

Stephens

Landlord & Tenant
Nixon v Richards copy 5

*Trespassing on Enclosed Lands—S. 2 of the Jamaica Act
(14 Vict. c. 46).*

This is an appeal from a decision of a Petty Sessions Court, sitting at Lucea on the 20th September, 1921, dismissing a charge of trespassing on enclosed land under s. 2 of the Jamaica Act (14 Vict. c. 46).

It appears from the notes of the evidence taken in the Court below that the land in question is open on two of its sides, that there is a fence of penquin plants on each of the other two sides, and that in one of these penquin fences there is an open space called a gateway.

In the Circuit Court at Lucea it was urged before me for the appellant that the land is "enclosed" within the meaning of the statute, and that the decision to the contrary from which the appeal is brought is wrong. It was argued that a lot of land having only the corners of its boundary lines indicated by boundary marks is "enclosed" land within the meaning of the statute. I do not agree. In my view, the land in question is not "enclosed" land within the meaning of s. 2 of 14 Vict. c. 46. The word "enclosed" in that section is used in its ordinary or popular sense as denoting land which is actually enclosed within fences, hedges, walls, banks, &c.; and land surrounded by a fence that is partially open in consequence of being out of repair is nevertheless "enclosed."

A similar interpretation of "enclosed land" in s. 97 of the English Turnpike Act, 1822 (3 Geo. 4, c. 126), was given by the decision in *Tapsell v. Crosskey* in January (1841), 10 L. J. Ex. 188. Following upon that decision the English Act, 4 & 5 Vict. c. 51, was passed in June, 1841, referring to the 3 Geo. 4, c. 126, and 5 & 6 Will. 4, c. 50, s. 53, and enacting that "all lands and grounds which shall be in the exclusive occupation of one or more persons for agricultural purposes shall be deemed and taken to be enclosed lands or grounds within the meaning of the said recited Acts, although the same may not be separated from any adjoining lands or grounds of other persons, or from the highway, by any fence or other enclosure." It will be observed that s. 2 of our Act of 1851 briefly provides against trespass upon any land "which is enclosed or in any manner cultivated."

The appeal is dismissed with £3 costs to the respondents.

(*Brown v. Spence et al.* (1921), S. C. J. B., Vol. 10, p. 172. De Freitas, P. J.)

Sale of Land—No Conveyance.

This is an appeal from the judgment of the acting judge of the Kingston Court. The plaintiff sold to the defendant in the year 1920 a piece of land situated in the parish of St. Andrew for

the sum of £20. No conveyance thereof has, however, been executed. The plaintiff alleges that £10 7s. of the purchase-money is still due and owing to him, while the defendant alleges that the amount due is £1 13s. Judgment has been given in favour of the defendant, and hence this appeal.

We are unable to agree with the judgment or with the reasons given therefor. It is still good law, acted upon in this Island (see *Dawes v. Henderson* (1876), Vol. 2, Judgment Book, at p. 257; and *Patty v. McNally* (1899), Vol. 7, Judgment Book, at p. 267) that, in the absence of special agreement, a purchaser of land let into possession thereof under a contract for sale, but who has not paid the purchase-money, and to whom no conveyance has been executed, is a tenant at will to his vendor, and upon the determination of that tenancy by notice or otherwise the vendor may recover possession of the land. It is thus stated in *Dart on Vendors and Purchasers*, 7th ed. (1905), at p. 1001:— "The purchaser when let into possession is, during the subsistence of the contract, only a tenant at will, though there may be a stipulation for payment of interest on the purchase-money until completion; but (unless under an agreement to quit in some specified event which has happened) he cannot, while such tenancy continues, be ejected without notice."

In this case we think that the documentary and oral evidence show a determination of the tenancy at will, and therefore the plaintiff was entitled to recover in the action.

As the defendant has already paid some portion of the purchase-money and has been in possession for some time of the land and has expended money thereon, though the plaintiff has been paying the taxes, we think that the learned judge who has concurrent jurisdiction in the administration of law and equity in his Court should have ascertained and determined what amount was due from the defendant to the plaintiff. Having done so, he should then have afforded relief on such reasonable terms and conditions as to him seemed just, so that as far as possible all matters in controversy between the parties respectively might have been completely and finally determined and multiplicity of proceedings avoided. (S. 201 (5) of Law 28 of 1904.)

It appears to us that reasonable terms would have been to adjourn the case for a reasonable time to enable the defendant to pay the amount found due, together with costs, and in the meanwhile not to charge the land without the consent of the plaintiff. Upon this being done, the case would be marked as settled; if those terms were not complied with, then judgment would be entered for the plaintiff for the recovery of possession with costs.

We do not think that it is too late for this course now to be pursued; the unfortunate effect of its not having been done before is that the respondent will have to pay the costs of this appeal.

The judgment in the Court below will be set aside and the case remitted to the Kingston Court with the following instructions:—

To ascertain the amount now due by the defendant to the plaintiff as balance of purchase-money; after doing so, allow such a reasonable time to the defendant to pay such amount to the plaintiff with the costs and solicitor's costs of the trial—the defendant undertaking in the meanwhile not to charge the land in any way without the plaintiff's consent. Upon defendant complying with these terms the action to be marked as settled: if defendant fails to comply with these terms, then judgment to be entered for the plaintiff for recovery of possession of the land with costs and solicitor's costs. The costs of the further hearing will be costs in the case. The appellant is to have the costs of this appeal fixed at £10.

(*T. Nixon v. Job Richards*, 18th Dec., 1922, De Freitas, Ag. C. J., Brown, J., and Orpen, Ag. J.)

Land Contracted to be Sold—Abatement in Price for Deficiency.

In this case the defendants agree to sell to the plaintiff four acres of land. Plaintiff paid to defendants £24, the full purchase-money, on 2nd September, 1918, and was then put in possession of the land. Subsequently the defendants sold another portion of the adjoining lands amounting to 13 acres to one Gordon, who in January, 1920, had his portion surveyed by Mr. Surveyor Byles, the male defendant being present and pointing out the boundaries.

Plaintiff was present at the survey and objected, saying that the land surveyed off for Gordon included a portion of his (plaintiff's) four acres, and on the same day he had his land surveyed by Mr. Byles, when it was found to contain only two acres and seven perches. He now sues for (1) specific performance of so much of the said contract as is capable of performance by conveyance of the said two acres and seven perches of land to the plaintiff; (2) compensation from the vendors for the deficiency of land and loss occasioned by the defendants' failure to convey.

The Court below made an order for specific performance of the contract so far as it is capable of being performed, and awarded the plaintiff £20 for compensation and loss by failure to convey.

The defendants now appeal from this judgment.

It is clear that the plaintiff is entitled to the specific performance ordered in the Court below: but the compensation to which the plaintiff would be entitled for the deficiency of land conveyed would be the difference in the prices of the four acres and the two acres and seven perches, which would amount to £11 15s., together with interest on this amount from January, 1920. Allowing