the acts complained of; and
- (iii) any further or other order as in the circumstances may be met. 40

The defendant admits that the plaintiffs are in possession of No. 14 Little East Street but denies that it is lot No. 536. The defendant admits that he is in possession of premises at No. 16 Little East Street and asserts that the concrete wall was erected on a portion of his premises. The whole case therefore resolves itself into the question of a boundary dispute between the parties. In order to decide this issue I propose to review the evidence given in the case and then to examine it and arrive at my conclusions.

[The learned judge reviewed the evidence of the witnesses of both parties as to the history and lay-out of the property in question, and particularly with regard to the boundary wall. He then continued:]

Learned counsel for the defendant, relying on 33 *Halsbury's Laws of England*, 2nd ed., at 10, and *Roscoe's Nisi Prius Evidence*, 18th ed., at 930-931 (1907), submitted that, the action being in the nature of a trespass, the person to sue is the person in possession. With this I agree, if the action were merely that of trespass of a temporary nature. But when learned counsel for the defence elaborated his submission and stated that the plaintiff should prove that the property on which the wall was erected formed part of his property, he unfortunately defeated himself. The legal position is made clear by reference to 33 *Halsbury's Laws of England*, 2nd ed., at 13:

"If land is in the possession of a tenant, the tenant is the proper plaintiff to sue for trespass committed in respect of the land; but where the trespass is not merely of a temporary nature, but is injurious to the reversion, the reversioner, although he cannot sue in trespass, may sue for the injury done to his interest."

The nature of the claim and the issues involved have to be considered to determine whether they are of such a nature that a mere tenant would fail. The claim is: (i) that a concrete wall erected on the plaintiffs' land be removed; and (ii) for an injunction to restrain the defendant from continuing the action of erecting a concrete wall on the land of the plaintiffs. These are matters which clearly raise questions of title which affect the reversion. The removal of a wall on the land is not a question for a tenant but for his superior in title, the landlord and reversioner. In my opinion the matters in dispute between the parties are such as are properly maintainable in an action between the plaintiffs and the defendant: see *Kerr on Injunctions*, 6th ed., at 630 (1927).

Having disposed of this matter, it seems to me that what I have to consider are (a) whether the land on which the defendant erected the concrete wall is the property of the plaintiffs or that of the defendant, and (b) whether, if it is the property of the plaintiff, it is a proper case for a mandatory injunction.

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[The learned judge reviewed the evidence as to the correct position of the boundary between the two properties. He considered, *inter alia*, a lease made between the present tenant of No. 16 Little East Street and the defendant's predecessor in title, and stated:]

There is a plan attached to the lease, although no reference is made to it there. But it was proved that this lease was registered in the registrar-general's office on the day of execution (February 20th, 1945) and the presumption is that it was on the lease at the time of execution. But the law as stated in *Norton on Deeds*, 1st ed., at 219 (1906), is that a map (in which expression a plan is included) annexed to a conveyance and not referred to in it could not be used to explain the conveyance. So that for the purpose of determining the area of the land I cannot refer to the plan in the lease.

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[The learned judge continued his review of the evidence, and concluded that there had been an encroachment of the boundary on to the plaintiffs' property. He further considered the defendant's claim that a fence had existed on the disputed boundary for so long that it must now be regarded as the rightful dividing line between the properties. He continued:]

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Having reviewed the oral evidence as to the boundary, I should state that if the defendant relies on the fact that the boundary as shown in the deeds differs from what he or his predecessors in title occupied he should bring evidence to convince me that his predecessors in title had extended their boundary beyond that shown in the documents for a sufficiently long period, of at least 12 years, so as to give them statutory title to the area in excess of what their title deeds call for. This they attempted to prove by the different witnesses as to the line of the fence at different times. I have reviewed the evidence of these witnesses, but not one of them satisfies me as to the exact boundary. Caulker stated he lived in No. 14 from 1938-1948, and there was a boundary line between the two premises, but he did not at any time measure the distance and he does not satisfy me that the wall is on the same spot as where the corrugated iron sheet fence was. He is contradicted as to the length of the fence by Jadallah Aboud who lived in No. 16 from 1935 up to the present. None of the other witnesses satisfy me

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that they knew the exact spot where the corrugated iron fence was or as to whether the concrete wall is now on the same place. What I cannot understand is why exhibits F and H show the boundaries to be different from what the defendant now claims. Of all the witnesses on this point I prefer the evidence of Jadallah Aboud who has lived in No. 16 from 1935 to the present and actually widened the gate of those premises for his convenience. He is more likely to know the dimensions. On this question I am satisfied that the oral evidence is not strong enough to contradict the documents of title as to the boundary between the parties, and repeat that I find that the defendant encroached on the premises of the plaintiff by 4 ft. 6 ins.

The last question is whether this is a matter in which damages would be sufficient or whether a mandatory injunction should be granted that the concrete wall be removed. The principles on which the court acts are stated in 18 *Halsbury's Laws of England*, 2nd ed., at 24-25, as follows:

"Where the injury done to the plaintiff cannot be estimated and sufficiently compensated for by damages, or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done, . . . the court will exercise its jurisdiction and grant a mandatory injunction"

A mandatory injunction may be granted although the act sought to be restrained has been nearly or entirely completed before the action is commenced, but it will only be granted in such cases to prevent extreme or very serious damage."

In the case of *Goodson v. Richardson* (1), it was held that in a case of trespass a mandatory injunction will be granted even though the damage is slight. The same decision was given in the case of *Marriott v. East Grinstead Gas & Water Co.* (3). In *Kerr on Injunctions*, 6th ed., at 41-42 (1927), the law is stated as follows:

"The Court will not as a rule interfere by way of mandatory injunction without taking into consideration the comparative convenience and inconvenience which the granting or withholding the injunction would cause to the parties. Where the injury done is capable of being fully and abundantly compensated by a pecuniary sum, while the inconvenience to the other party from granting an injunction would be serious, the Court will not interpose by way of mandatory injunction, but will award damages by way of compensation for the

injury. But where the injury is of so serious or material a character that the restoring things to their former condition is the only remedy which will meet the requirements of the case, or the defendant has been guilty of sharp practices or unfair conduct, or has shown a desire to steal a march upon the plaintiff . . . the injunction will issue, notwithstanding the amount of inconvenience to the other party, and though the expense thereby caused to him will be out of proportion to any advantage the plaintiff may derive from it.” 5

The court always exercises a discretion in the granting of a mandatory injunction. In the case of trespass the court has to consider the position and avoid the defendant gaining an undue advantage by the act of trespass. An adjoining tenant who covets a piece of land, which he could not get properly, may by an act of trespass extend his boundary and hope that all the court would do would be to award damages or compensation. 10 15

Before, however, I can decide whether this is a proper case to make an order for mandatory injunction, I propose to consider the circumstances, for as Chitty, J. stated in *Lawrence v. Horton* (2) (59 L.J.Ch. at 441; 62 L.T. at 751): “. . . [I]n granting mandatory injunctions the Court exercises its discretion with caution and, in deciding whether that is or is not the appropriate remedy, it has regard to all the circumstances of the case.” 20

In the first place, I am satisfied the defendant encroached on the land of the plaintiffs and erected the wall on a portion of land which is the property of the plaintiffs, and by so doing he committed an act of trespass. On March 28th, 1949, he was informed of this act of trespass. The plaintiffs’ solicitor then suggested the parties should meet on the site and rectify the boundaries. The defendant instructed his solicitor in reply to deny any encroachment. In the letter it was alleged that the defendant’s boundaries have been the same for over 40 years. The defendant therefore had an opportunity of adjusting the matter and in all probability coming to a satisfactory settlement, but he refused to meet the plaintiff. While this would not be sufficient to justify an order for a mandatory injunction, it seems to me that the other circumstances are such that would make a refusal to grant the order a negation of justice. The wall of the defendant as now erected obstructs the windows of the house of the plaintiff and the windows on that side cannot be opened. Ventilation or light from the southern side of the defendant’s premises is cut off. Further, the space between the wall and the house is such 25 30 35 40

that no human being can get in and that area cannot therefore be kept clean. On grounds of sanitation the position is either that the plaintiffs' house should be removed from its present position or the wall should be removed from its present position.

5 It seems quite reasonable that the plaintiffs' house should not be removed from its present position, since it is on their land. The other alternative is that the defendant's wall should be removed. The balance of convenience, and what would cause less expense, is for the wall to be removed. On all the circumstances of the case and acting on the principles of the legal authorities cited, I am of the opinion that the proper remedy in this case is to order that the portion of the concrete wall which encroaches on the property of the plaintiffs should be removed, so as to make the southern boundary of the plaintiffs' land 75 ft. 9ins. in a straight line, and in order to be more exact the wall should be removed so that the boundary of the plaintiffs' land shall be east 52 ft., west 51 ft., north 75 ft. 10 ins. and south 75 ft. 9in. I therefore make an order that the wall erected on the plaintiffs' land by the defendant be removed in the manner and to the extent stated above, that the defendant, his servants, or agents be restrained from continuing or repeating the act of erecting a wall on the plaintiffs' land, and that the defendant pays the costs of the plaintiff of and incidental to this action.

Order accordingly.

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MOHAMMED ABDALLA v. REGEM

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WEST AFRICAN COURT OF APPEAL (Blackall, P., Lucie-Smith, C.J. (Sierra Leone) and Lewey, J.A.): March 22nd, 1950 (W.A.C.A. Cr. App. No. 4/50)

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[1] **Criminal Procedure—assessors—judge's summing-up—judge may express strong view on facts provided decision left to assessors:** The mere fact that, in considering the evidence in his summing-up, a judge expresses a strong view on the facts is not sufficient to entitle a person to have his conviction set aside; a judge is entitled to express his views on the way the facts should be dealt with provided that he does not take the actual decision out of the hands of the assessors (page 30, lines 11-20).

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[2] **Criminal Procedure — assessors — judge's summing-up — judge must direct assessors' attention to salient points of case—if case properly**