JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 5 OF 2007

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

BETWEEN	**ELSIE RAFFINGTON**	**APPELLANT**
AND	**JOSEPH McINTOSH**	**RESPONDENT**
	(Agent of Paulina Lindsay And Margaretta Anderson)	

Garth McBean instructed by Carl McDonald for the Appellant.

Mrs. Jacqueline Samuels-Brown and Miss T. Maragh instructed by Miss Yvonne Ridguard for the Respondent.

November 3, 4, 2008 and April 24, 2009

SMITH, J.A.:

I have read in draft the judgment of Harrison, J.A. I agree with his reasoning and conclusion. I have nothing further to add.

HARRISON, J.A.:

1. This is an appeal from the judgment of Her Honour Mrs. Andrea Collins who on the 1st of May, 2006 ordered Elsie Raffington (the appellant) to vacate premises known

as Moore Park, Bybrook, situated at Buff Bay in the parish of Portland on or before October 31, 2006.

2. The plaint was filed by Joseph McIntosh, agent of Margaretta Anderson and Paulina Lindsay who claimed that they were owners of the property and that at all material times, the appellant was a licensee. They further claimed that by notice to quit dated August 20, 2001 the appellant was requested to deliver up the premises to the respondent but failed to do so.

3. The appellant in her defence contended that the respondent had no locus standi to bring the claim since Anderson and Lindsay had no proof of ownership of the property and were not landlords. She agreed that the land in question had been owned by Franklyn Anderson, a brother of both the respondent Margaretta Anderson and the appellant's mother, Indiana Anderson. She contended however, that Franklyn Anderson had died intestate; no Letters of Administration were applied for so, the estate remained "unsettled". It was also said that the beneficiaries to the estate Franklyn Anderson were Margaretta Anderson, Indiana Anderson (deceased mother of the appellant) and Regina Anderson.

4. The background facts are summarized hereunder:

(a) Franklyn Anderson, a brother of Margaretta Anderson and Indiana Anderson, was the owner of the Moore Park property. In the mid

1980s Indiana and her children lived on the land at Moore Park. Margaretta was then living in the United States of America (U.S.A).

(b) There was an old house on the property and in 1986, Indiana had asked Margaretta to build a new house since the original structure was old and broken down. Margaretta spoke to her brother Franklyn about the request since she said that the land and house had been owned by Franklyn and herself. Franklyn had bought the land from one Matthew Shaw. A receipt (Exhibit 1) for purchase of the land was admitted in evidence.

(c) Margaretta and Franklyn got the land surveyed and Margaretta was put in possession of the land by Franklyn in 1987. The survey documents were tendered and admitted into evidence as Exhibit 2.

(d) Whilst Margaretta was in the USA she sent US$11,000.00 to Franklyn in order to commence construction of the new house. Her brother Consie, who was also living in the USA, had also sent money to Indiana in order to assist her. Paulina Lindsay the daughter of Margaretta had also contributed.

(e) The plan for the house was admitted in evidence as Exhibit 3. Margaretta said she would send money to Franklyn since he was in charge of building the house.

(f) The house that was being built was comprised of two bedrooms, a living room, kitchen, bathroom and a verandah. The room identified as Room

number 3 on the plan, was designated as Margaretta's bedroom. It was agreed that Margaretta would occupy this room whenever she visited Jamaica. Room number 1 was occupied by Indiana and her children.

(g) The basic structure of the house was built with money provided by Margaretta and Paulina.

(h) The appellant with the help of her sister Clarice had put in certain fixtures such as kitchen cupboards and other things to make the house habitable.

(i) The construction of the house was substantially completed at the time of Franklyn's death.

(j) Franklyn died in 1993 and the appellant took possession of room number 3. Margaretta did not object to her staying in that room but after Indiana died in 1999, the appellant took over the entire house. The appellant was requested to deliver up possession of the premises but she failed to do so. A Notice to Quit (Exhibit 5) was therefore served on the appellant.

(k) Margaretta continued to pay the taxes for the land after the death of Franklyn. Tax certificate dated May 8, 2003 was admitted in evidence as Exhibit 6.

5. On May 10, 2006 the appellant lodged a Notice of Appeal. The judgment of the learned Resident Magistrate was challenged under two main heads: -

(a) That the annual value of the property was not stated in the Particulars of Claim and this omission was fatal and could not be cured by oral evidence.

(b) That the Court had no jurisdiction to make a declaration and/or order as to the occupation and possession of the house on the basis of proprietary estoppel.

Ground of Appeal 1

The Learned Resident Magistrate erred in finding as she did that the provisions of Order 6 Rule 4 of the Resident Magistrates Court Rules requiring the Particulars of Plaint to state the annual value of the land was satisfied by oral evidence given during the trial by the Plaintiffs/Respondents. The Learned Resident Magistrate so erred for the following reasons:-

(a) The Particulars of Plaint did not state the annual value of the property and this omission could not be legally cured by the subsequent oral evidence.

(b) In any event, the oral evidence of the Claimant that the annual value did not exceed $75,000.00 and the unimproved annual value of the land stated in the tax receipts exhibited at the trial did not constitute sufficient evidence of the annual value of the property and could not cure the omission to state the annual value of the property in the Particulars of Plaint.

6. Mr. Garth McBean, for the appellant, has submitted that by virtue of Order 6 Rule 4 of the Resident Magistrates Court Rules (the Rules) failure to state the annual value of the property in the particulars of claim was fatal and could not be cured by oral evidence of Paulina Lindsay who had testified that the annual value did not exceed $75,000.00.

7. Order 6 Rule 4 of the Rules provides as follows:

> "In all actions for the recovery of land the particulars **shall** contain a full description of the property sought to be recovered, and of the annual value thereof, and of the rent, if there be any, fixed or paid in respect thereof". (emphasis supplied)

Mr. McBean submitted that the word "shall" referred to in Order 6 (supra), made it mandatory for the claimant to state the annual value in the particulars of claim.

8. The word "shall" has been construed in the English case of **Cooke v New River Co** (1888), 38 Ch 56 and at p. 69, Bowen LJ, said:

> 'After all, the word 'shall' is only the future tense and colourless, but it may receive, and it does receive, in ordinary language either a compulsory colour or an optional colour from the context.'

9. In Craies on Statute Law, 4th Edn, at p 240, the following passage appears:

> 'As a general rule, the conditions imposed by statutes which authorise legal proceedings to be taken are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the Legislature simply for the security or benefit of the parties to the action themselves, that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court.'

10. In Maxwell on The Interpretation of Statutes, 7th Edn at p 316, the following passage is to be found:

> 'It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating

> consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the Statute under consideration must be regarded.'

11. In **Doyle v Stephenson** (1959) 1 WIR 296 there is a similar provision to our Order 6 rule 4. Rule 52 of the Petty Civil Courts Rules of Trinidad and Tobago which provides as follows:

> 'In an action for the recovery of land the particulars **shall** contain a full description of the land sought to be recovered and the annual value thereof and the rent (if any), and shall state the ground on which possession is claimed.' (emphasis supplied)

12. The facts in **Doyle's** case (supra) are quite similar to those in the instant case. The respondent had brought an action in the Port of Spain Petty Civil Court by summons against the appellant claiming recovery of possession of a room. The particulars endorsed on the summons contained no reference to the annual value of the room sought to be recovered, but during the hearing of the case evidence was led from which the trial judge could have found that neither the annual value of the room nor the rent payable in respect of it exceeded the sum of $240.00, the statutory limit of his jurisdiction. At the close of the case counsel for the appellant submitted that the

summons was bad for non-compliance with rule 52 of the Petty Civil Courts Rules. The trial judge overruled the submission and gave judgment for the respondent.

13. The appellant appealed the decision of the trial judge and one of his grounds of appeal was that as the summons did not comply with the provisions of rule 52 of the Petty Civil Courts Rules, the Petty Civil Court judge had no jurisdiction to entertain the action. At the hearing of the appeal, counsel for the appellant submitted that the provisions of rule 52 were imperative or mandatory and, as there was no endorsement on the summons of the annual value of the land sought to be recovered, the court had no jurisdiction to entertain or to hear the action. In reply, counsel for the respondent contended that the provisions of the rule were merely procedural or directory, that no objection was taken to the summons before the hearing commenced, that the matter proceeded to a hearing during which some evidence of the annual value of the premises was given, and that such a procedure cured any defect in, or any objection that could have been made to, the summons.

14. Gomes CJ in delivering the judgment in Doyle said at pages 298 – 299:

> "In the first place, therefore, it is necessary to examine the provisions of the rule in some detail.
>
> It will be observed that the rule prescribes that the particulars shall contain (1) a full description of the land sought to be recovered, (2) the annual value thereof, (3) the rent (if any), and (4) the ground on which possession is claimed. It seems clear that the degree of importance that attaches to each of those matters is not on the same plane. For example, suppose that three of them were endorsed with fair precision and the fourth–a full description of the

land–was not or was omitted entirely: could it be said in such a case that the summons was defective in a vital way? We think not, because it is highly improbable that the defendant would not have a good and fair idea of the property which is the subject-matter of the dispute, and any reasonable amendment which could be made either at the commencement of, or during the hearing of, the description of the property would not unduly prejudice or mislead the defendant.

Again, suppose the missing endorsement was the omission to state the annual value of the land: would that be fatal? If it were held to be so, it would mean that the same rule that commanded or directed that certain things shall be done, must be done as regards some of them only and not as regards others.

In our view the requirement in the rule with respect to indorsement of value is intended to serve a two-fold purpose. The first is to inform the defendant that the plaintiff considers that the action is within the jurisdiction of the Petty Civil Court, and therefore gives to the defendant an opportunity to prepare himself to contend otherwise when the action is called for hearing, or to enable him to decide (where title to the land is in question) whether he will apply to the Supreme Court under the provisions of s 14 of the Petty Civil Courts Ordinance, Cap 3, No 3 [T], to have the action transferred to the Supreme Court. The rule also serves the purpose of indicating to the judge who is to hear the action whether it is one that is considered as coming within his jurisdiction. If an endorsement is made on the summons that the value of the subject-matter is under $240, then the judge knows at the outset that the action is one over which he may exercise jurisdiction, although, when the evidence is given, it may turn out to be otherwise. If, on the other hand, no indorsement is made on the summons, then the judge is not in a position to know whether he should or should not entertain the action. This purpose of the rule is to prevent the abortive hearing of an action, during which it might transpire that the value of the subject-matter is outside the jurisdiction of the Petty Civil Court, for in such case time may be wasted on entering upon the trial which ought never to have commenced.

> It must be remembered that the rule does not confer any jurisdiction on a Petty Civil Court Nor is the question whether or not the court has jurisdiction dependent upon or to be determined by a statement in the particulars of the value or annual value of the land, for the simple reason that the evidence may disclose that the value of the land is in excess of the amount to which the jurisdiction of the court is limited.
>
> The requirements of the rule pertain to pre-trial matters only, and as such are governed by the provisions of s 29 (1) and (2) of the Petty Civil Courts Ordinance. Subsection (1) provides that all summonses and other process shall be substantially in the prescribed form. The prescribed form of summons in an action for the recovery of land is Form 13 in the Schedule to the Rules, and r 52 prescribes certain things that should be stated in the particulars. In our view a summons would not be substantially in the prescribed form unless it contained, at least in form, the things that are prescribed."

16. Mrs. Samuels-Brown, for the respondent, submitted that even if there had been failure to comply with Order 6 rule 4, since the Resident Magistrates' Courts are not courts of pleading, the point as to omission to plead must fail. She submitted in the alternative that this was not a case regarding dispute to title to land, so section 89 of the Judicature (Resident Magistrates) Act would be applicable thereby making the annual value irrelevant. She referred to and relied heavily on the cases of **Brown v Bailey** [1974]12 JLR 1340 and **Ferguson et al v Burke** [1991] 28 JLR 614.

17. Mrs. Samuels-Brown also submitted that rules and or regulations made pursuant to law do not and cannot confer jurisdiction on the court. That, she said, is a privilege confined to laws or the parent statute. She argued that since Order 6 rule 4 did not

seek to confer jurisdiction, in considering the effect of its non compliance, regard must be had to section 251 of the Judicature (Resident Magistrates) Act which states:

> "251. Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury.
>
> And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:
>
> Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause:
>
> Provided also, that an appeal shall not be granted on the ground of the improper admission or rejection of evidence; or on the ground that a document is not stamped or is insufficiently stamped; or in case the action has been tried with a jury, on the ground of misdirection, or because the verdict of the jury was not taken on a question which the Magistrate was not at the trial asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned in the

> trial, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and allow the appeal as to the other part only, or as to the other party or parties.

18. The question now arises - what is the position where the particulars of claim fail to comply with Order 6 Rule 4? In my judgment, the proviso to section 251 of the Judicature (Resident Magistrates) Act, that is,

> "Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, **where the effect of the judgment shall be to do substantial justice between the parties** to the cause": (emphasis supplied)

is very crucial in the outcome of this ground of appeal. Margaretta Anderson had given a description of the property in her evidence and the surveyor's diagram which was tendered and admitted in evidence clearly delineated the boundaries of the land in question showing the adjoining lands and the ownership of each parcel of land. Furthermore, the tendering of the surveyor's report was done in response to a Notice to Produce that was filed by the appellant's Attorney-at-Law. The learned Resident Magistrate's reasons for judgment also indicated that there was a request regarding the annual value of the land and that the respondent in response said that it did not exceed $75,000.00. In my judgment the dicta of Gomes C.J in **Doyle** (supra) is very persuasive and I must say that they are quite apt to this appeal on the question of failure to state the annual value in the particulars of claim.

19. I further hold that in the circumstances of this case the failure to state the annual value of the land in the particulars of claim would not be fatal. The recovery of possession was undoubtedly sought under section 89 of the Act which empowers not only the legal owner but an equitable owner to maintain an action for recovery of possession and damages for trespass against a person who can show no title. I therefore find no merit in ground of appeal 1.

Ground 2

> **The Learned Resident Magistrate erred in finding as she did that the doctrine of proprietary estoppel applied and was sufficient to give the Plaintiff/Respondent a claim to the property in question. The Learned Resident Magistrate so erred for the following reasons:-**
>
> **(a) The court had no jurisdiction to make the declaration as to the exclusive occupation of the house binding on the estate of Franklyn McIntosh in the absence of representations for and on behalf of Mr. McIntosh's interest in the land and the said house.**
>
> **(b) The equity sought by the Plaintiff/Respondent seeking to rely on the doctrine of proprietary estoppel acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner' by defeating a common intention, and therefore requires an investigation into what the parties intended at the time the representation was made and the Plaintiff acted in reliance on said representation.**
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> **(c) In the absence of representation by the legal owner, the only equity that could have been raised in favour of the Plaintiff/Respondent, but was not, was a constructive trust, since the Learned Magistrate had found as a matter of fact that the Plaintiff Margaretta McIntosh had contributed US$11,000 to the building of the house. As such, since equity could have already operated in favour of the Plaintiff/Respondent, there was then no room for a separate interest by way of proprietary estoppel.**

(d) Further, the Learned Magistrate's judgement was not a just one, as there ought also to have been an equity in favour of the Defendant/Appellants. The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result. In finding as a fact that the Defendant/Appellant made the house habitable the Learned Magistrate ought to have made an order as to compensation for the Defendant/Appellant for the money so expended.

(e) The Learned Resident Magistrate erred in granting an order for possession to the Plaintiff/Respondent who was not a Landlord of the premises for the purposes of the Rent Restriction Act.

(f) Further, or in the alternative, the Learned Resident (sic) had no jurisdiction to make a declaration as to the ownership or possession of the said house.

20. Mr. McBean submitted inter alia in his written submissions as follows:

> "8. In the instant case no representative of the estate of the late Franklyn Anderson was a party to the suit nor was there any representative of the interest of the estate. Therefore it is submitted that in those circumstances the Court had no jurisdiction to make a declaration and/or order as to the occupation and possession of the house on the basis of proprietary estoppel.
>
> 9. In view of the finding by the Learned Resident Magistrate that the Plaintiff/Respondent, Margaretta McIntosh had contributed US$11,000.00 to the building of the house there is no room for a finding that the Plaintiff/Respondent had acquired an interest by way of proprietary estoppel.
>
> 10. In the instant case there is no evidence of an express or implied promise or representation by the late Franklyn Anderson that the house or land would belong to Margaretta Anderson or that she would have exclusive possession thereof if she funded its construction. The evidence of the Plaintiff's name being on the survey diagram and the evidence that she was given the receipt for the initial purchase is insufficient for such an inference to be drawn.

> 11. The evidence only discloses that the Plaintiff Margaretta Anderson obtained permission from the late Franklyn McIntosh to build a house on his property in furtherance of an agreement with Indiana that a house would be built to replace the one originally occupied by Indiana and her children".

21. Mr. McBean has also submitted that since there was no evidence of a promise or representation by the late Franklyn Anderson, the Plaintiff/Respondent could not have acted to her detriment in reliance on a promise or representation by the late Franklyn Anderson.

22. Mrs. Samuels-Brown submitted that an equitable interest by way of an incomplete gift was created in favour of the respondent. She relied on the case of **Trenchfield v Leslie** (1994) 31 JLR 497. She submitted that the equitable interest of the respondent Margaretta Anderson was made inter vivos (that is between Franklyn and herself) and that she had acted to her detriment during the lifetime of the legal owner. She argued that in those circumstances Margaretta would have acquired her interest prior to his death and having acquired an equitable interest, could only be defeated by someone having a superior title. She submitted that Elsie Raffington would not qualify and accordingly the respondent was entitled to take such steps to exclude her from the property.

23. It is my view that the appellant has misstated the learned judge's findings with regard to the issue of proprietary estoppel. At page 117 of the Record of Appeal, the learned Magistrate said inter alia:

"The Plaintiffs are relying on the doctrine of proprietory (sic) estoppel in order to establish a claim to the house in question. The doctrine of proprietory (sic) estoppel operates to permit the revocation of a right affecting land which one party has been led by the other to believe to be permanent. The doctrine is based on the wider equitable principle of unconscionability and it has the effect of preventing a person from enforcing his strict legal rights when it would be inequitable to do so in light of the parties' conduct between them. Thus where one person, the owner of land allows another to expend money on that land or otherwise to act to his detriment under an expectation created or encouraged by that person then that other person will be able to remain on the land or acquire an interest in it, and equally will ensure that that persons' (sic) expectations are not defeated. The doctrine is inextricably related to that of licences because if the owner of land gives someone a licence to do something on land then that licence is protected by estoppel if the requirements of the doctrine are met.

It seems to me that this is a case of an estoppel that arose via an incomplete gift. This arises where one intends to make a gift of land to another but the gift is incomplete because the appropriate formalities have not been complied with. It would seem fair to say that the Plaintiffs in this case, expended moneys in the least as a result of Franklyn permitting and actively encouraging the construction of the house. He is the one to whom moneys were sent and he supervised the constructions (sic) of the house.

It is my view that Franklyn's acts of causing the plaintiff Margaretta to be named along with himself and the person at whose instance the survey was done, of handing over to her the documents he had in respect of the land namely his original purchase receipt and a surveyor's diagram are consistent with an intention on his part that she should become at least joint owner of the land along with himself. Franklyn's estate is bound by his acts and the Plaintiffs would have a better right to occupy the house in question..."

24. The learned judge had clearly stated that it was the plaintiffs who were relying on the doctrine of proprietary estoppel but it seemed to her that it was a case of an estoppel that arose "via" an incomplete gift. The crucial issue as I see it is whether or not the learned Resident Magistrate was in error when she concluded that an incomplete gift had arisen on the facts of this case.

25. It was held in **Pennington v Waine** (No.1) (CA (Civ. Div)) Court of Appeal (Civil Division) 4 March 2002 that:

> "where a transaction was purely voluntary, the principle that equity would not assist a volunteer was to be strictly applied, **Milroy v Lord** 45 E.R. 1185 QB followed. However, the court was able to treat an apparently incomplete gift as completely constituted at the point where it would have become unconscionable for the donor to change his or her mind, **T Choithram International SA v Pagarani** [2001] 1 W.L.R. 1 PC (BVI) followed".

27. In **Dillwyn v Llewelyn** [1861-73] All ER Rep at 384, there was an imperfect gift of land by a father who encouraged his son to build a house on it for £14,000. Lord Westbury LC said at 387:

> 'About the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A. gives a house to B., but makes no formal conveyance, and the house is afterwards, on the marriage of B., included, with the knowledge of A., in the marriage settlement of B., A. would be bound to complete the title of the parties claiming under that settlement. So if A. puts B. in possession of a piece of land, and tells him "I give it to you that you may build a house on

> it", and B. on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made.'

28. In **Plimmer v Mayor of Wellington** (1884) 9 App. Cas. 699, the Privy Council posed the question, 'How should the equity be satisfied?' The Board declared that on the facts a licence revocable at will became irrevocable as a consequence of the subsequent transactions.

29. In my judgment, I agree with the learned Resident Magistrate's reasons for judgment in relation to the equitable principle of the "incomplete" gift. This was clearly a case where there was an incomplete or imperfect gift of land by Franklyn Anderson during his lifetime to Margaretta Anderson. The evidence before the learned Magistrate remained uncontradicted that both Margaretta and her daughter had expended moneys as a result of Franklyn permitting and actively encouraging the construction of the house. He was the one to whom moneys were sent and he supervised the construction of the house. It also seems clear to me that the learned Magistrate was correct in holding that Franklyn's acts of causing the plaintiff Margaretta to be named along with himself and the person at whose instance the survey was done, of handing over to her the documents he had in respect of the land, namely his original purchase receipt and a surveyor's diagram are consistent with an intention on his part that she should become at least joint owner of the land along with himself. I also agree with the learned Resident Magistrate that Margaretta and Paulina had an irrevocable right to occupy the

house in question. The question of the administration of Franklyn's estate did not arise for consideration. That matter will have to be dealt with separately on another occasion.

30. Weighing all of the considerations, I would conclude that the equity to which the facts in this case give rise can only be satisfied by perfecting the imperfect gift. The respondents in my view would therefore be entitled to possession of premises known as Moore Park, Bybrook in the Parish of Portland.

31. I would dismiss the appeal with costs to the respondents.

G. SMITH, J.A. (Ag.):

I too agree.

ORDER

SMITH, J.A.:

The appeal is dismissed. Costs fixed at $15000 to the respondent.