

RAM NARAIN

v.

RAM KISUN

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[COURT OF APPEAL, 1968* (Gould V.P., Hutchison J.A., Marsack J.A.)
3rd, 22nd October]

Civil Jurisdiction

C Native land—native leasehold—leave and licence to occupy part—breach of section 12 of Native Land Trust Ordinance (Cap. 104—1955)—recovery of possession by lessee—notice of revocation of leave and licence unnecessary.

Action—pleading—leave and licence to occupy native leasehold land—transaction illegal, null and void under section 12 of the Native Land Trust Ordinance (Cap. 104—1955)—action for possession—plaintiff succeeding on strength of own title—unnecessary to plead unlawful transaction.

D Courts—jurisdiction of Magistrate's Court—action against trespasser—no jurisdiction under section 16(1) (a) of the Magistrates' Courts Ordinance to entertain action for the recovery of land—Magistrates' Courts Ordinance (Cap. 10) ss.16(1) (a) (b) (e) (f) (Proviso), 16(4), 27(2)—County Courts Act 1888 (51 & 52 Vict. c.43) (Imp.) ss.56, 59—County Courts Act 1934 (24 & 25 Geo. 5, c.53) (Imp.) s.40.

Interpretation—Ordinance—jurisdiction of Magistrate's Court—personal action—construction of Magistrates' Courts Ordinance (Cap. 10) s.16.

E The appellant commenced proceedings in the Magistrate's Court for a declaration that the respondent was a trespasser upon a quarter acre section of land comprising part of the appellant's native leasehold and for an order for possession thereof. The magistrate granted the relief claimed, holding that the respondent had been in occupation by leave and licence of the appellant but, on the revocation of the leave and licence, had become a trespasser. In the Supreme Court this judgment was

F reversed on the ground that the leave and licence had not been revoked until after the writ in the action was issued and the appellant had no cause of action when he commenced the proceedings.

Held: 1. (*per curiam*) The land in question being native land subject to a native lease the leave and licence to occupy it given by the appellant to the respondent amounted to a dealing in the land contravening section 12 of the Native Land Trust Ordinance, which rendered the transaction unlawful, null and void. The appellant could rely on the strength of his own title and no notice to revoke the leave and licence was necessary.

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2. (a) (*Per Hutchison and Marsack JJ.A. — Gould V.P. dissenting*) The Magistrate's Court had no jurisdiction to entertain the action because the jurisdiction (if any) fell to be derived from subsection 1 (a) of section 16 of the Magistrates' Courts Ordinance, which is confined to personal suits arising out of contract or tort, and which does not therefore include actions for the possession of land.

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* The report of this judgment was inadvertently omitted from Volume 14 — Ed

(b) (*Per Gould V.P., dissenting*) (i) The action being based on trespass was a personal action for the purpose of section 16(1) (a) of the Magistrates' Courts Ordinance and none the less so because part of the relief claimed was the ejection of the trespasser (ii) The word "property" in the sub-section is governed by the word "claimed" and includes real as well as personal property.

Cases referred to: *R. v. Cheshire County Court Judge and United Society of Boilermakers; ex parte Malone* [1921] 2 K.B. 694; [1921] All E.R. (Rep.) 344; *Chalmers v. Pardoe* [1963] 3 All E.R. 552; [1963] 1 W.L.R. 677; *Joe v. Young* [1964] N.Z.L.R. 24; *Amar Singh v. Kulubya* [1964] A.C. 142; [1963] 3 All E.R. 499.

Appeal from a judgment of the Supreme Court sitting in appellate jurisdiction from the Magistrate's Court in an action in trespass.

K. P. Mishra for the appellant.

M. S. Sahu Khan for the respondent.

The following judgments were read:

GOULD V.P. [22nd October, 1968]—

These proceedings were commenced in the Magistrate's Court by the issue of a writ by the present appellant against the respondent, on which the following Particulars of Claim were endorsed:—

"The Plaintiff says that he is lessee of the Native Lease No. 9444 containing 215 acres situate at Nadrau in the District of Ba and that the Defendant is in occupation of approximately $\frac{1}{4}$ acre of the said lease without consent of the Native Land Trust Board obtained as required by Section 12 of the Native Land Trust Ordinance, Cap. 104, volume 2 of the Laws of Fiji. The Plaintiff further claims that such occupation therefore is an unlawful one. Wherefore the Plaintiff claims —

- (a) The declaration that the Defendant is a Trespasser.
- (b) Order for possession of the said land.
- (c) General damages.
- (d) Costs.

The defence filed by the respondent reads as follows:—

- "1. That the defendant denies that he is trespasser and says that he has been living there with the leave and licence of the Plaintiff.
2. That the defendant had been occupying the same area for the last forty years.
3. That the plaintiff has many such tenants and the defendant has been living on the land and paying rents and therefore the Plaintiff is not entitled to the declaration asked for."

Having heard evidence, the learned magistrate held that after the leave and licence under which the respondent occupied the land was revoked, the respondent was a trespasser and the appellant was entitled to possession.

A There was an appeal to the Supreme Court in which the learned judge reversed the judgment of the Magistrate's Court upon the ground that the evidence showed that the leave and licence of the respondent was not revoked until after the writ was issued and therefore the appellant had no cause of action when he commenced his proceedings. Certain other matters were argued in the Supreme Court but the learned judge did not find it necessary to deal with them. They will be referred to later in this judgment.

B On his appeal to this court the appellant is limited to questions of law, and he has challenged the correctness of the judgment of the Supreme Court on the ground that, having regard to the provisions of section 12 of the Native Land Trust Ordinance (at the relevant time Cap. 104 of the Laws of Fiji, 1955 — now Cap. 115 of the Laws of Fiji, 1967) the question of leave and licence is immaterial. Section 12 reads:—

C “12. (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board and any sale, transfer, D sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the twenty-ninth day of September, 1948, to mortgage such lease.

E (2) For the purposes of this section “lease” includes a sublease and “lessee” includes a sublessee.”

It is sufficiently clear and not a matter of challenge, that the arrangement between the appellant and respondent under which the respondent occupied the quarter acre in question was a dealing within the meaning of section 12; it is also common ground that the land is land to which the Ordinance applies, and that the consent of the Native Land Trust Board was never obtained. Section 12 has been considered in a number of cases, but it will be necessary to refer only to the most authoritative of these — that of *Chalmers v. Pardoe* [1963] 3 All E.R. 552. The Privy Council there held that where there was an arrangement which amounted to a dealing with land contrary to the section, it was unlawful to the extent that the person purporting to acquire the interest in the land was deprived of the aid of equity to which, but for the illegality, he would have been entitled. It will be observed that section 12, as well as declaring transactions which contravene its terms to be unlawful, provides that they shall be “null and void”. Similar provisions, where the additional words were “have no effect,” were considered by the Court of Appeal for New Zealand in *Joe v. Young* [1964] N.Z.L.R. 24 in which a conclusion similar to that in *Chalmers v. Pardoe* (supra) was H reached.

So far as pleading is concerned the appellant does not have to rely upon anything but the strength of his own title to assert his claim. He does not have to rely upon anything illegal though the particulars he in fact gave included the allegation that the respondent's possession was

unlawful. The position was very similar to that which arose in the case of *Amar Singh v. Kulubya* [1964] A.C. 142, 150 where the Privy Council said, "although as has been seen, the plaintiff set out in his plaint that he had entered into agreements to lease the plots of land to the defendant, his claim to possession did not depend on those agreements . . . He was able to rest his claim upon his registered ownership of the property. The defendant did not have and could not show any right to the property". On the real issue between the parties in the present case it was the respondent who had to assert the illegal transaction to justify his claim to remain on the land. This he could not lawfully do.

Counsel for the respondent has argued that even though the leave and licence given by the appellant is unlawful, nevertheless the tort of trespass requires that the alleged trespasser must be on the land against the will of the plaintiff; that a form of *de facto* leave and licence existed and would subsist until terminated by notice. I do not think that this can be a valid argument in the circumstances. The nearest to a parallel I have been able to find, is the right of a person who enters on the land under a contract unenforceable by action because of the lack of writing, to justify his possession on the ground that the contract gave him a right to enter — see *Halsbury's Laws of England* Vol. 38 (3rd Edition) p.757. Such a contract of course is something which exists, though not enforceable for lack of evidence. The present case is one in which the leave and licence given has been shown to be null and void. There is no evidence of any other leave or licence, and indeed any renewed leave or licence to do the things on the land which the respondent has been doing would be equally null and void. There is no evidence of a *de facto* leave or licence to be on the land for any purpose which would not amount to a dealing contrary to section 12 of the Native Land Trust Ordinance. It is not a case of holding over after the expiry of a lawful tenancy (in which case demand would be necessary) because such title as the respondent relied upon to justify his presence is null and void. Therefore, subject to the question next to be discussed, I am of the opinion that the judgment in the Supreme Court was incorrect in that it held that notice to determine a leave and licence which was by law already null and void, was necessary.

Counsel for the respondent next relied upon a submission that a magistrate's court had no jurisdiction to grant a declaration except by way of ancillary relief to a money claim, and no jurisdiction to make an order for possession except in landlord and tenant cases. The judgment of the learned magistrate, as I understand it, grants a declaration that the respondent is a trespasser, an order for possession, and refuses the claim for damages. Counsel for the respondent (additionally to the two points I have mentioned above) quoted authorities in support of a submission that a magistrate's court has no jurisdiction to give damages unless they are specified in the Particulars of Claim in an amount within the jurisdiction of the court. As, however, no damages were awarded in this case, it is unnecessary to pursue that matter further. Neither is the question of a declaration an essential one, as once the court was satisfied that the cause of action was established, it could give effect to that finding by relief in such form as was appropriate and within its jurisdiction. Counsel before this court were in agreement that a declaration could be granted only as an ancillary remedy, and, in the light of such authorities as *R. v. Cheshire County Court Judge* [1921] All E.R.

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A Rep. 344, they may well be correct. It is not a matter upon which I need express a concluded opinion in this case, though it seems apparent that ancilliary relief might cover a wider field in an action for the recovery of (say) goods than in one for debt.

B The important matter is whether the learned magistrate has jurisdiction to make an order for possession. The provisions conferring jurisdiction in civil matters upon the magistrates' courts, so far as they are relevant to the question now arising for decision, are contained in section 16 of the Magistrates' Courts Ordinance (Cap. 10 — Laws of Fiji, 1967). It will suffice to set out subsection (1) (a) (b) (e) and (f) and subsection (4) :—

“(1)

- C (a) In all personal suits, whether arising from contract, or from tort, or from both were the value of property or the debt or damage claimed, whether as balance claimed or otherwise, is not more than four hundred pounds;
- D (b) in all suits between landlord and tenant for possession of any lands or houses claimed under agreement or refused to be delivered up, where the annual value or rent does not exceed four hundred pounds;
- (e) to grant in any suit instituted in the court injunctions or orders to stay waste or alienation or for the detention and preservation of any property the subject of such suit, or to restrain torts or breaches of contract.
- (f) to enforce by attachment any order made by the court;
- E (4) If, in any suit or matter before a magistrate's court, the title to any land is disputed, or the question of the ownership thereto arises, the court may adjudicate thereon if all parties interested consent; but, if they do not all consent, the presiding magistrate shall apply to the Supreme Court to transfer such cause or matter to itself.”

F Mention should also be made of the proviso to subsection (1) which enacts certain exceptions to the jurisdiction, including, in paragraph (v), actions for malicious prosecution, libel, slander, seduction or breach of promise of marriage. The court was informed by counsel that, although it is not recorded in the notes of the learned magistrate, it was agreed in the Magistrate's Court that the value of the matter in dispute (which I take to include the land) was below £400, and that consent was given to adjudication on questions of title in terms of section 16 (4). One further section of substantial importance is section 27 of which the second subsection reads :—

H “(2) A magistrate in the exercise of the jurisdiction vested in him by this Ordinance shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or relief whatsoever, interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which shall appear in such cause or matter; so that as far as possible all matters in controversy between the said parties respectively may be completely and finally

determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The power to grant relief given by that subsection is very wide indeed subject only to the limitation imposed by the words "in the exercise of the jurisdiction vested in him by this Ordinance".

My task is to construe the Ordinance, and in particular section 16 thereof. Only limited assistance can be derived from the consideration of legislation in other jurisdictions in which different words are used. For example section 56 of the County Courts Act, 1888, embraces "All personal actions, where the debt demand or damage claimed is not more than £50...". Section 40 of the County Courts Act, 1934, uses the words "action founded on contract or tort where the debt etc." Neither section includes reference, as does section 16 (1) (a) of the Fiji Ordinance to the value of the "property" claimed.

In relation to the use of the word "personal" which occurs in the County Courts Act 1888 as well as the Fiji Ordinance, there is an enlightening passage in the judgment of Scrutton L.J. in *R. v. Cheshire County Court Judge* (supra) at page 351, where, dealing with the argument that a demand could be enforced by a declaration in a personal action, he said:—

"I cannot help thinking that would have much astonished the learned men who first used the phrase "personal action." I think they had not the advantage of being acquainted with such a thing as a declaration, and they would have been very much puzzled by an action for a declaration in a case where no other relief was claimed. I refer merely to one authority-BLACKSTONE'S COMMENTARIES, vol. 3, p. 117 — and I find:

'Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs.'

The idea of something which was not a claim for money founded on contract, or on tort, but was a demand for a declaration, never, I think, occurred to Sir William Blackstone, and I do not think, when the legislature used the phrase "personal actions," it was thinking of any such matter as declarations, which were practically unknown in the county court. It was thinking of the old distinction which is dealt with in the statute between personal and real actions, for, having dealt with personal actions in s.56, the legislature goes on to real actions, or actions similar to real actions in s.59 where it deals with the recovery of lands and tenements:—

I am not, in this aspect of the case, dealing with declarations, but with an action which appears to me to be based on trespass though the recovery of land is the main object. In a section in *Halsbury's Laws of England* (3rd Edition) Vol. 1 p. 23 dealing with the old forms of action there is mention of *ejectione firmae* which was a personal action in the nature of trespass originally confined to claims for damages but under which at a later date a tenant could recover his term. It then became what Halsbury calls a "mixed" action. Generally speaking other forms of the action of trespass, were personal actions. In the chapter on trespass in

A *Salmond on Torts* (14th Edn.) at p.71 it is stated that every person wrongfully dispossessed of land may sue for it in the action of ejectment, which was originally a special variety of trespass; all fictions having been swept away the term ejectment has been replaced by the term action for the recovery of land. As to the historical argument I think that the modern approach, where an action was originally "mixed", would be to construe it as personal rather than real.

B The old forms of action have, of course been abolished and I think it is proper to construe the word "personal" in section 16 (1) (a) in the light of the words "arising from contract, or from tort" which words were absent from the section which Scrutton L.J. was considering. I am satisfied that an action based on trespass is a personal action for the purpose of the section and none the less so if part of the relief claimed is the ejectment of the trespasser. The action of ejectment itself is a remedy against a trespasser and so arises from tort — if it has any wider significance that is not material for the purposes of this case.

C I turn now to the word "property" in section 16 (1) (a). Prima facie it is a word of wide meaning and includes property both real and personal. It would be a departure from normal canons of construction to limit the meaning to "personal property" unless the context requires it. There appear to be two considerations which might have such an influence.

D The first is again the phrase "personal suits", the second is the presence of section 16 (1) (b) which deals with lands and houses in some degree.

E Does the limitation to personal suits automatically restrict the property recoverable to personal property? It would seem that at one time it might well have done so and the argument has weight. The Magistrates' Courts Ordinance however, was first passed in its present form in 1944, long after the abolition of forms of action, and at which date historical considerations would be of less moment. It may well be at the present day the phrase "personal action" calls to mind the action *in personam* as distinct from the action *in rem* and that all suits are regarded as personal unless they fall into the latter category. As I read the section, the word "property" as well as "debt" and "damage" is governed by the word "claimed" and if the intention was to refer only to such matters as recovery of chattels wrongfully detained, it would have been easy to use the phrase "personal property" and the risk of using the wider word must have been apparent: the word appears before the reference to debt or damage and is entitled to be given full weight. Section 16 (4) also provides a safeguard in that actions in which title or ownership is in dispute, may only be entertained by consent. I do not find an easy or clear answer to this question but think that the better view is that the word "property" should be given its normal and unrestricted meaning.

G The basic limitation of course remains, that the action must arise out of contract or tort, or both.

H The argument concerning section 16 (1) (b) was relied upon by counsel for the respondent. His contention was that, as recovery of possession of land was dealt with there, it was implied that there was no jurisdiction in that regard except such as arose from that particular subsection. I would not accept this as valid. Subsection (b) in the first place makes a distinction in the matter of value. Whereas subsection (a) is limited to a property value of £400 the special cases of subsection (b) are dealt with in terms of annual value — a higher limit. Secondly, whereas

subsection (a) deals with matters arising from contract or tort, subsection (b) though it may include some matters of contract, goes beyond such matters into all relations of landlord and tenant some of which might not fall within subsection (a). It will be observed that when in the passage of his judgment in *R. v. Cheshire County Court Judge*, which I have quoted, Scrutton L.J. refers to "actions similar to real actions in section 59" the provision mentioned does not limit actions for recovery of land to "landlord and tenant" cases but is quite general, subject to the limitation in annual value. There would be good reason to regard that as an exclusive provision but, in my opinion, the same reasoning does not apply to section 16 (1) (b) which fulfils its own limited object, leaving untouched the question of the construction and effect of subsection (a).

For these reasons, I take the view that section 16 (1) (a) confers jurisdiction upon a Magistrate's Court to entertain an action arising out of the tort of trespass in which the relief claimed is the recovery of land in the occupation of the defendant as a continuing trespasser, provided the land is within the jurisdiction in the matter of value, and provided that either no question of title or ownership arises, or consents have been given in terms of sections 16 (4). In such a case if the plaintiff succeeds, the court has power to give all appropriate relief, including an order for possession, under section 27 (2). In the light of the fact that actions involving land of even higher value may be entertained under section 16 (1) (b) I do not think that there can be any practical objection to this view.

I would therefore allow the appeal with costs, set aside the order of the Supreme Court and restore the judgment of the learned magistrate to the extent of his order for possession and for costs. My opinion being a minority one, and as each of my learned brethren take the view that, for the reasons in their judgments (which differ from those relied upon by the Supreme Court) the appeal must be dismissed, it is accordingly dismissed with costs.

HUTCHISON J.A. :

On the substantial issue arising on s.12 of the Native Land Trust Ordinance, I agree entirely with the learned Vice-President.

Upon the point of the jurisdiction of the Magistrate's Court, however, I find myself, with all respect, in disagreement with him.

At the risk of being thought repetitious, I again set out as follows such subsections of s.16 of the Magistrates' Courts Ordinance as may possibly be relevant:—

"(1) A magistrate empowered to hold a court of the first class, shall, in addition to any jurisdiction which he may have under any other Ordinance for the time being in force, have and exercise jurisdiction in civil causes —

(a) in all personal suits, whether arising from contract, or from tort, or from both, where the value of property or the debt or damage claimed, whether as balance claimed or otherwise, is not more than four hundred pounds;

(b) in all suits between landlord and tenant for possession of any lands or houses claimed under agreement or refused to be deli-

vered up, where the annual value or rent does not exceed four hundred pounds;

- (e) to grant in any suit instituted in the court injunctions or orders to stay waste or alienation or for the detention and preservation of any property the subject of such suit, or to restrain torts or breaches of contracts;
Provided that a magistrate's court shall not exercise jurisdiction.

...

- (v) in any action for malicious prosecution, libel, slander, seduction or breach of promise of marriage.
- (4) If, in any suit or matter before a magistrate's court, the title to any land is disputed, or the question of the ownership thereto arises, the court may adjudicate thereon if all parties interested consent; but, if they do not all consent, the presiding magistrate shall apply to the Supreme Court to transfer such cause or matter to itself."

One further subsection which counsel for appellant submitted is of importance is s.27 (2) of the Ordinance:—

- "(2) A magistrate in the exercise of the jurisdiction vested in him by this Ordinance shall have power to grant, and shall grant either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or relief whatsoever, interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which shall appear in such cause or matter, so that as far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

These powers, however, may be exercised, as the subsection says, only "in the exercise of the jurisdiction vested in him by this Ordinance", and in my opinion, the subsection does not widen the jurisdiction conferred by s.16.

Returning then to s.16, the action, not being between landlord and tenant, does not come within para. (b) of s.5 (1), and, if the Magistrate had jurisdiction, it had to be by virtue of para. (a).

It is in my opinion clear that, to fall within para. (a), the suit has to arise from contract or from tort or from both. The word "personal" can restrict the scope of that, but it cannot enlarge it. As to what that word means, I think that assistance may be obtained from the judgment of Scrutton L.J. in *R. v. Cheshire County Court Judge* [1921] All E.R. (Reprint) 344 at p. 351. There his Lordship quotes from Blackstone's Commentaries:—

"Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs."

And then he said, below the letter I:—

“It (the Legislature) in using the phrase “personal actions” was thinking of the old distinction which is dealt with in the statute between personal and real actions, for having dealt with personal actions in s.56, the legislature goes on to real actions, or actions similar to real actions in s.59, where it deals with the recovery of lands and tenements”.

So here, in my opinion, para. (a) of s.16 (1), confined to such suits or actions as arise out of contract or tort or both as can properly be called personal, cannot, in my opinion, include actions for possession of land. The learned Vice-President in his judgment placed some weight on the use of the word “property” in paragraph (a). I do not think that any assistance can be obtained from that. The value of the property is relevant only to the magistrate’s jurisdiction as to value. I can agree that the word may apply to real property as well as to personal property. For instance, if a motor driver negligently driving his car collides with and damages another person’s fence or gate post, that other person’s claim for damages in respect of that injury to his real property could, in my opinion, be a personal claim arising out of tort within paragraph (a).

The question then is whether this action was one for trespass or one for possession of land. In my opinion it was one for possession of land. It was common ground on the argument that a declaration in the Magistrate’s Court may be made only as ancillary to other relief sought, and that was, in my opinion, the justification, and the only justification, for the seeking of the declaration sought in para. (a) of the Particulars of Claim.

Holding then, as I do, that the suit was not a personal suit arising from contract or from tort or from both, I am of the opinion that the Magistrate had no jurisdiction to entertain it.

In my view, then the appeal should be dismissed with costs, but on the grounds with which the learned Judge in the Supreme Court did not deal.

MARSACK J.A. :

I have had the advantage of reading the judgments of the learned Vice President and of Hutchison J.A., and agree with both on the questions arising on the interpretation of section 12 of the Native Land Trust Ordinance, Cap. 104.

With regard to the issue concerning the jurisdiction of the Magistrates’ Court to deal with the claim, I am of the same opinion as my brother Hutchison that the matter is outside the jurisdiction of the Magistrates’ Court.

With the greatest respect I feel that more weight should be given to the use of the phrase “personal suits, whether arising from contract, or from tort or from both”, in subsection (1) (a) of section 16 of the Magistrates’ Courts Ordinance. Although there appears to be a singular lack of direct authority on the subject, I am inclined to the view that the

A denfinition of "personal action" in *Jowitt's Dictionary of English Law* is applicable to the present case. The term "personal suit" could in the context of the Ordinance be regarded, I think, as synonymous with "personal action". Jowitt says:

B "Personal action. In the division of actions, a personal action originally meant one which was brought to enforce a remedy against a person, while in a real action the remedy was to recover a thing, the *res*, itself. Thus, an action on a contract or tort was a personal action, while an action to recover land was a real action, because the land itself could always be recovered."

If this definition is adopted, as I think it should be here, it would result in excluding from the jurisdiction of the Magistrates' Court any action for the recovery of land, whatever the value of the land in issue, except an action under subsection (1) (b).

C Although in his statement of claim the appellatant asks for a declaration that the respondent is a trespasser and for damages in respect of that trespass, yet he also asks for an order for possession of the land; and, in my view, his claim is, in its essence, one for recovery of the land. It is conceded that the action is not founded on subsection (1) (b), as the relationship of landlord and tenant does not exist between the parties. Any jurisdiction the Magistrates' Court had to entertain the action must be derived from subsection (1) (a) of section 16 and, for the reasons I have given, I am of opinion that this section does not confer on the Magistrates' Court the jurisdiction required to entertain and adjudicate upon the appellatant's claim.

D In my view, the word "property" must be read only in relation to what is covered by the rest of the subsection. Although the word itself is very wide in meaning, I do not think it was intended to refer here to anything more than what might be claimed in a "personal suit whether arising from contract or from tort or from both". If my view of the meaning of the phrase "personal suit" is correct then the word "property" in the section refers only to the property which might be in issue in a personal suit, which does not include an action for the recovery of land.

F For these reasons I agree with Hutchison J.A. that the appeal should be dismissed with costs to the respondent.

Appeal dismissed.