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

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HEARNE, C.J.

or member, duly authorised, (which again the Superintendent was not). If section 80, Chapter 71, contained words limiting the right to prosecute to an aggrieved person and the Central or a Local Board, the decision in *Kyle v. Barber* would have been conclusive, but there are no express words of limitation in section 80. For the same reasons the case of *Bowyer, Philpott & Payne Ltd. v. Mather* (1919) 1 K.B. 419, not cited by Counsel, affords no guide to the interpretation that is to be placed on section 80; while *Harring v. Mayor of Stockton* 31 J.P. 420, the other case cited by Counsel for the appellant does not appear to be relevant.

The whole matter is free of authority, there is no section of English law comparable with the first part of section 80, and it is necessary for us to ascertain what section 80 means. Does it mean that private individuals may not lay informations at all under the Public Health Law or does it simply mean that where proceedings *are* taken on behalf of "the Central Board or a Local Board as the case may be", and not by private individuals (by whom, however, they may also be taken), they should be taken on behalf of the Board by the Clerk or other duly authorised officer or servant of such Board?

Section 80 consists of two parts—the second part being based on section 259 of the Public Health Act, 1875, quoted above. This part causes no difficulty. It envisages the case of a prosecution by the Central Board or a Local Board and prescribes in the event of such a prosecution how the Board may be represented in a Court of Law and by whom the prosecution on behalf of the Board may be instituted and carried on. Its provisions are entirely procedural.

It is the first part of section 80 that causes difficulty. Section 253 of the Public Health Act, 1875, enacts that—

> "proceedings . . . . . shall *not* be had or taken by any person other than a party aggrieved or the local authority . . . . . ",

and section 80 enacts that—

> "proceedings may be had or taken . . . . by the Clerk or other duly authorised officer or servant of the Board."

Does the latter mean that proceedings may only be taken by the Clerk or other duly authorised officer or servant and that proceedings may not be taken by private individuals?

We would now refer to the language of Lord Alverstone, C.J., in *Giebler v. Manning*. He said:—

> "Can a private person institute proceedings under section 47 (2)? Apart from express provisions limiting the right, I should have thought the point was too clear for argument. . . . . I think that if it had been intended to limit the right to take proceedings . . . . to a limited class of persons, such as medical officers and sanitary inspectors, words would have been introduced into the section taking away from private persons the right to lay informations under the section."

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In our opinion the first part of section 80 merely lays down that proceedings may be had or taken by the Central Board or a Local Board but not exclusively by one or the other. The right of a private individual to lay an information "in person or by his Counsel or Solicitor"—section 9 of Chapter 433—is not excluded either expressly or impliedly. If it had been intended to abrogate the right of a private individual to lay an information under the Public Health Law this would have been expressly stated. This is the view we take quite independently of the provisions of section 96 of Chapter 71.

Counsel for the appellant referred to the marginal note to section 80 which reads "Persons entitled to take proceedings for offences against the Law". We take the headnote to refer to persons who, under the section, viz.—those who are authorised to act for the Central Board or a Local Board, are entitled to take proceedings; we do not read it as meaning (for a headnote is itself liable to be interpreted) that these persons are the *only* persons who are entitled to take proceedings.

In our opinion the Sanitary Inspector as a private individual was entitled to lay the information he did and, in the circumstances, the first point made on behalf of the respondent does not arise for consideration.

The appeal is dismissed.

REX A.I.O. MAHFOOD v. HANNA

HIGH COURT (In Chambers) 1946

June 21; July 12

14 S.C.J.B. 351.

Landlord and Tenant—Rent Restriction—Recovery of Possession—Premises required by landlord for use by "him"—Rent Restriction Law, Law 17 of 1944 s. 17 (1) (e). Landlord and Tenant—Rent Restriction—Recovery of Possession—Notice to Quit or Agreement as to duration of tenancy.

The owner of premises 41 South Parade, Kingston, was the wholesale firm of R. Mahfood & Bro. The partners of the firm, for the purpose of extending their business and for making provision for the sons of Mr. R. Mahfood, one of the partners, formed a limited liability company to carry on a retail business. The appellant, tenant of the premises, was given notice to quit on 31st March, 1945, and failed to deliver up possession. On the 14th April, 1945, the appellant in consideration of Messrs. Mahfood taking no proceedings against him, agreed to vacate and deliver up possession of the premises on or before the 30th day of September, 1945.

The appellant failed to deliver up possession.

HELD: (i) The respondent was not entitled to a warrant for possession of the premises under the Rent Restriction Law, Law 17 of 1944, section 17 (1) (e) as the premises were not required by the landlord for use by him;

(ii) nor was he entitled to a warrant for possession under section 17 (1) (d) as the agreement of the 14th April was not a notice to quit by the appellant.

De Vries v. Sparks 43 T.L.R. 448, followed.

APPEAL from the order made by Graham, Acting Resident Magistrate, Kingston, in Petty Sessions.

Appeal allowed.

Murad for the appellant:

Manley, K.C., for the respondent.

Cur. adv. vult.

1946. July 12:

MACGREGOR, Ag. J.

MACGREGOR, Ag. J.: This is an appeal from the decision of the Acting Resident Magistrate for Kingston in which he ordered that a warrant of possession issue for the complainant to recover possession of shop premises at 41 South Parade in Kingston by 31st July, 1946. The defendant appeals against that order.

By section 17 (1) (e) of the Rent Restriction Law, 1944, Law 17 of 1944, it is provided that no order for the recovery of possession of any controlled premises shall be made unless—

(a) the premises being a commercial building (which in fact they are), are reasonably required by the landlord for use by him for trade purposes; and

(b) the Court considers it reasonable to make such an order; and

(c) provided that an order shall not be made unless the Court is also satisfied that having regard to all the circumstances, less hardship would be caused by granting the order than by refusing to grant it, which circumstances include the question of whether other accommodation is available for the landlord or the tenant.

The first question is whether in fact the premises are controlled premises. It was submitted by Counsel for the respondent that, on the facts, it was wrongly assumed in the Court below that the tenancy was a statutory tenancy created by section 19 (3) of the Law, as that sub-section only refers to a dwelling-house and not to a public or to a commercial building. I am not satisfied that any such assumption was made in the Court below. Mr. Edward R. Hanna was a tenant of 41 South Parade up to 31st December, 1944, and the appellant was a sub-tenant of his of a portion of the building, and on the 30th November, 1944, Mr. E. R. Hanna gave the appellant one month's notice to quit on the 31st December, 1944, the date that his tenancy terminated. There is, in my judgment, abundant evidence from which the Court could draw the conclusion that thereafter the appellant became a monthly tenant of the respondent at a rental of £60 per month. I have considered the case of *Morrison v. Jacobs* (1945) 2 A.E.R. 430. It differs from the present case in that in this case there is the evidence of the creation of the new tenancy, while in *Morrison's* case the learned County Court Judge held that there was a continuing common law tenancy from year to year because the tenant held over at the expiration of his lease paying rent which was accepted by the landlord.

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The appellant was given notice to quit on the 31st March, 1945, and has failed to deliver up possession. It was argued that an order under section 17 (1) (e) cannot be made because the premises are not required by the landlord, because it is unreasonable under the circumstances for the Court to make an order, and because, if an order were to be made, a greater hardship would be created on the appellant than would be created on the respondent if no order were made.

The evidence disclosed that the owner of the premises, 41 South Parade, is the wholesale firm of R. Mahfood & Bro., and that the premises are wanted for the limited liability company of Mahfood's Limited, to carry on a retail business. I have no doubt that it cannot be said that the premises are wanted by the landlord "for use by him". The respondent has, therefore, failed to prove one of the requirements for an order unless the arguments put forward by Counsel on his behalf are successful.

It was submitted that the phrase "for use by him" must be given a broad construction consistent with business and trade usages. The evidence disclosed that the partners of R. Mahfood & Bro., Mr. Rizk Mahfood and his brother, for the purposes of extending their business and of making provision for the sons of Mr. Rizk Mahfood, formed this limited liability company to carry on a retail business which would be supplied with goods for sale, by the firm and by other wholesalers. The evidence also disclosed that the object was to circumvent allegedly contemplated legislation prohibiting a wholesaler trading as a retailer. On these facts it was submitted that the particular situation that had arisen was in the nature of a tied house, that the owners proposed to make use of the premises for the furtherance of their own business, and that the requirement of the section "use by him" were complied with. I cannot accept that argument. I was referred to the case of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1915) A.C. 433. That was a tax case in which the House of Lords held that the company, in estimating the balance of the profits of its business for the purposes of assessment to income tax, was entitled to deduct certain sums expended by it on expenses necessarily incurred for the purpose of earning the profits. The particular expenses related to tied houses, houses owned by the Company and rented by the Company to tenants. That case differs from the present in that the Brewery Company itself was the owner of the tied houses. In passing, I wonder what would be the reaction of Mahfood & Bro. should they be assessed to income tax on the profits of Mahfood Limited.

It was also submitted for the respondent that he was entitled to the order for possession by reason of section 17 (1) (d), as the tenant had given notice to quit, and in consequence of that notice, the landlord had taken steps as a result of which he would be severely prejudiced if he did not obtain possession. On the 14th April, 1945, the parties signed a document, exhibit 4, the material part of which is as follows:—

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"It is agreed . . . . . that in consideration of Messrs. Mahfood taking no proceedings against Mr. Hanna to recover possession of 41 South Parade, Mr. Hanna will vacate and deliver up vacant possession of the said premises to Messrs. Mahfood on or before the 30th day of September, 1945, ..."

It was submitted that this document amounted to a notice to quit by the defendant. I cannot see that it amounts to anything more than an agreement as to the duration of the tenancy, *De Vries v. Sparks* 43 T.L.R. 448, and it is not, in my judgment, a notice to quit.

The respondent, therefore, is not entitled to the order for recovery of possession and the judgment of the Court below must be reversed. The appellant must have the costs of this appeal fixed at three pounds.

REX v. JOHN WALLACE

COURT OF APPEAL 1946

May 30; July 26

2 C.A.J.B. 650.

Jamaica Constabulary Force Law, Chapter 129, section 22—Search in presence of Justice of the Peace of person arrested on suspicion of being in possession of ganga —Provision enabling and not mandatory.

Appellant, on being told by a constable that he had a warrant to search his premises for ganga, put his hand into his pocket; the constable then held the appellant's hand, searched the pocket and found ganga in it. The constable said he did not take the appellant before a Justice of the Peace to be searched in accordance with the provisions of section 22 of the Constabulary Force Law, Chapter 129, because he thought the appellant would throw away the ganga and evade arrest while the constable recovered the ganga.

HELD: The search in the presence of a Justice of the Peace provided for in section 22 of Chapter 129, is enabling and not mandatory, and when a defendant is not taken before a Justice of the Peace to be searched that fact together with the reason for the omission are matters to be taken into account by the Resident Magistrate together with the other facts of the case in arriving at his judgment.

APPEAL from conviction by MacGregor, Resident Magistrate, Saint Catherine.

Appeal dismissed.

Manley, K.C., for the appellant:

Phillips for the Crown.

Cur. adv. vult.

1946. July 26: The judgment of the Court (Hearne, C.J., Savary, J. and Carberry, Ag. J.) was delivered by the Chief Justice.

HEARNE, C.J.

HEARNE, C.J.: The appellant was charged with the unlawful possession of ganga and was convicted by the Resident Magistrate for Saint Catherine. He had been arrested by a police constable who had not taken him "forthwith before a Justice of the Peace to be searched in his presence" and it was submitted to the Resident Magistrate who tried the case that as the provision of the law contained in section 22 of the Jamaica Constabulary Force Law, Chapter 129, had not been complied with, "the defendant must be discharged".

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The material portion of the section is as follows:—

"It shall be lawful for any . . . . . Constable to apprehend without warrant any person known or suspected to be in unlawful possession of . . . . . ganga . . . . . and to take him forthwith before a Justice of the Peace who shall thereupon cause such person to be searched in his presence."

The Resident Magistrate ruled that non-compliance with the law did not alter the fact of possession (if proved). In this Court it was argued, not that the Resident Magistrate should have rejected the evidence as the law had not been complied with, but that, as it had not been complied with, the Resident Magistrate should have treated the case as *in dubio* and acquitted the appellant.

The provision of section 18 of Chapter 129, which is preceded by the words "it shall be lawful" was construed in *Palmer v. Robinson* Clark's Reports 2, to be enabling and not mandatory; and, in our opinion, the provision of section 22 of Chapter 129 (that the search after arrest should be made in the presence of a Justice of the Peace) which is preceded by the same words "it shall be lawful" must similarly be regarded as enabling and not mandatory. It would appear that it was enacted as well for the protection of the police, in a case where the police found no ganga on a search being made, as for the protection of the subject in a case where the police, on a search being made, claim to have found ganga. In the former case, if the provision was mandatory, non-compliance together with other additional evidence may leave a constable exposed to a civil action even if compliance in the particular circumstances would have involved the constable in difficulty and the subject in hardship. A person may, for instance, be arrested at night many miles from the nearest Justice of the Peace. In the latter case we think, the provision being enabling and not mandatory, that when a defendant is not taken before a Justice of the Peace to be searched, Counsel is entitled to submit that the credibility of a witness deposing to the finding of the ganga should be viewed in the light of that not having been done, as well as the reason (if any) given in explanation of why is was not done, assuming it is believed, but it is not a good ground for submitting that "the defendant must be discharged".

The evidence given by the constable who arrested the appellant was that the appellant on being told by the constable that he had a warrant to search his premises for ganga, put his hand into the pocket of his overall, that he then held his hand and searched the pocket into which the hand had gone. There he found ganga. He acted as he did, he explained, as he was afraid the appellant would throw away the ganga and possibly evade arrest while the constable recovered the ganga.

We are not prepared to assume that the Resident Magistrate did not consider these circumstances in coming to the conclusion he did, and we are quite unable to say that he should have viewed with doubt the evidence of the police constable because he did not, for the reasons he gave, forthwith take the appellant before a Justice of the Peace to be searched.

The appeal is dismissed.