1946 — 1950

THE

JAMAICA LAW REPORTS

[5 J.L.R.]

DECISIONS

OF

THE HIGH COURT

AND OF

THE COURT OF APPEAL

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

Editor — MR. JUSTICE MACGREGOR

PRINTED BY
THE GOVERNMENT PRINTER,
DUKE STREET, KINGSTON.

1951

COURT OF APPEAL 1946

EMILY JACOBS v. K.S.A.C & ANOTHER

HEARNE, C.J.

Clerk declines to renew the hire or tenancy of the stall; the stall-holder shall remove all goods that he may have on the stall.

It is to be noted in the present case that the defendant March, if he purported to have acted under this section, did not give the plaintiff any opportunity of removing her goods. He nailed the stall and refused to give her access to her goods.

But as we have said, rule 24 has reference only to a state of affairs that exists when the hire or tenancy has run out. If, however, the period of hire has not come to an end—and that was the position in the plaintiff's case though fees were in arrears—it is only the Mayor or Chairman who in his discretion may determine the hire or tenancy (rule 8).

How salutary is that rule is illustrated by this case. No Mayor would have acted in the high-handed way adopted by March towards the plaintiff who had been a stall-holder for 30 years.

We are clearly of the opinion that the ejectment of the plaintiff by the defendant March was unlawful.

It is, however, claimed that the Kingston and Saint Andrew Corporation were not liable by reason of the provisions of rule 6.

Rule 6 reads:—

> "All goods taken into a market shall remain at the sole risk of the owners of such goods and the Corporation shall not under any circumstances be liable for any loss or damage thereto and if any such loss or damage shall be occasioned by the act neglect or default of any officer or servant of the Corporation such officer or servant shall alone be liable for any such loss or damage."

It was claimed that although March purported to act in pursuance of his duties as an employee of the Kingston and Saint Andrew Corporation, the latter were not liable. If the section is construed in that way, we would be constrained to hold that the Kingston and Saint Andrew Corporation can make a regulation, having the force of law, which is repugnant to the Common Law. This the Corporation, in our opinion, cannot do. "Bye-Laws in general may not be repugnant to the laws of the land (5 Co. Rep. 63A)". In *Powell v. May* (1946) K.B. 330, it was held that a bye-law made by a County Council was *ultra vires* on the ground that it was repugnant to the general law of the land contained in certain Acts of Parliament.

In our opinion rule 6 would be applicable and was intended to be applicable only if the defendant March, by reason of an act, neglect or default of his, unconnected with the discharge of his duties as an employee of the Kingston and Saint Andrew Corporation, had caused damage to the plaintiff. That is admittedly a mere statement of the Common Law but, as has been often pointed out, a bye-law sometimes repeats a statutory enactment (or a principle of the Common Law) and is, to that extent, surplusage.

For the reasons we have given, the appeal is dismissed with costs fixed at ten guineas.

KNIGHT v. PRATT

2 C.A.J.B. 675.

COURT OF APPEAL 1946

Sept. 18, 19
Oct. 17, 18
December 9

Licence to enter on land, sow food crops and reap them—Duration of—How terminated—Reasonable notice to remove property put on land.

Resident Magistrates Law, Chapter 432, section 195—Wrong remedy claimed—All relevant evidence before lower Court—Court will finally dispose of issue between parties.

By an agreement made between the defendant and the plaintiff, the plaintiff, for the duration of the present war against Germany, agreed to work and plant such plot of land at Malvern Park, the property of the defendant, as may be allotted to him. The plaintiff agreed not to destroy grass nor to remove woods and trees and to plant and establish guinea grass throughout the plot. As the plot was established in guinea grass, the defendant agreed to allow the plaintiff to move to another plot on the same conditions. The plaintiff was not permitted to plant bananas or plantains, nor was he allowed to bring anyone onto the plot other than his wife or housekeeper and his children. He also agreed to obey the agents of the defendant who were stated in the agreement to be in charge of the business. In pursuance of the agreement, the plaintiff entered into Malvern Park and cultivated there a plot of land. On the 3rd July, 1945, the defendant ordered that his cattle be depastured on the plaintiff's cultivation, and as a result they damaged the cultivation. There was no finding by the Resident Magistrate whether notice had been previously given to the plaintiff.

HELD: (i) That the agreement between the parties was a licence to enter on land and sow food crops in exchange for planting grass and to reap the crops so sown and was not a lease;

(ii) that the plaintiff was entitled to a reasonable time to quit and to remove property which he put upon the land on the faith of the licence;

(iii) that the plaintiff was not in the circumstances given a reasonable time to reap the crops he had sown; and

(iv) that the plaintiff was entitled to recover the value of the crops destroyed.

The action as originally issued, and on which judgment was entered in the Resident Magistrate's Court was based on the submission that the agreement between the parties was a lease, and was based in tort. Had an application been made to the Resident Magistrate at the trial he would have made the amendments "necessary for the purpose of determining the real question in controversy between the parties", as provided by the Resident Magistrates Law, Chapter 432, section 195. Notwithstanding that the wrong remedy was sought, as it appeared that all the relevant evidence was before the Court, and as the plaintiff was entitled to judgment, the Court of Appeal directed that judgment be entered for him.

APPEAL from the decision of Graham, Acting Resident Magistrate, Saint Ann.

Appeal allowed. Case remitted to the Resident Magistrate to assess damages and to enter judgment for the plaintiff for the amount of damages so assessed, and costs.

Manley, K.C., for the appellant:
Evelyn for the respondent.

cur. adv. vult.

COURT OF APPEAL 1946

KNIGHT v. PRATT

HEARNE, C.J.

1946. Dec. 9: The judgment of the Court (Hearne, C.J., Savary and Carberry, JJ.) was delivered by the Chief Justice.

HEARNE, C.J.: In the action out of which this appeal arises the plaintiff claimed from the defendant "£100 damages for that on or about the 3rd day of July, 1945, the defendant by himself, his servants or agents unlawfully entered upon the plaintiff's land at Malvern Park in the parish of Saint Ann and thereon illegally turned cattle and destroyed the plaintiff's crops and field and illegally evicted the plaintiff therefrom and committed divers other acts as a result of which the plaintiff suffered loss and damage and incurred expense".

The agreement, Exhibit 1, under which the plaintiff and others occupied the defendant's land, is as follows:—

> "We the undersigned, jointly and severally, as tenants at will on Malvern Park, for the duration of the present war against Germany, do hereby agree to work and plant each plot of land allotted to us for our own benefit. We agree not to destroy any grass, economic woods and trees. And to plant and establish guinea grass thoroughly throughout these allotted plots as compensation to the owner for the benefit allowed us to work, plant and reap from the said land. As each plot is properly established in guinea grass the owner agrees to allow us to move to another allotted plot under the same conditions. *No* bananas or plantains are to be planted in any of these plots of land so allotted. On no account is any such tenant, under any circumstances whatever, to bring in anyone else, as help or otherwise, on the said land or property except his wife or housekeeper and *his* small children. No other peoples' children. No men or women of his own family either. We agree to enter Malvern Park to go to the said land opposite Cleveland Smith's dwelling. We also agree to obey the agents of the landowner, who are in charge of the business.
>
> I, Edward Carroll Pratt, the landowner, agree to abide by my part in the above agreement."
>
> (Signed) E. CARROLL PRATT.
> 17.10.39.

Signed jointly and severally by 19 persons including the plaintiff, Hosea Knight.

It was stated by Counsel for the plaintiff at the trial that the plaintiff had received no notice to quit and it was argued that, "as on the 3rd July, 1945, (the date of the alleged trespass) the war against Germany had not ended though hostilities had ceased", the plaintiff was still lawfully in possession on that date.

It was also stated by him that at the time the plaintiff was put into possession the agreement was read and that, upon enquiry being made as to the position that would arise if the war terminated suddenly, the defendant agreed that "time would be given to reap growing crops".

COURT OF APPEAL 1946

KNIGHT v. PRATT

HEARNE, C.J.

The defence stated by the Solicitor for the defendant was that on the 3rd July, 1945, "the defendant took possession of the land by depasturing cattle thereon", that the parties intended the date of the expiration of the contract to be the date of the termination of hostilities", that by remaining on the land after the 8th of May, 1945, when hostilities had ceased, the plaintiff became a tenant on sufferance and that "any act of the landlord showing an intention of terminating the tenancy is sufficient to terminate it *ipso facto* provided the act is done on the land". It was submitted that the plaintiff had no right to emblements, as a tenant on sufferance had no such right. The verbal promise alleged to have been made by the defendant was denied and the amount of damages claimed was not admitted.

The Resident Magistrate did not decide the question of whether notice had been given before the alleged trespass and eviction.

He found that:—

(a) Plaintiff was tenant of defendant under Exhibit 1.

(b) Defendant did state to tenants, at the time of the signing of Exhibit 1 (before or after execution I cannot say) that they would have a year after termination of the war to take off their crops.

(c) Plaintiff's crops were not adversely affected by the drought, but were in good condition.

(d) Plaintiff did not plant guinea grass in manner required by his agreement.

(e) Defendant ordered that his cattle, a large herd of them, be depastured on the cultivation of the plaintiff, thereby causing the damage complained of.

As a matter of law he held that the alleged verbal promise made by the plaintiff, which he found had been made by him, was not admissible to vary the written contract. He also held that the "plaintiff was entitled to possession up to the 8th May, 1945, (V-E day) and no longer" and that in consequence "the defendant was entitled to depasture his cattle on the 3rd July, 1945".

On these findings he dismissed the claim of the plaintiff who has now appealed.

At the outset of his argument on appeal, Counsel for the appellant referred to the case of *Lace v. Chandler* (1944) K.B. 368, 1 A.E.R. 305, and submitted, to use his own words, that "in so far as 'duration of war' makes the agreement (Exhibit 1) void, it is not void, as the effect of the Law in Jamaica validates the agreement and recognises it as operative for the purpose of our Law". In this connection he cited the Emergency Powers Defence Act, 1939, the Foodstuffs Production

Order, (No. 2) 1942, in particular section 3 and referred to "a suggested draft of Tenancy Agreement for proprietors who lease land to tenants in accordance with sub-paragraph (2) of paragraph 3 of the Foodstuffs Production Order, (No. 2) 1942", (Exhibit 3). We have come to the conclusion that Exhibit 1 which was executed in 1939 independently of the Foodstuffs Production Order, (No. 2) 1942, was not and could not have been retrospectively validated as a lease, if indeed it is a lease, for the reasons submitted to us. It is unnecessary, however, as will later appear, to state our views on the subject as well as on the arguments addressed to us by both sides on the question of whether, assuming Exhibit 1 to be a lease, the alleged verbal agreement, found by the Resident Magistrate to have been made, was admissible, as he put it, "to vary the terms of Exhibit 1".

Counsel for the respondent's position was that Exhibit 1 was a tenancy agreement, that it was void *ab initio* on the authority of *Lace v. Chandler*, that the appellant was, for that reason as well as for the reason that he was so described in Exhibit 1, a tenant-at-will, and that, therefore, the respondent could at any time, even before the war had ended, have entered his land and terminated the tenancy in the way he did.

We do not subscribe to the view that, if Exhibit 1 is a tenancy agreement the appellant was under that agreement, no more than a tenant-at-will because he is so described in it. His position could only be ascertained by construing the whole document. Nor do we agree, assuming the appellant had entered into possession under a void tenancy agreement, that the respondent could have entered his land at any moment dictated by his own caprice, terminated the tenancy and deprived the appellant with impunity of the fruits of his money and labour. Such cases as *Turner v. Doe d. Bennett* (1842) 9 M. & W. 643, 152 E.R. 271, where the tenancy was a strict tenancy-at-will, are no authority for such a claim.

But Exhibit 1 is, in our opinion, not a tenancy agreement at all. This was alternatively argued by Counsel for the appellant, although the argument was not advanced at the trial. In our opinion it is a licence to enter on land and sow food crops in exchange for planting grass, and to move from one allotment to another with the landlord's permission as the planting on each allotment was concluded. The licensee was restricted as to the persons he could bring on to the land to help him and he agreed to obey the agents of the landlord who were "in charge of the business". In short, the agreement lacked three of the requisites of a lease; a definite or ascertainable duration, a definite thing demised, and exclusive possession.

As a licence, Exhibit 1 is not affected by the rule which requires the term of a tenancy to be ascertainable.

It, therefore, becomes necessary to consider what is the position of a licensee who is granted a licence to enter upon land, sow food crops and reap them.

The rule laid down in *Meller v. Watkins* (1874) L.R. 9 Q.B. 400, seems to apply to a licence of this nature, and is to the effect that a licensee under these conditions is entitled to a reasonable time to quit and to remove any property which he has put on the land on the faith of the licence. Cockburn, C.J., at page 405, says:—

> "On the other point, principle, reason and common sense alike require that, although a licence may be revocable at any moment, the licensee should have a reasonable time for removing off the premises what he has been licensed to put upon them."

Blackburn, J. expressed a similar view and Lush, J. concurred.

In the present case the licensee was not given a reasonable time. The whole purpose of the licence, from the point of view of the licensee, would have been defeated if the licensee, in breach of the clearly implied terms of Exhibit 1 and quite apart from the verbal agreement, was not given a reasonable opportunity of reaping the crops he had sown. The appellant was entitled to sow *and* to reap—and the right to reap was denied to him. It was claimed by the respondent that an informal message had been sent to the appellant that he intended to resume possession in April, 1945, (this was before V-E day) but even assuming it to be true, it involved the repudiation of the appellant's right to reap. It is in evidence that the crops would not have matured till 4½ to 5 months from March-April, 1945, when the planting took place and we think that had the action been founded in contract and not in tort the appellant would have been entitled to succeed.

If an application had been made to the Resident Magistrate who tried the case he could have made the amendments "necessary for the purpose of determining the real question in controversy between the parties" (section 195 of the Resident Magistrates Law) and, notwithstanding that the wrong remedy was sought, it appears that all the relevant evidence was before the Court and we, therefore, think that the appellant is entitled by reason of the premature breach of the licence to damages commensurate with the loss he has wrongfully sustained. *Kerrison v. Smith* (1897) 2 K.B. 445 *vide* Clerk and Lindsell on Torts at page 423 of the ninth edition.

It is to be noted that the respondent did not claim through his Solicitor at the trial that the appellant had not planted guinea grass to the extent required of him, nor did he put forward any counter-claim for that reason. It is also to be noted that while the Resident Magistrate held that the appellant had not planted guinea grass "in manner required by the agreement", he appears to have found, not

COURT OF APPEAL 1946

KNIGHT v. PRATT

HEARNE, C.J.

that he had not planted any guinea grass at all, but that he had not planted as many as the 4 acres he claimed to have planted. (Paragraph 8 of the judgment).

For the reasons we have given the appeal is allowed and the case is remitted to the Resident Magistrate who tried it, for the assessment of damages to the appellant's crops. He should then enter judgment in the appellant's favour in accordance with the assessment he has made together with such costs as, in his discretion, the plaintiff is entitled to recover.

As to the costs of the appeal, we have said that the appellant, in our opinion, misconceived his remedy. But the facts involved in the case would have been the same and we do not think he should be deprived of his costs in this Court which we fix at ten guineas.

It will be noted that it has not been found necessary to decide many questions raised in argument including the question of whether the war against Germany had ended on the 3rd July, 1945, and, if so, whether the respondent, on whom the onus of proof lay, had proved it.

Although we express no definite opinion on the meaning of the expression contained in the agreement, Exhibit 1, "for the duration of the present war against Germany", it may be of assistance if we mention the case of *Rex v. Bottrill, ex parte Kuechenmeister*, (1946) 2 A.E.R. 434; 62 T.L.R. 570.

COURT OF APPEAL

1946
Dec. 18

1947.
Jan. 10

SYDNEY BROWN v. OBEDIAH HENRY AND ANOTHER

2 C.A.J.B. 682.

Liability for Injuries by Dogs Law, Chapter 406—Intervening act of third party—Failure of owner to prevent third parties meddling with dog—Liability of owner for injury done by dog.

The plaintiff was injured by an attack made upon him by the dog of the defendant Obediah Henry. The dog was set upon the plaintiff by two small boys, one the nephew of Obediah Henry and the other his cousin. The dog was not kept under control by Obediah Henry with the result that it strayed with the two small boys.

HELD (1) The Liability for Injuries by Dogs Law, Chapter 406, imposes a strict liability on the owner of a dog which causes injury to any person, independent of proof of scienter, and as a result the owner of a dog in Jamaica is in the same position as the owner of a dog in England where scienter has been proved: (2) The intervening act of a third party can be raised as a defence only where the owner of a dog has done everything he reasonably could be expected to do to prevent a third person from meddling with it. The defendant was, therefore, liable to the plaintiff for the injury caused to him by the dog.

Baker v. Snell (1908) 2 K.B. 825, not followed;
Statements in *Salmon* on *Torts*, 10th Ed. at p. 553 and *Winfield* on *Torts*, 3rd Ed. at p. 519, approved.

APPEAL from the decision of MacGregor, Resident Magistrate, Saint Catherine.

Appeal allowed. Judgment entered for the plaintiff.

Manley, K.C., for the appellant:

Evelyn for the respondent.

Cur. adv. vult.

1947. Jan. 10: The Judgment of the Court (Hearne, C.J., Savary and Cluer, JJ.) was delivered by Savary, J.

SAVARY, J.: The plaintiff, a boy of 10 to 12 years of age, brought an action to recover damages for injuries received as a result of an attack upon him by the defendants' dog. It was not disputed that the plaintiff was injured by the dog but the defendants set up the defence that the dog was set upon the plaintiff by two small boys—one a nephew of the male defendant, and the other his cousin—with whom the dog was on the main road from St. Faiths to Glengoffe in Saint Catherine. SAVARY, J.

The learned Resident Magistrate of Saint Catherine accepted these facts of the defence and gave judgment for the defendants on the ground that the damage was caused by the intervening act of a third party.

The Liability for Injuries by Dogs Law, Chapter 406, imposes a strict liability on the owner of a dog which causes injury to any person without proof of a previous mischievious propensity in the dog or of neglect on the part of the owner. This is a departure from the Common Law where it was necessary to prove that the owner knew of its mischievous propensity in order to establish liability. It does not follow from what we have said that the provisions of our Law exclude the defence being raised by the owner of a dog that the damage caused by his dog was the result of the intervening act of a third party. But in our opinion it can be raised successfully only where the owner of a dog has done everything he reasonably could be expected to do to prevent third persons from meddling with it. In respect of this defence we think that the owner of a dog in Jamaica, where liability is independent of scienter, is in the same position as the owner of a dog in England where scienter has been proved.

Two leading text books on the law of torts express the view that the defence of the act of a stranger in the case of injury by a dog where scienter is proved is in England qualified and can succeed only if the evidence establishes that the owner of the dog took all reasonable care to prevent it from doing mischief, or, as we have said, has done everything he reasonably could be expected to do to prevent third persons from meddling with it. We refer to *Salmon* on *Torts* 10th Edition at p. 553, and *Winfield* on *Torts* 3rd Edition at p. 519. Although *Baker v. Snell* (1908) 2 K.B. 825 indicates a contrary view, all the text books on torts express the opinion that the decision is unsatisfactory and should not be followed. We agree.