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Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

IN COMMON LAW

SUIT NO. C.L. - L036/1980

BETWEEN	ALVIN LENNON	PLAINTIFF
AND	WORKERS SAVINGS AND LOAN BANK	DEFENDANT

Mr. O'B. Fernandez-McCartney for Plaintiff. Roy Fairclough for Defendant.

Heard: 25th July, 1983; 14th October, 1983; 3rd May, 1982/and 29th November, 1984

J U D G M E N T

Theobalds J.

By endorsement to a Writ of Summons dated 17th day of April, 1980 the Plaintiff, Alvin Lennon, claimed from the Defendant "damages for Detinue and/or Conversion etc.....". His Statement of Claim dated 21st day of April, 1980 goes on to particularize as follows:

> "1. The Plaintiff is a higgler, over the age of 18 years and resides at 46b Mannings Hill Road, in the parish of Saint Andrew.
>
> 2. The Defendant is a company established by virtue of Section 3(1) of the Workers Savings and Loan Bank Act, 26 of 1973, with its main office at 134 Tower Street, Kingston.
>
> 3. The Plaintiff is and was at all material times the owner and entitled to the possession of a Motor Van lettered and numbered FN 7545.
>
> 4. The Defendant is and has been since the 1st day of November, 1979, wrongfully in possession of the said Motor Van.
>
> 5. By letter dated the 19th day of February, 1980 and orally on divers dates prior to the said 19th day of February, and after the Plaintiff demanded the said Motor Van of the Defendant, but the Defendant has wrongfully failed refused and/or neglected to deliver it up to the Plaintiff and has thereby converted the same to his own use and/or wrongfully detained the same thereby depriving the Plaintiff thereof by reason whereof the Plaintiff has suffered loss and damage.

PARTICULARS.

" Balance due on the said Motor Van valued $6,500.00.	$2,500.00
Loss of use of the said Motor Van for the period 1st November, 1979, to date of filing of the Writ and/ or Judgment at $300.00 monthly to the 31st April, 1980	$1,800.00
TOTAL	$4,300.00

Interest on $2,500.00 at the rate of 6% per cent per annum from the 1st November, 1979, to the date of Judgment and/or payment.

AND THE PLAINTIFF claims damages for conversion and/or Detinue.

Dated this 21st day of April, 1980.

(S E T T L E D)

(H. O'B. Fernandez-McCartney)
Attorney-at-Law for the Plaintiff herein.

The Defence as filed, in its relevant paragraphs, reads as follows:

" 3. Save that it is admitted that the Plaintiff was up to on or about May 4, 1979 the owner of motor van lettered and numbered FN 7545 paragraph 3 of the Statement of Claim is denied.

4. The Defendant admits that it has been in possession of the said motor van since November 1, 1979 but denies that its possession is wrongful.

6. The Defendant avers that the Plaintiff sold the said motor van to one Audley Daley on or about May 4, 1979 and that the property in the said motor van passed to the said Audley Daley at the time of the said sale.

7. The Defendant avers further that the said Audley Daley obtained possession of the motor van and the registration book with the consent of the Plaintiff as seller.

8. The Defendant will say that on or about May 9, 1979 the said Audley Daley by a Bill of Sale delivered and or transferred to the Defendant the said motor van and or the property in the said motor van to secure a loan which Bill of Sale was duly recorded. The Defendant will at the trial refer to the Bill of Sale for its full meaning and effect.

9. If which is not admitted the Plaintiff was entitled to the possession of the said motor van at the time of the disposition by Audley Daley to the Defendant the Defendant

" says that it received the same in good faith and without notice of any lien or other right of the Plaintiff.

10. No admission is made as to the alleged or any loss. The Defendant will say that sums of $1.000 and $5,170.85, the latter through the Defendant, were made to the Plaintiff by Audley Daley and that the cheque for the latter amount was lodged into the account of the Plainiff's Attorney-at-Law.

13. The Defendant claims against the Plaintiff for a declaration that the Defendant is the owner of the said motor van.

After the opening remarks of Learned Counsel for the Plaintiff, Learned Counsel for the Defendant quite properly applied to the Court to strike out two sections of the particulars contained in paragraph 5 of the Statement of Claim namely -

" Balance due on the said motor van valued at $6,500.00 $2,500.00

Interest on $2,500 at the rate of 6% per cent per annum from the 1st November 1979 to the date of Judgment and for payment."

This application was grounded on the unrecorded but correct contention that counsel in his opening for the Plaintiff had stressed that there had been no dealing prior to the 1st November, 1979 between the Plaintiff and the Defendant, concerning this motor van and a fortiorori, the amount of $2,500 was not owed by the Workers Savings and Loan Bank. If there is no principal debt then the question of payment of interest could also not arise. There is no record of any reply to these contentions and indeed there could be no answer to them. The application was accordingly granted. It would be convenient at this stage to also point out that in relation to the second item in these particulars no evidence was led as to any loss of use of his motor van suffered by the Plaintiff. The sole issue left for determination therefore is whether or not the Plaintiff is entitled to damages for conversion and/or detinue, and if so, how this figure should be arrived at.

It would be helpful at this stage to indicate what appeared to be the factual situation which gave rise to this suit. For sometime prior to and on the 1st November, 1979 Mr. Alvin Lennon (the Plaintiff) was the registered owner of the motor van in question. This van was given out for repairs to a mechanic by the name of Audley Daley who is named in the Defence and Counterclaim. Before the repairs were completed the Plaintiff agreed to sell the van to Audley Daley for the amount of $6500. Pursuant to this arrangement a down payment, the amount and date whereof is a live issue between the parties, was made. The balance was to be paid by an agreed date. The van remained at the repairers' garage. The agreed date having come and indeed gone by some four months and the Plaintiff not having, in spite of much effort, been able to locate Mr. Daley, the Plaintiff went to this gentleman's garage and took the van back to his (the Plaintiff's) home. It appears that prior to his "disappearance", Mr. Daley had gone to his Bankers - the Workers Savings and Loan Bank (the Defendant to this suit), obtained a loan of $6,500.00 on the security of the said van and sundry items of furniture. The bill of sale is signed by Audley Daley and one Shirley Daley. Mr. Daley never met his obligations to the bank under this Bill of Sale and in due course, servants or agents of the Bank attended at the Plaintiff's home and in spite of strong protests from the Plaintiff, the van was seized and taken away. The whereabouts of Mr. Audley Daley are unknown to all concerned to this day. It is against this factual background that the Plaintiff has brought this action. The Defendant has counterclaimed against the Plaintiff for a declaration that the Defendant is the owner of the said motor van.

The first witness called for the Plaintiff was one Mrs Barbara Kerr, Senior Collector of Taxes (Licences), St. Andrew. From her records it was established that on the 1st November, 1979

the Plaintiff was the registered owner of motor vehicle Reg. No. FN 7545. The reply and defence to Counterclaim was the first and only time that the question of registered ownership as distinct from ownership of the motor vehicle was raised. All along it had been purely a question of ownership both on the Statement of Claim and on the Defence and Counterclaim. The 1st of November, 1979 was the agreed date of the alleged seizure. Counsel for the Plaintiff then proceeded to lead evidence from this witness of a transfer on the Records of the Collector of Taxes from the Plaintiff to one Ashton Pitt on the 15th September, 1982, nearly two years after the alleged seizure. Out of context and before Counsel could be stopped the Instrument of Transfer which formed part of the Collectors of Taxes records was shown to the Plaintiff and he denied having signed any such document. The Collector of Taxes was not cross-examined and the Form D Application for a Transfer of Licence although marked exhibit (2) was returned to the Collector of Taxes at her request. The only relevant finding of fact from this exercise is that on the 1st November, 1979 Mr. Alvin Lennon (the Plaintiff) was the registered owner of motor vehicle lettered and numbered FN7545. Indeed a tribunal of fact is left to conjecture why the evidence in relation to the transfer Lennon to Pitt as late as the 15th September, 1982 was led at all. Conjecture leads to bewilderment when Lennon himself later flatly denies having signed any such transfer. It is not being contested on the pleadings that the Defendant Company did on the 1st day of November, 1979 take possession of the motor vehicle in question, but how a transfer from Alvin Lennon to Ashton Pitt came to be effected some nearly three years after the seizure is not part of the complaint before me in this action and therefore I do not propose to deal with it. I do not consider this relevant to the issues

before me, but bearing in mind that there was no cross-examination of this witness by the defence, I will have to take this factor into account when dealing with the Counterclaim filed to this action.

The next issue which would arise for a determination of this claim was whether or not the Defendant had any legal right to deprive the Plaintiff of possession and control of this motor vehicle, he being at the time of the admitted seizure the registered owner in possession of his goods.

The Plaintiff's evidence was to the effect that in or about May 1979 he gave his vehicle to a mechanic by the name of Audley Daley for the purpose of effecting repairs to it. These repairs were never completed and while the van was at Mr. Daley's garage the Plaintiff agreed to sell same to him for $6,500. It was one of the terms of payment that $4,000 was to be paid down and the balance of $2,500 was to be paid in four months time. Mr. Alvin Lennon said he received the $4,000.00 down payment but as the balance of $2,500 was never forthcoming he paid several visits to Mr. Daley's garage with a view to collecting this outstanding sum. Not seeing Mr. Daley or getting the balance of $2,500 Mr. Lennon, quite understandably it would seem, decided to mitigate his loss. He took what he saw, namely his van, and kept it at his home and put it back in service. At the same time he decided to keep the $4,000 and keep his pick-up until such time as the balance of $2,500 was forthcomimg. This decision in all the circumstances, could not be considered unreasonable. Quite different considerations might apply if, for example, any message had been left by Mr. Daley for the Plaintiff or any one else who might have had business with Daley's garage.

Now Mr. Lennon describes himself as a higgler by trade. To use his own words he "can read and write but not a great reader". In this respect he cannot be regarded as a rarity in our society. He is, certainly in percentage terms, more

the norm than the usual. He says he involved his attorney from the very beginning of the transaction in about May, 1979. Along with Mr. Daley, the Plaintiff attended at his attorney's office. His attorney was Mr. H. O'B Fernandez-McCartney who also represents him at this trial. Under cross-examination Mr. Lennon denied emphatically that any down payment of $1000 was made at the lawyer's office or that he signed any receipt for this sum, or that such receipt was in turn witnessed by his attorney. The matter of this $1000 down payment was raised initially in the pleadings and cannot therefore be said to have taken the plaintiff (or his attorney) by surprise. Notwithstanding, the matter is not dealt with conclusively in the Reply and Counterclaim and even at this trial. Why was the alleged witness to the signing of this receipt not called and an attempt made to prove the circumstances under which this alleged payment was made? But on the well known principle of civil law "he who affirms a fact must prove it", it would be for the Defendant to prove on a balance of probability that this $1000 payment was made to and received by the Plaintiff. To simply put the suggestion in cross-examination of the Plaintiff and leave it at that is not a discharge of the onus probandi. Why was the process of the Interrogatories not used - either a notice to admit facts or a notice to produce might well have been the lever whereby secondary evidence of this agreement or receipt for $1000 might have been admitted, and had this been possible immeasurable good would have been done to the Defendant's case as the Plaintiff never retracted from his denial that there had ever been any down payment of $1000 or that any agreement to pay any balance of $5,500 was ever made and signed in his attorney's office. A clear attempt was made to cure this most unsatisfactory state of affairs by calling Mr. H. O'B. Fernandez-McCartney, as a witness for the defence. A subpoena duces tecum would have been more effective it turns out, for Mr. McCartney's

memory failed him. It resulted in this goodly gentleman being placed in a most unusual and inviduous position for here was an attorney-at-law engaged in the preparation and presentation and conduct of a case on behalf of a client being called upon to testify on a question of fact against his own client - a question of fact so fundamental to his client's case that it had been raised in the pleadings, filed and delivered from as far back as January, 1981 approximately one year and six months before the trial commenced, and to which there had been no reply. Well Mr. McCartney suffered a loss of memory -

> "some years ago, I can't remember everything ..... I can't say from memory if $1000 paid ..... if you show me original I can assist",

he says. He would wish to refresh his memory but could only do so from an original. He goes on -

> ".....I have seen my signature on a duplicate with Lennon signature and a $1000 mentioned. I can't say if my signature is on original".

Of course Counsel for the defence having called this witness would be precluded from cross examining him, but one might well ask why one's memory can only be refreshed by looking at an original when the office copy bears the witnesses' signature, address and profession according to that witnesses' own testimony. As presiding Judge at a trial of a civil matter one is perhaps understandably unwilling to descend into the arena by questioning a witness who insists that his memory can only be refreshed by reference to an original. The system whereby office copies of documents prepared in an Attorney's office are made is well known. At the same time the original is typed the copy is produced by means of carbon paper. Why then the only expressed insistence for purpose of refreshing memory/on seeing an original particularly as the copy available displays

the signature, address and profession of the attorney involved? Would not the sight of an office copy be sufficient to jog the memory on an issue as fundamental as the payment of a deposit of $1000 on a $6,500 sale of a motor van?

A Bill of Sale said to have been executed and signed by Audley Daley on the security of the Mazda pick-up FN 7545 was tendered and admitted in evidence as exhibit 111. Although there are numerous omissions, inaccuracies and errors on the face of this document its purport and intention is clear. It purports to secure a loan of $6,500 made to Audley and Shirley Daley on the security of the pick-up in question as well as on other items of furniture listed in the Schedule thereto. But is this document of any value in this case? It is tendered through one Errol Bennet who describes himself as a Loans Officer employed in 1979 to the Defendant Company. This Errol Bennett not only handled the entire transaction on behalf of the Bank but was the witness to the execution of the document by Audley Daley and Shirley Daley. It is the same Audley Daley with whom the Plaintiff Alvin Lennon purported to deal. It is the same Audley Daley who after making a down payment (the exact amount whereof is in issue) on Mr. Lennon's van disappeared from his place of business and whose whereabouts Lennon was subsequently unable to ascertain with any degree of certainity or at all.

It is axiomatic that atribunal of fact faced with a situation in which witnesses of fact are collectively incapable of belief, has no other recourse in its search after the truth than to examine the documentary evidence (if any) which has been produced to see which side's allegations are supported by such documentary evidence. Applying this principle to the present scenario one finds that the Plaintiff Mr. Lennon who describes himself as a higgler by trade and is therefore not altogether unfamilar with the science of reading, writing and

arithmetic is uncertain as to whether he received $4,000 or $5,176.85 as a down payment on his van. In his evidence-in-chief he is certain that he got "$4,000.00 in cheque in name of Mr. McCartney". His explanation is that neither he (Plaintiff) nor Mr. Daley had any bank account and the cheque was therefore drawn in the Attorney's name, the intention being that it would be lodged in the Attorney's account. He is certain however there was one cheque and one cheque only is involved in this transaction, so naturally when he is confronted with a cheque for $5,176.85 made out in his name he denies stoutly that such a cheque was ever before in existence or that he ever endorsed any such cheque. If he did endorse this cheque (exhibit 1) and I so find, then payment by the Defendant Bank to him of the sum of $5,170.85 is beyond dispute. I cannot accept the Plaintiff when he says that he had a cheque in his possession for some one to two days without looking to see the amount for which the said cheque was drawn. If payment of an amount to Mr. Audley Daley out of this cheque is being contended then the party so contending must prove it. Such proof can only be forthcoming from the Attorney who is alleged to have made the payment on behalf of the Plaintiff. The explanation that the particular cheque and indeed another one proving payment to the Plaintiff of another sum ("which could be $4000 or $10,000") according to Mr. McCartney's evidence were passed to one's accountant and mislaid by that accountant is not good enough. One has to ask oneself the rhetorical question - has the system of keeping of separate accounts of client's money been abandoned? If cheques are indeed mislaid then the client's ledger sheets should be available, and a pretrail reference to such ledger sheets would be more than sufficient to refresh one's memory. These ledger sheets would be originals and there could not therefore be any reluctance to refresh one's memory by reference to them on the ground that they are copies. I have already

commented unfavourably on this witness'es insistence that only an original could assist in refreshing his memory. Again a rhetorical question - was there really any wish or need to refresh one's memory?

The Bill of Sale tendered through Mr. Errol Bennett for the Defendant as Exhibit 111 is a useless document. It can afford the Defendant no security for his money. It describes in its first Schedule under Item 2 - name of borrower - Audley and Shirley Daley. In its recitals it describes the Borrower as being the absolute owner in possession of the security free from incumbrances. There was no basis on which either Audley or Shirley Daley could be construed to be absolute owners in possession or otherwise of this motor van. It is beyond question that the Registration Booklet for this vam showed the name Alvin Lennon as being the registered owner at the time when it was submitted by Mr. Daley to Mr. Errol Bennett. Bennett admits that he regarded himself as being put on his enquiryyet all he did was have the unit checked through his Credit Information Service to see whether or not there were any loans outstanding on it. According to Bennett he has Alvin Lennon sign a transfer to Audley Daley. He is a conscientious officer and takes and keeps copies of the Registration Book and other relevant documents yet he is unable to say that he made any copy of the most important document - a duly completed form of transfer from Alvin Lennon to Audley Daley. He insists however that he knows that Alvin Lennon did sign a transfer "because this is normal procedure", and it was done in his presence. One is left to wonder if it was done in the witnesses' presence why the reason given for so saying is not that he saw it done but that it is normal procedure that this is done. Oddly enough it was left to me to extract from the witness a concession, frankly given, that in his book "normal procedure is sometimes departed from whether by inadvertence or forgetfulness". The absence

from the Bank's records of any original or copy transfer coupled with the above admission justifies a safe finding of fact that Alvin Lennon did not sign any form of transfer. A finding of fact on this is germane to the issues, for it was submitted on behalf of the Defendant that there being an agreement or contract of sale for specific or ascertained goods between the Plaintiff and Audley Daley the property in the goods passed to Audley Daley upon payment of the deposit. Put another way the nature of Daley's possession changed from that of a repairer to that of a purchaser in possession under an agreement for sale. I did not accept this submission. I accepted Mr. Lennon as truthful when he avered that it was part of the contract for sale that property in the goods was not to pass until such time as the purchase money in full had been paid. Indeed there is no evidence to the contrary and if any contrary position is to be found there must be evidence to support it. Submissions to the contrary in law is not good enough. The submission that there was no notice to the Defendant that Lennon retained any lien over the goods is also rejected. The Loans Officer from the Bank admitted that the Registration Booklet for the van named Alvin Lennon as the Registered Owner. Since no transfer from Lennon was signed and I have so found then there is no reason why the Loans Officer should have assumed that Lennon had been paid in full and it was his duty to enquire of this specifically, particularly as he knew that the van had been in Daley's possesion for the purpose of having repairs done to it. Daley was in no position to make any disposition to any Bank and if the Bank received same without notice of any lien or right in a third party in respect of the van then clearly it would be the fault of the Bank. Daley could give no better title than he himself had and his pledge of the van by way of security for a loan

would give the Bank no right to seize the unit from the registered owner.

The cases (for Plaintiff and Defendant) have been presented in the form of a jig-saw puzzle, neither side going the full way to establish on a balance of probability or at all what would clearly be their duty to establish. It is inconceivable that a Plaintiff whose statement of claim is contending, albeit by inference, that on a $6,500 transaction he only received payment of $4000/ yet when he is in the witness box he is unable to give any credible account as to whether the $4000 was paid by cash or by cheque and if by cheque whether that cheque was in his favour or in favour of his attorney. The more he is cross-examined the more he vacillates and on matters of fundamental importance. His final plea "only my lawyer can explain that" falls on deaf ears, for even although every opportunity is given to the said lawyer to explain, not a single question suggestive of what might have actually happened is put to him in cross examination. This is indeed surprising when it is recalled that one of the purposes of cross-examination is to put your case to the witness being cross-examined and give him an opportunity to confirm or deny what is being put forward as the truth by the cross-examining party. The result of this omission is that the evidence has disclosed that a cheque for $5,176.85 was drawn by the Workers Savings and Loan Bank in favour of the Plaintiff. The Plaintiff's contention that of this sum only $4000.00 was actually received by him, the balance of $1176.85 being paid to athird party (presumably Mr. Audley Daley) is a fact peculiarly within his knowledge or that of his attorney and must be proved by him. In the absence of any such proof then receipt of the amount of $5,176.85 by the Plaintiff is established and the Defendant must be given credit for this sum. By the same principle the Defendant having pleaded the payment of an additional amount of $1000 as a deposit on the van it is for the Defendant to prove this

payment. No returned cheque for this sum endorsed by the Plaintiff is forthcoming as in the case of the $5176.85 mentioned above. No receipt is produced, no witness is called to attest to any such payment. Indeed when the opportunity presented itself and a witness who should have best been in a position to shed a ray of light in this darkness is called to the stand his evidence is vague and inconclusive for the transaction took place years ago and his recollection is dim. He is shown an office copy of a document which bears his signature, address and profession but this is of no help to his powers of recollection because it is a copy and the witness wants to see the original. The Judge cannot look at this document for it is not an exhibit in the case nor has it been used by any witness to refresh his memory. The defendant's efforts have been stymied and proof of payment of $1000 by way of a deposit remains a matter of conjedture only. Proof in the legal sense of that term has not been attained because no evidence has been adduced from which it could be said that one is satisfied that payment of that $1000 was even made. The Plaintiff in his particulars claimed an amount based on a valuation of $6,500 on his motor van. This figure has not been challenged. Indeed it is also the amount of the loan made to Audley and Shirley Daley on the security of the Bill of Sale (Exhibit 3). It is usual for the amount lent to be somewhat lower than the market value of the item submitted as security for the loan but the Plaintiff is bound by his pleadings, and on his pleadings the value is $6,500.00. In an action for wrongful detention the successful Plaintiff gets judgment for the return of the specific goods detained or in default of return their value, and this is so even if the Defendant had previously converted the goods by selling them. In an action for conversion the judgment is for damages only, and if the Defendant satisfies

the judgment, he thereby pays for the goods and they thereupon vest in him as if he had bought them. See Cooper v. Sheperd /18467 3 C.B. 206. It is clear from the way his particulars are framed that this Plaintiff is not interested in the return of his van but wishes the full amount of the purchase price for which he had contracted to sell it. I have already found on the evidence that of the agreed amount the Plaintiff had received payment by cheque, (Exhibit 1) of the sum of $5170.85 so the balance due to him would be $1329.15. I find it unnecessary for the purpose of this judgment to deal with the submisions on the Hire Purchase Act which in my view has no applicability to the facts of this case or with the two cases cited. There will be a judgment for the Plaintiff for $1329.15 with costs to be taxed if not agreed. The Counterclaim is dismissed with no order as to costs.

Puisne Judge.