

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 12/89

BEFORE: The Hon. Mr. Justice Carey, P. (Ag.)
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

BETWEEN GLADSTONE LEWIS PLAINTIFF/APPELLANT

AND HENRY THOMPSON DEFENDANT/RESPONDENT

D. N. Wilcott for Appellant

Miss Dawn McNeil for Respondent

October 2, 1989

CAREY P. (AG.)

This is an appeal from a judgment of His Honour Mr. G.G. James, Resident Magistrate for the parish of Trelawny, whereby, he dismissed the plaintiff's claim which seemingly sounded in contract. I think it is of some interest to read the particulars of claim which were framed in the following terms. It is to be noted that there were a series of wholly un-numbered paragraphs:

"The Plaintiff is a farmer residing at Rio Bueno in the parish of Trelawny. He is the owner of five cows which he keeps at Braco also in the parish of Trelawny.

The Defendant is also a farmer residing at Rio Bueno, and is the owner of several cows, which he keeps at Braco in the parish of Trelawny, in the care of one Johnny Blake - his agent.

"On Wednesday June 15, 1988 the Defendant spoke to the Plaintiff and admitted to him that the heifer (belonging to the Plaintiff) was killed by a bull belonging to the Defendant. The Defendant, the said Johnny Blake and the Plaintiff went to the scene. The Defendant then agreed to pay the Plaintiff for the heifer, which at the Defendant's request was valued. The Defendant has steadfastly refused/neglected to pay for the said heifer. Therefore the Plaintiff's claim against the Defendant is to recover the sum of four thousand seven hundred dollars being the payment for the heifer.

PARTICULARS

Cost of heifer	\$4,600.00
Valuator's fee	<u>100.00</u>
	\$4,700.00 "

When one reads that document one would be pardoned for thinking that this was an action for breach of an agreement to pay for the cost of a heifer.

When the matter was heard before the learned Resident Magistrate, the plaintiff, both in examination-in-chief, and under cross-examination said that:

"The defendant denied any responsibility for the death of my cow."

One would have thought that that would be an end of the action. But during the arguments at the end of the case, learned counsel who appeared for the plaintiff, suggested to the judge that he regarded the case as one in Cattle Trespass and referred the learned judge to McFarlane v. Anderson, 9 J.L.R. 192. That case was concerned with damage under the Cattle Trespass Act, whereby cows belonging to the appellant had entered the respondent's land and eaten the grass thereon. The question before the court then, was whether the damage was capable of precise ascertainment. So, that case really had nothing at all to do

with what the learned trial judge had before him. But learned counsel made the point that the cow had escaped and done damage. If it was being sought at that stage of the proceedings in some indirect form to amend his claim to one for liability in tort, that is in negligence for damage done by an animal, then it is well-known that in the absence of negligence there would be an onus upon the plaintiff, the present appellant, to show scienter because the animal is a normal domesticated animal which in the old days was referred to as an animal mansuetae naturae. There was plainly in this case no evidence of scienter. Indeed, there was no evidence really as to how the plaintiff's heifer came to her untimely end.

A witness called by the plaintiff, a Mr. Johnny Blake, had stated in evidence that he had gone to look for the defendant's cow and he found it some eight chains from where, it was tied on government property and that cow was tied up with another cow and that other cow died. I suppose for "cow" one should substitute i.e. for the defendant's cow "defendant's bull", and that was the only evidence given to suggest that there was some meeting of these animals. But at all events, it mattered not, there was no evidence of scienter and there certainly was no proof as to how the animal met her death. So, that was an end of the plaintiff's case. Indeed, as I have endeavoured to show, the plaintiff's case had ended at an earlier stage, and the action was ripe for a non-suit.

Before us this morning Mr. Wilcott with no lack of prudence did not endeavour with any degree of confidence to put forward any arguable ground. It is enough to say that this case was hopeless from the beginning and the learned Resident Magistrate accordingly came to a correct decision. For myself therefore, I would dismiss the appeal with costs.

WRIGHT J.A.

I am in complete agreement with the words of the learned President (Ag.) and there is nothing that I can usefully add.

GORDON J.A. (AG.)

I too agree with the judgment of the learned President (Ag.) and there is nothing that I can usefully add.

CAREY P. (AG.)

The appeal is accordingly dismissed. The judgment of the court below is affirmed and costs of appeal fixed at \$500.00