1956 – 1960

THE
JAMAICA LAW REPORTS

[7 J.L.R.]

DECISIONS

OF

THE HIGH COURT

THE COURT OF APPEAL

AND OF

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

to the 31st July, 1959 when these reports were discontinued
pursuant to an arrangement with Messrs. Butterworth
& Co. (Publishers) Ltd. publishers of
The West Indian Reports.

PUBLISHED BY THE AUTHORITY OF THE SUPREME COURT
OF JUDICATURE OF JAMAICA

Editors — THE HON. MR. JUSTICE MacGREGOR (1956-1957)
THE HON. MR. JUSTICE DUFFUS (1958-1960)
Judges of The Supreme Court of Jamaica.

PRINTED BY
THE GOVERNMENT PRINTER,
DUKE STREET, KINGSTON

1960

COURT OF APPEAL 1957

R. v. RUBY FRANCIS

COOLS-LARTIGUE, J.

By section 2 of the same Law unlawful gaming is defined thus:

"'Unlawful gaming' includes—

(2) The act of betting or of playing a game for a stake when practised—

(a) in or upon any path, street, road or place to which the public have access, whether as of right or not;".

In our opinion what the appellant did comes within the offence created by the section under which she was charged and the fact that she was doing it as an employee makes no difference to her guilt. There was no suggestion that she was coerced into doing this by her husband.

The appellant was fined £25 and 25 guineas costs or 60 days hard labour on each information. The sentence did appear to be severe, having regard to the fact that this was apparently the first conviction for this offence. It was pointed out that despite the fact that the cases were pending the appellant herself continued her activities throughout the Christmas season on each occasion when there was horse racing at Knutsford Park. In the circumstances we were of opinion that the sentence was not manifestly excessive.

Solicitor: for the appellant, *Aris*.

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3 C.A.J.B. 700.

COURT OF APPEAL

1957
May 2, 3
July 24.

BRAMWELL v. GORDON

Landlord and Tenant—Tenancy—Tenancy at will—Agreement of sale—Portion of purchase price paid—Possession—Exclusive occupation of premises—Intention of parties.

Licence—Licence to occupy premises—Exclusive occupation.

The appellant and the respondent entered into an agreement under which the appellant purchased land from the respondent. Upon execution of the agreement, the appellant paid eighty pounds and gave a promissory note for payment of the balance of seventy pounds. The respondent put the appellant in possession and requested him to have the land surveyed as early as possible so as to complete the transaction.

The appellant arranged for a survey of the land, and the surveyor, having served the necessary notices, attended the land to make the survey. The respondent objected to the survey on the ground that the balance of the purchase money payable was still outstanding. The promissory note had not yet fallen due for payment. Shortly afterwards the respondent sent persons on the land to cut trees growing thereon. The appellant brought an action for trespass against the respondent.

The Resident Magistrate held that the appellant was a tenant at will and that the entry of the respondent was a termination of the tenancy.

HELD: Whether or not the relationship of landlord and tenant was created depends on the intention of the parties, that the circumstances under which the appellant was put into possession showed that it was not the intention of the parties that the appellant should be a tenant at will but that he was a licensee. Under the circumstances, therefore, he was entitled to maintain an action for trespass.

Errington v. Errington and Woods [1952] 1 K.B. 290, and *Cobb and Another v. Lane* [1952] 1 A.E.R. 1199 followed.

Nixon v. Richards, Clark's Reports 95, and *Lee v. Brown*, 4 J.L.R. 1, distinguished.

APPEAL from the judgment of McCarthy, Resident Magistrate, St. Ann.

Appeal allowed and judgment entered for the plaintiff.

Coore for the appellant.

Rowe for the respondent.

1957. July 24: The reasons for judgment of the Court (Carberry, C.J., MacGregor and Rennie, JJ.) were read by Rennie, J.

RENNIE, J.

RENNIE, J.: In this appeal the judgment which was entered by the Resident Magistrate, St. Ann, in favour of the defendant was set aside and judgment was entered for the plaintiff for £37 with costs in the Court below and costs of the appeal fixed at £12. When the judgment was announced, we promised to put our reasons in writing. We now do so.

On June 16, 1956, the plaintiff and defendant entered into an agreement under which the plaintiff purchased from the defendant one half acre of land at Rosetta, St. Ann, for one hundred and fifty pounds. He paid down eighty pounds on the execution of the agreement and gave a promissory note in respect of the balance of seventy pounds. The agreement in so far as it is material is as follows:—

"Mr. Joseph Bramwell of Rositta bought of Mr. Thomas Gordon of Rositta (½) one half of an Acre of land at Resetta with building attached.....for the sum of (£150) One hundred and fifty pounds only. Down payment (£80) Eighty pounds only. Balance (£70) Seventy pounds only to be paid in instalments."

The promissory note is in these terms:—

"I Joseph Bramwell of Rositta do agree to pay Mr. Thomas Gordon £17 10/- on the 1st of March 1957, and continue in the same time until balance of £52 10/- is paid."

Both documents are dated June 16, 1956.

On June 18, 1956, the defendant put the plaintiff into possession of the land and pointed out the boundaries to him.

When the agreement was executed, the defendant requested the plaintiff to have the land surveyed as early as possible as he wished 'to finish away with the business'. The plaintiff accordingly made arrangements for the survey. The surveyor sent out the notices for the survey, including one to the defendant, and attended on June 25, 1956, to make the survey. The defendant then objected to the survey on the ground that the balance of the purchase money payable was still outstanding, and refused to allow the survey to be made until seventy pounds was paid to him.

On July 2, 1956, the defendant sent two men on the land to cut a tree. The plaintiff complained to the defendant about this and the defendant told him that he was no longer selling the land. Next day the two men continued cutting the tree. As a result of the felling of the tree damage was done to crops on the land.

The plaintiff therefore claimed damages for the trespass on the land by the two men, agents of the defendant.

At the trial the defendant called no evidence but relied on the submission that the plaintiff was merely a tenant at will of the defendant, he having been let into possession of the land before completion of the contract of sale, and, in these circumstances, until payment of the purchase money and/or completion of the purchase, any acts done by the defendant inconsistent with the tenancy at will determined the tenancy and no action for trespass could lie.

The Resident Magistrate acceded to these submissions and entered judgment for the defendant. In doing so he relied upon the cases of *Nixon v. Richards*, (1922) Clark's Reports 95, and *Lee v. Brown*, 4 J.L.R. 1. In *Nixon v. Richards* at page 95, Brown J. said:

> "It is still good law, acted upon in this Island (see *Dawes v. Henderson* (1876) Vol. 2, Judgment Book, at p. 257, and *Patty v. McNally*, (1899) Vol. 7, Judgment Book, at page 267) that, in the absence of special agreement, a purchaser of land let into possession thereof under a contract for sale, but who has not paid the purchase money, and, to whom no conveyance has been executed, is a tenant at will to his vendor, and upon the determination of that tenancy by notice or otherwise the vendor may recover possession of the land."

The headnote to *Lee v. Brown* is as follows:

> "(1) In the absence of special agreement a purchaser let into possession before completion becomes a tenant at will of the vendor by virtue of being so let into possession, not by virtue of the agreement to purchase:
>
> .....
>
> (2) Until payment of the purchase money and/or completion of the purchase any acts done by the vendor inconsistent with the tenancy at will determines it, and no action for trespass will lie against the vendor for such acts:....."

We would also invite attention to the case of *Cockburn v. Walters*, Clark's Reports 122, in which it was held by the Full Court that where the whole of the purchase money has been paid and all that is outstanding in the vendor is the bare legal estate, which he is bound to convey, when called upon, either to the original purchaser or to his assigns, the vendor is not justified in entering upon the land, and the fact that he still holds the bare legal estate is no defence to an action of trespass.

In the instant case the purchaser was let into possession and was requested by the vendor to have the land surveyed. The purchaser incurred expense in engaging a surveyor for that purpose. He gave a promissory note for the balance of the purchase money and was not at the date of the cause of action in default with respect to the payment of the balance of the purchase money. The legal effect of receiving a promissory note for the balance of the purchase money is that there was a conditional payment; the original debt remains but the remedy for it is suspended till the maturity of the note in the hands of the vendor.

There arises for consideration the question as to whether in the circumstances of this case the relationship of landlord and tenant was created between these parties.

It seems to us, from a study of the authorities, that the principle that guided the judges in the earlier cases, and in particular in the case of *Lynes v. Snaith*, [1899] 1 Q.B. 486, was to ascertain whether there was exclusive occupation for an indefinite period, and if so, to come to the conclusion that a tenancy was created. It would seem that no attention was given to the intention of the parties even though in the cases of *Nixon v. Richards* (sup.) and *Lee v. Brown* (sup.), the facts could have been construed to show that the parties intended to create a tenancy at will. It is, however, now settled law that one must look to the intention of the parties to ascertain whether the relationship of landlord and tenant has been created. The test is not entirely one of exclusive possession.

In *Errington v. Errington and Woods*, [1952] 1 K.B. 290, the headnote reads as follows:—

> "A father, wishing to provide a home for his son, who had recently married, purchased a dwelling-house through a building society, paying a lump sum and leaving the balance on mortgage to be paid by weekly instalments. He retained the conveyance in

his own name and paid the rates, but promised that if the son and daughter-in-law continued in occupation and duly paid the instalments until the last one was paid, he would then transfer the property to them. He was on affectionate terms with the daughter-in-law and handed her the building society's book, directing her not to part with it. When the father died he, by his will, left all his property, including the house in question, to his widow. Up to that time the son and the son's wife had together occupied the dwelling-house and paid the instalments, but the son then left his wife and went to live with his widowed mother. The wife continued to occupy the dwelling-house and to pay the instalments.

The mother brought an action for possession against the daughter-in-law, which was dismissed by the county court judge on the ground that the son and daughter-in-law were tenants at will and the claim was barred by the Limitation Acts, 1939. On appeal:—

HELD, that the daughter-in-law and her husband were licensees, with no power to assign or sublet, but entitled under a personal contract to occupy the house for so long as they paid the instalments to the building society, and the appeal failed."

At pp. 295, 296, Denning L.J., as he then was, said:

"What is the result in law of those facts? The relationship of the parties is open to three possible legal constructions: (i) That the couple were tenants at will paying no rent. That is what the judge thought they were. He said that, in this case, just as in *Lynes v. Snaith* (sup.), the defendant 'was in exclusive possession and was therefore not a mere licensee but in the position of a tenant at will.' But in my opinion it is of the essence of a tenancy at will that it should be determinable by either party on demand, and it is quite clear that the relationship of these parties was not so determinable."

Then at pp. 296, 297 he further said:

"The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will (see *Doe d. Tomes v. Chamberlaine*, (1839) 5 M. & W. 14, 16, *Lynes v. Snaith* (sup.)), whereas if he had not exclusive possession he was only a licensee: *Peakin v. Peakin*, [1895] 2 I.R. 359. This test has, however, often given rise to misgivings because it may not correspond to realities. A good instance is *Howard v. Shaw* (1841) 8 M. & W. 118, where a person was let into exclusive possession under a contract for purchase. Alderson B. said that he was a tenant at will; and Parke B., with some difficulty, agreed with him, but Lord Abinger said that 'while the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant.' Now, after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right. The test of exclusive possession is by no means decisive.

The first case to show this was *Booker v. Palmer* [1942] 2 A.E.R. 674, 677, where an owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. This court held that the evacuees were not tenants, but only licensees. Lord Greene M.R. said: 'To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.' Those emphatic words have had their effect. We have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees."

After mentioning a number of cases in which occupiers in exclusive possession had been held not to be tenants, at p. 298 Denning L.J. further said:

"The result of all these cases is that, although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

In *Cobb and Another v. Lane*, [1952] 1 A.E.R. 1199 the headnote reads:

"The fact of the exclusive occupation of property for an indefinite period is no longer inconsistent with the occupier being a licensee and not a tenant at will. Whether or not a relationship of landlord and tenant has been created depends on the intention of the parties, and in ascertaining that intention the court must consider the circumstances in which the person claiming to be a tenant at will went into occupation and whether the conduct of the parties shows that the occupier was intended to have an interest in the land or merely a personal privilege without any such interest.....*Lynes v. Snaith* [1899] 1 Q.B. 486 no longer good law."

At page 1202 of the report Denning L.J. said:

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land? It seems to me that the judge has so found. The defendant had only a personal privilege with no interest in the land, which he could assign or sub-let, and he could not part with the possession to another. He was only a licensee, and he cannot pray in aid the provisions of the Limitation Act, 1939. I would only add that I agree with all that my Lord has said about *Lynes v. Snaith* (sup.). That case can no longer be regarded as authoritative."

In the instant case the purchaser occupied under a valid contract of sale, paid the vendor more than half of the purchase price and gave him a promissory note for the payment of the balance by instalments.

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BRAMWELL v. GORDON

RENNIE, J.

The vendor put the purchaser in possession and required him to have the land surveyed as early as possible and, in accordance with this requirement, the purchaser engaged the services of a surveyor.

We do not see how on these facts it can be held that the purchaser became the tenant of the vendor. It is true he had exclusive possession, but this is no longer the sole determining factor. It seems to us that he was holding under a licence from the vendor which could not be revoked unless and until he was in default under the agreement.

For these reasons we are of opinion that the vendor's entry by his agents on the land was a trespass for which he was liable in damages to the purchaser.

Solicitors: for the appellant, *G. W. Thomson*; for the respondent, *Allwood & Barrett*.

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3 C.A.J.B. 707

COURT OF APPEAL 1957

Oct. 16, 17
Dec. 9

BOWEN v. PHILLIPS

Bailment—Bailor and Bailee—Bailee for reward—Master and servant—Negligence of servant causing damage to property bailed—Scope of servant's authority—Motor car left with garage for greasing—Damage while in wrongful use by garage servant.

The appellant took his motor car to the respondent's garage to be greased and sprayed. On the directions of the respondent he left it with one H who was employed to the respondent to grease and spray customers' cars. He left the switch key in it. H thereafter drove the car out of the garage on a frolic of his own and damaged it. The facts established the relationship of bailor and bailee for reward between the appellant and the respondent.

HELD: that the respondent entrusted the responsibility for the care of the appellant's car to H, that H did something inconsistent with the bailment, resulting in damage to the car, and that the respondent was liable for the damage.

Aitchison v. Page Motors Ltd. (1936) 52 T.L.R. 137 and *Coupé Company v. Maddick* [1891] 2 Q.B. 413, followed.

APPEAL from the judgment of McCarthy, Resident Magistrate, St. Ann.

Appeal allowed.

Blake for the appellant.

Rowe for the respondent.

1957. Dec. 9: The reasons for judgment of the Court (MacGregor, C.J. Acting, Rennie and Semper, JJ.) were read by Rennie, J.

RENNIE, J.

RENNIE, J.: This appeal relates to a claim for damages to the appellant's motor car. The action was tried by the Resident Magistrate for St. Ann who gave judgment for the respondent. After hearing counsel for both the appellant and respondent we allowed the appeal, set aside the judgment of the Court below, entered judgment

for the appellant for £34. 6. 8 with costs in the Resident Magistrate's Court and with costs of the appeal fixed at £12 and promised to put our reasons in writing which we now proceed to do.

COURT OF APPEAL 1957

BOWEN v. PHILLIPS

RENNIE, J.

It was established at the trial of the action that the appellant took his motor car to the respondent's garage to have it greased and sprayed. The respondent directed him to take the motor car to one Henry Harrison who was employed to the respondent to grease and spray customers' cars. A hydraulic lift is used in the process of greasing and spraying motor cars at the respondent's garage. The appellant drove his car on to the hydraulic lift and left it there with the said Henry Harrison. The appellant left the switch key in the car. Sometime thereafter Henry Harrison drove the car out of the garage on a frolic of his own and damaged it.

The appellant had on previous occasions taken cars to the respondent's garage to have them greased and sprayed and Harrison had always been the person who looked after the vehicles on the grease stand. These facts in our view created the relationship of bailor and bailee for reward between the appellant and the respondent. What then is the responsibility of such a bailee for the acts of his servant in circumstances where the bailee directed the bailor to deliver the motor car to the servant?

In directing the bailor to deliver the car to the servant the master must be taken to have entrusted the servant with the responsibility of custody of the car. Once that has been established and it can be shown that the servant did something which was inconsistent with the bailment and which resulted in damage to the thing bailed the master will be liable for such damage and it matters not that the damage was done while the servant was engaged on a frolic of his own. This seems to us to be the effect of the decisions in Aitchison v. Page Motors Ltd. (1936) 52 T.L.R. 137 and Coupé Company v. Maddick [1891] 2 Q.B. 413. Dealing with this branch of the law Paton on Bailment in the Common Law, 1952 Edition, at page 182 states:—

> "There has been much confusion concerning the liability of a bailee for the acts of a servant. If a chauffeur, without authority and on a frolic of his own, takes out his master's car and negligently injures a pedestrian, the master is not liable as the servant is acting outside the course of employment. If the car is one bailed to the master, and the servant, again on a frolic of his own, takes out the car and damages it, the master is liable or not according to whether he entrusted that servant with the responsibility of custody. If the servant was not charged with the responsibility of keeping that car the master is