

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 40/70

BEFORE: The Hon. Mr. Justice Shelley, Presiding
The Hon. Mr. Justice Eccleston J.A.
The Hon. Mr. Justice Smith J.A.

JESTINA McLENNON v. PAULETTE VACIANNA & CONSTABLE BLAKE

Mr. H.G. Edwards, Q.C. for Appellant

1970

October 22; November 13

SMITH, J.A.:

On 22nd October we allowed the plaintiff's appeal from the judgment of the learned resident magistrate for Westmoreland in an action for trespass to land and goods in which judgment was entered on behalf of the defendants. For some unexplained reason the defendants were, unfortunately, not represented at the hearing of the appeal. We now give the reasons for our decision.

The plaintiff is the grandmother of a child named Derrick, of whom the defendant Vacianna is the mother and the plaintiff's son the father. Derrick was born on 15th December, 1963. On 17th June, 1969, the defendant Vacianna and the other defendant, Constable Blake, went to the house of the plaintiff at Saint Leonard's in Westmoreland. Derrick was then, and had been almost since his birth, living with the plaintiff in whose custody he was. In the absence of the plaintiff, the defendants removed Derrick from her premises taking his clothes with him. It is in respect of this act of the defendants that the action was brought claiming £300 damages. The plaintiff claimed that £25 which she had in her room was taken by the defendants as well as a grip valued at £1.

The learned resident magistrate accepted the evidence given by the defendants that they entered the plaintiff's premises, going only as far as the verandah of the house, and peacefully took away the child. He rejected the evidence of plaintiff's witness that the defendants entered the plaintiff's bedroom and took away the child's clothes in a grip. He believed the defendants that the plaintiff's witness Clover Robinson

handed them the grip with clothes. He rejected the plaintiff's evidence that money was taken from her room.

In his reasons for judgment the learned resident magistrate stated as follows:-

"It is in the Law that she had a lawful right to her child and the only manner in which she could abandon that right was by a legal adoption. The Law further gives one a right to recover one's chattel from another (sic) land provided one exercised reasonable care in so doing. It may be further argued with equal or greater force that was (sic) good in respect of one's chattel will be good also in respect of one's child."

Based on this statement of the law he came to the following conclusions:

- "(a) that first defendant was lawfully entitled to enter plaintiff's premises and first defendant was entitled to use reasonable steps to retake possession of her child which was then on the premises;
- (b) that she went there in accordance with that right and her entry was therefore not a trespass;
- (c) second defendant as a peace officer was entitled to enter the premises also to protect someone who was exercising her lawful right in a reasonable manner and also to see that no breach of the peace was occasioned. He also therefore was not committing a trespass."

It appears from the evidence that soon after Derrick's birth he was left by the first defendant, his mother, in the care of the plaintiff and that he remained continuously in her care and under her control until he was taken away on 17th June, 1969. The learned resident magistrate found that there had been no abandonment of her child by the first defendant as she visited the plaintiff's home from time to time "to look for the child."

The statement that the law gives one a right to recover one's chattel from another's land by the exercise of reasonable care is wrong if, as appears to be the case here, it is intended to be a statement of the law of general application. Whether or not there is such a right depends on the circumstances in which the chattel came to be on the land. Thus, it is clear that A is justified in entering the land of B and taking from it A's goods which have been wrongfully taken and placed there by B (Patrick v. Colerick, (1838) 3 M. & W. 483). And it appears that a man

may enter another's land to retake his own chattels if the occupier of the land permitted a wrongdoer to leave them there, or if they came there by accident or by the felonious act of a third party (see Salmond on Torts, (15th edn.) pp.814 & 815n). Apart from these cases, "it is a matter of some doubt how far the right of retaking chattels will serve to justify an entry on the land on which they are situated." (ibid, p.814).

We are unable to find any authority to support the proposition that where chattels on B's land came lawfully into B's possession A, the owner of the chattels, is justified in entering the land to retake them. There is a statement in Clerk & Lindsell on Torts (12th edn.), para. 1158, to the contrary. It is there stated that: "One cannot justify entry on the plaintiff's land to retake goods, the original possession of which was lawfully acquired, merely because he converts them, as where a bailee refuses to deliver to the bailor."

The learned resident magistrate has said that what is good in respect of one's chattel will be good also in respect of one's child. Learned counsel for the plaintiff submitted that an interest in the custody of a child cannot give a right to interfere with the plaintiff's possession of her premises in furtherance of that interest as there is no right to recapture persons. We are bound to say that we agree with this submission. We know of no law or authority which extends the remedy of self-help to persons who claim to be wrongfully deprived of the custody of children. We are not prepared without a full argument on both sides to hold that this remedy should be available to such persons. At the moment we see no justification or necessity for it in view of the remedies otherwise available. Even if this remedy did exist, it would not necessarily justify the entry on the land of another to take or retake a child. On the principles applicable to chattels, the entry on the plaintiff's land in this case would not be justified since the child was put in the plaintiff's care by the first defendant herself. The plaintiff's custody of the child was not, therefore, originally wrongful.

The burden was on the first defendant to justify her entry on the plaintiff's premises. In our view she failed to do this. The plaintiff was, therefore, entitled to succeed on her claim for trespass against her.

In his evidence, which the learned resident magistrate accepted, the second defendant said that he recovered the child and handed him over to his mother. He, therefore, actively assisted the first defendant in removing the child and was not on the premises merely to prevent the commission of a breach of the peace. He is, therefore, also liable in trespass.

The learned resident magistrate found, in effect, that no actual damage was done on the premises apart from removal of the plaintiff's grip, which he regarded as de minimis. We considered that the plaintiff was entitled to nominal damages only. We, accordingly, allowed the appeal, ordered that the judgment entered in the Court below be set aside and that judgment be entered for the plaintiff against both defendants for \$5.00 with costs. The plaintiff was awarded costs of the appeal fixed at \$30.00.