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JAMAICA LAW REPORTS

[3 J.L.R.]

DECISIONS

OF

THE HIGH COURT

AND OF

THE COURT OF APPEAL

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1941.

COURT OF APPEAL. 1936.

RUSSELL v. DIRECTOR OF PUBLIC WORKS.

SHERLOCK Ag. C.J.

Mr. Allen for Plaintiff argues that in the circumstances, in view of the fact that the Superintendent of Public Works had led the plaintiff to believe that his claim would be met and asked him not to proceed further until he heard from him and that the defendant delayed answering plaintiff till June 26th, defendant should not be allowed to rely on the Statute as a defence.

Mr. Rennie in reply cited *Hewlett v. London County Council* (72 Justice of the Peace 136).

It is in our opinion quite clear that Section 30 of Law 33 of 1931 is a Statute of Limitation. A Statute enforcing a certain limit of time for the bringing of an action is properly described as a statute of limitation for the purposes of the defence to the action. The Public Authorities Protection Act which is worded no more strongly than this section has been held to be a Statute of Limitation. *Gregory v. Torquay Corporation* (1912 1 K.B. 442).

It follows that Notice should have been given, but the Magistrate should have allowed the defendant to set up the defence of the Statute on such terms as he thought just for example by granting an adjournment and payment of costs and should not have refused unconditionally to allow the defendant to avail himself of the statutory defence, see *Gray v. Gray*, reported Stephens Volume II page 1215.

Unfortunately the defendant is not debarred from setting up the defence of Limitation although his delay in answering plaintiff's letter and conduct during the negotiations, probably led to plaintiff not complying with the provisions of Section 30, see *Hewlett v. London County Council*, 72 Justice of the Peace 136. There is nothing to be gained by ordering a new trial as no facts are in dispute and we have all the materials before us to enable us to deal with it. It is a hard case and might well have been settled. The defence is not a meritorious one in the sense that it does not go to the merits of the action, but the law is clear. The appeal must be allowed. We will set aside the Judgment of the Court below and enter Judgment for defendant without costs.

As to costs of appeal, if appellant applies for costs, we will consider the matter, otherwise no order as to costs of appeal.

Appeal allowed.

Solicitor for appellant: *B. C. O'B. Nation.*
Solicitor for respondent: *Geo. A. Campbell.*

CHAMBERS v. HOPKINS.

COURT OF APPEAL. 1936.

June 22.

1 C.A.J.B. 330.

Landlord and Tenant—Trespass—Eviction—Tenancy Agreement in writing—Proviso for re-entry on breach—Rent in arrear—No Common Law demand—Renunciation by tenant of performance of term of contract—Re-entry without notice—Waiver of forfeiture by conduct—Relief from forfeiture:—The Conveyancing Law (40/1889), s. 16 [R.L. Cap. 353, s. 17].

Under an agreement in writing dated Jan. 18, 1934 C rented land from H at a quarterly rental. The tenancy commenced on Jan., 1933.

The agreement with H superseded and replaced a former agreement between C and H's deceased father.

The agreement reserved the right to H to re-enter without notice and take possession if the rent was in arrears for 30 days.

The agreement also provided, *inter alia*, that C should reap and deliver to H, at a specified price, the bananas grown on the demised land, and contained a proviso for re-entry on C breaking or refusing or neglecting to comply with the terms of the agreement (which were divisible).

C on several occasions refused or neglected to deliver bananas to H on the ground that previous to his tenancy agreement with H, he had contracted to deliver to X the bananas grown on the demised land and was still bound to do so.

On May 18, 1934, H informed C, whose rent was then more than 30 days in arrear, that he expected him to deliver the bananas as agreed: Thereupon C reiterated his previous objection and stated that he did not intend *at any time* to deliver the bananas to H.

On May 21, 1934 H, without prior notice, re-entered and took possession.

HELD (1) H was entitled to treat C's unqualified refusal to deliver bananas as a renunciation of performance of the agreement as to this term, and H cannot, by his words and conduct, be deemed to have waived his right to re-enter for the forfeiture as provided in the agreement. *Toleman v. Portbury*, L.R. 6 Q.B. 248, considered.

(2) C's previous contract to deliver to X bananas reaped from the land, which was then demised under the previous agreement with H's deceased father, will not relieve him of his obligation to deliver same under the new tenancy agreement with H:

(3) The tenancy agreement in this case is not a 'Lease" within the meaning of s. 16 of Law 40 of 1889 and consequently it was not necessary for H to serve on C notice of the breach complained of before enforcing the forfeiture.

Swain v. Ayres, 21 Q.B.D. 289 followed.

Charley v. Ricketts, 10 S.C.J.B. 49, mentioned.

(4) The terms of the tenancy agreement in the present case dispense with the necessity for a *Common Law Demand* for rent.

(5) C's claim under s. 16 (2) of Law 40 of 1889 for relief from forfeiture cannot be entertained in the circumstances of this case.

APPEAL by Defendant from the Judgment of Nethersole, R.M. St. Thomas awarding the Plaintiff damages for trespass and eviction.

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Appeal allowed. Judgment for the Plaintiff set aside and judgment entered for the defendant with costs.

S. R. Braithwaite for defendant appellant.

N. W. Manley, K.C., Foster Sutton with him, for plaintiff respondent.

Cur. adv. vult.

1936, JUNE 22: The Judgment of the Court (Sherlock, Ag. C.J. and Brown, Ag. J. of A.) was delivered by Brown Ag. J. of A.

BROWN, AG. J. OF A.

BROWN, AG. J. OF A.: This is an appeal by the defendant from the judgment of the Resident Magistrate for Saint Thomas awarding the plaintiff damages against him (the defendant) for trespass on, and eviction from, five acres of land at Blue Mountain in the said parish.

The plaintiff was the tenant of five acres of Blue Mountain property under an agreement with the defendant dated the 18th January, 1934. The tenancy commenced in January, 1933. This agreement superseded and was a new agreement in place of a former one between the plaintiff and the defendant's late father.

The rent was 5/- an acre per quarter. The agreement contained a provision for re-entry in the event of the plaintiff committing a breach of the terms of the agreement (which were divisible) or neglecting or refusing to comply with them.

One term provided that if the rent was not paid thirty days after it fell due the landlord should be at liberty to re-enter without notice and take possession without any liability to compensate for cultivation or improvement on the land.

Another term provided that the plaintiff should reap, and the defendant sell, the bananas grown on the land rented by the plaintiff, at the same price per Count as all share bananas grown on the property. The plaintiff's bananas were to be delivered at such place or places as the defendant should from time to time require and on such dates as the defendant or his agents should designate.

On the 30th April, 1934, the plaintiff was in arrears for 15/-, representing the balance of one quarter's rent of 25/-, for the quarter ending the 31st March, 1934.

The Resident Magistrate found that the plaintiff had also been called upon to deliver bananas at the receiving stand (established on the property on the 13th February, 1934) on several occasions, but had refused or neglected to do so. The plaintiff had been maintaining that he was bound by contract to The Jamaica Banana Producers Association to deliver the bananas from the land in question and that he had not assented to this term when he signed the agreement. The Resident Magistrate rejected this contention and we see no reason to differ from him on this question of fact.

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BROWN, AG. J. OF A.

The defendant, therefore, had two grounds on which he might re-enter and take possession of the land the subject of the tenancy agreement.

On the 18th May, 1934, the defendant saw the plaintiff and informed him that he expected him to fulfil the terms of his agreement to deliver the bananas when called upon to do so at the place designated.

The plaintiff reiterated his contention about his contract with the Jamaica Banana Producers Association and asserted that he had so stated when he signed the agreement and did not intend at any time to supply any bananas. It was as the Resident Magistrate correctly states "a flat refusal to supply any fruit".

The Resident Magistrate, however held that these grounds of re-entry were waived by what occurred on this 18th May.

No one would impugn the proposition that when a landlord after a forfeiture has come to his knowledge, *does* anything whereby he recognizes the relation of landlord and tenant as still existing, he is precluded from saying he did not do the *act* with the intention of waiving the forfeiture; and if what had been done in the present case amounted to a recognition of an existing tenancy, I should at once agree that the defendant could not take advantage of the previous forfeiture. (Cockburn, C.J. in *Toleman v. Portbury* L.R. 6 Q.B. 248). We are unable to see how it can be said that the Defendant's words and attitude on this 18th May operated as a waiver of the right which had arisen to re-enter for refusal or neglect to deliver the fruit.

The defendant was asking the plaintiff if he proposed to fulfil his agreement and the answer was an unqualified refusal to do so either then or in the future. In other words, the plaintiff renounced performance of the agreement as to this term, and so far from the defendant's words and attitude on this 18th May showing that he had elected not to take advantage of this right of re-entry defendant exercised his right on the 21st May.

We say, with regret, that we are unable to agree with this conclusion of the Resident Magistrate and his judgment so far as it depends on this conclusion cannot be sustained.

The Resident Magistrate, however, further held that the defendant had given no notice under section 16 of Law 40 of 1889. If this section is applicable, then undoubtedly the defendant would be guilty of trespass. *Fox v. Jolly*, (1916) 1 A.C. 1 at pages 8 and 9.

We are unable to agree with the Resident Magistrate. The two cases to which we were referred are cases on a different section and arose out of a tenancy created by holding over on the expiration of leases. The case of *Swain v. Ayres* 21 Q.B.D. 289 (referred to in the local case of *Charley v. Ricketts* S.C. Vol. 10, page 49) indicates that the section has no application to a tenancy agreement such as this. In the absence of authority to the contrary, we hold that this agreement is not a "lease" within the meaning of Section 16 of Law 40 of 1889. The judgment, therefore, cannot be sustained on this ground.

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With regard to the contention that the formalities of the common law as to the demand for rent had not been complied with, we agree with the Resident Magistrate that the terms of the agreement dispensed with the necessity for such a demand.

We are unable to agree with the contention that was urged that the defendant could not take advantage of the failure to deliver fruit, because, to do so, would be to compel the breach of an existing contract which also carried with it certain penalties under Law 5 of 1923, we think that the answer is that given by the appellant's counsel that the contract applied to the agreement that had been superseded by the existing agreement and not to this.

There was an alternative claim for relief, but we do not think that such a claim is possible on this agreement or if it is, we think that for the reason given by the Resident Magistrate it cannot be entertained.

The appeal must be allowed with £10 costs. The judgment appealed from must be set aside and judgment entered for the defendant with costs.

Appeal allowed.

Solicitor for appellant: *D. V. Silvera.*
Solicitor for respondent: *H. E. Rickards.*

DUNKERLEY v. ASSESSMENT COMMITTEE.

HIGH COURT. (In Chambers) 1936.

May 21. June 12. July 10.

13 S.C.J.B. 374.

Income tax—No return made by taxpayer—Estimated assessment made—Assessment disputed—Form of Notice of Objection—Failure to agree as to assessment—Appeal—The Income Tax Law (24/1919) ss. 23, 24. [R.L. Cap. 201, ss. 23, 24].

(1) The law does not prescribe any particular form, in which an application to the Assessment Committee to review and revise an assessment is to be made, except that it must be in writing and state precisely the grounds of the objection to the assessment.

(2) Where failure to do a thing is spoken of, a previous attempt to do that thing is not necessarily implied. The verb "to fail" is frequently used in place of the negative, hence the words "any person who . . . . has failed to agree" contained in s. 24 (1) of Law 24 of 1919 (cap. 201, s. 24 (1)) means "any person who . . . . . has not agreed".

APPEAL from the refusal of the Assessment Committee to revise an estimated assessment made upon the appellant in respect of income tax for the year 1934.

Appeal allowed.

G. K. Fletcher (Solicitor) for the appellant.
A. B. Rennie (Crown Solicitor) for the respondent.

HIGH COURT. (In Chambers) 1936.

DUNKERLEY v. ASSESSMENT COMMITTEE.

SETON J.

936: JULY 10: *Seton, J.* read the following judgment:—

19th December, 1935, there was served upon the Appellant a e of assessment in respect of Income Tax for the year ending 31st mber, 1935. The appellant had neglected to make the usual n and in its absence, the Assessment Committee had made an ated assessment on him in the sum of £400. On the 20th ecember, that is to say the day following the service of the notice sessment, the Appellant wrote to the Secretary of the Assessment mittee as follows:—

"I have been assessed on a basis of income of £400 for 1934.
"Actually, I left the employment of U.F. Co., at end of 1933, and
"have been working with Bryden & Evelyn since January, 1934.
"I earned with Bryden & Evelyn 8 weeks at £2 and 44 weeks at
"£4—£200. I was also employed by Springfield Beach Club
"during the year 1934, and earned from them £100. Total
"income for 1934 = £300."

e Inspector of Income Tax replied to this letter on 23rd December, as follows:—

"With reference to your letter of the 20th inst., I have to point
"out that you were required to render a return of your income
"for the year 1934 on or before the 31st May last. This you
"neglected to do and in the absence of such return the Assess-
"ment Committee assessed you in the sum of £400.

"If you are aggrieved by such assessment you may apply in
"writing to the Assessment Committee within thirty days from
"the receipt of the Notice to review and revise the assessment,
"otherwise it stands.

"You should at the same time render on the prescribed form a
"return of your income for the year 1934."

e appellant did nothing more until 31st March, 1936, when he applying for a revision of the assessment and giving particulars income for the year 1934; he explained the delay in sending his cation by stating that he considered that his letter of 20th mber, 1935 had been an appeal against the assessment but since d subsequently received applications for the payment of the tax w made formal application for a revision of the assessment.

this the Inspector of Income Tax replied at the direction of the sment Committee that his application for revision had not been within the prescribed time and his request for revision could not tertained.

e appellant appeals.

r the Assessment Committee, it is contended in the first place the appellant's letter of 20th December, 1935 was not an applica- o review and revise the assessment within the meaning of section) (as amended) of the Income Tax Law, 1919 and that no such