JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 73 of 1969

BEFORE: The Hon. Mr. Justice Eccleston, Presiding
The Hon. Mr. Justice Luckhoo, J. A.
The Hon. Mr. Justice Edun J.A. (ag.)

RALPH THOMPSON PLAINTIFF/APPELLANT

v

ATTORNEY GENERAL DEFENDANT/RESPONDENT

Mr. Karl Rattray Q.C. for Plaintiff/Appellant

Mr. Lloyd Ellis Crown Counsel for Attorney General

30th April, 1970
26th June, 1970

ECCLESTON J.A.

This is an appeal by the plaintiff from a judgment of the Resident Magistrate of St. Mary delivered on the 5th February 1969.

The action was brought for cattle trespass alleging that six head of cattle depastured on Orange River Estate, St. Mary belonging to and in the possession of the Ministry of Agriculture and Lands then belonging to the said Ministry of Agriculture and Lands and or then being in the custody and control of the said Ministry wrongfully trespassed on plaintiff's cultivation doing damage thereto.
The action was brought against the Attorney General under the Crown Proceedings Law 68 of 1958.

The defence was a denial of ownership or possession or control of any cattle which trespassed on plaintiff's property on 11th December 1967.

The Resident Magistrate dismissed the action finding it impossible to accept on the evidence that defendant was in possession or control of the cattle and thus liable. Liability for trespass by cattle, she said, rested on the proprietor or owner of such cattle and it was wrong in law placing liability on the person in possession or control. Further, she said, the officer in charge of the farm: (1) had no authority to authorise cattle to remain on the farm and in doing so acted outside the scope of his employment and (2) even if he had authority something was done beyond what

he authorised and without his knowledge i.e. the cows were kept in a second pasture and not with the revolving herd and a trespass resulting from either of the above facts could not bind the defendant.

The learned Resident Magistrate found the following facts

(1) Orange River Farm is the property of the Government of Jamaica and Norman Prendergast was its chief employee with the designation "Officer in charge".

(2) The "Officer in charge" was responsible through his Farm Manager for the keeping of Government cows on this farm which cows were known as the Revolving herd and kept in a pasture. No other cows were authorised by the Government to be kept on the property.

(3) This Farm Manager has kept in a second pasture for some considerable time some cows not owned or belonging to the Government but to its employees.

(4) Six cows from the second pasture trespassed into the plaintiff's property on the 11th December 1967 and did damage amounting to £44. 15/-.

(5) Of these six, authority was given by the Officer in charge to depasture two with the revolving herd. These two were not so depastured but were in the second pasture from which they strayed.

Counsel for the appellant submitted that where in section 12 of chapter 392 under part 11 dealing with Cattle Trespass the proprietor is made responsible in damages for injury done by stock trespassing on the land of other persons the term 'proprietor' not being defined, is synonymous with 'owner'. He referred to the 3rd Edition of Vol. 1 of Halsbury's Laws of England p.665 para.1270, and submitted that liability there mentioned was not restricted to dogs but to any animal kept on premises or allowed to remain on premises which strayed and did damage to the property of a neighbour. Counsel further submitted that from and after the decision in Hendricks v Singh: Clark's Reports at 252 the word 'owner' has been accepted to relate to 'occupier' as well and that the evidence established that the cows were in the possession and control of the officer in charge of the property.

Counsel for the Respondent submitted that in keeping with Section 12 of Chapter 392 the person liable is the 'proprietor' and the Oxford dictionary defines 'proprietor' as owner but that Plaintiff failed to prove that the

ownership of the cattle was in Defendant. He however agreed that a person who is in possession or control can be liable in trespass vide Dawtry v Huggins (1635) Clayton 32.

The evidence disclosed that two of the trespassing cows belonged, one to Carnegie and one to Campbell, both employees on the Farm while among the other four, the ownership was in Cheddar the Farm Manager, Schloss the Veterinary Officer, and McKenzie the Live Stock officer.
The two cows belonging to Carnegie and Campbell were found in plaintiff's cultivation while the other four were on the road after they were driven out of his field. Prendergast, the officer in charge, said the revolving herd was kept on the farm and he gave permission to Carnegie and Campbell to depasture their cows along with the revolving herd. The other four cows were however on the farm without his permission. On the day of the trespass it was discovered that the two animals of Carnegie and Campbell were not with the revolving herd but had escaped from a different pasture to the one in which the revolving herd was placed.

It is the submission of appellant's counsel that permission having been given to Carnegie and Campbell by Prendergast, the officer in charge, to place their cows along with the Revolving herd, the revolving herd scheme being a government scheme which allows a farmer to leave his cow on the government farm to run with its bull and the farmer returns the first calf to government, these two animals were then in the possession and control of the proprietors of the Farm and as Prendergast was acting within the scope of his authority the animals were in the possession and control of Government.
Counsel for the Respondent submitted that although the officer in charge may have had ostensible authority to give some permission, that was not enough for a finding that possession and control could emanate from the fact that some permission was given.

Accepting the findings of fact, at Nos. 4 and 5, of the learned Resident Magistrate, guidance may be had by resort to the following passage from the judgment of the Chief Justice in Hendricks v Singh (supra)

> "At the conclusion of the hearing of this case the Court was inclined to think that the test of unqualified liability for cattle trespass is an affirmative finding that the defendant

> was at the time of such trespass in possession and control of animals whose habit it is to "go in pursuit of herbage". Cox v Burbridge 13 C.B. N.S. 430. Subsequent reflection, has, however, satisfied us that this view is incorrect. Cox v Burbridge (ubi supra) and other authorities shew that the unqualified duty of keeping cattle from straying rests upon the owner or occupant of the land on which they happen with his consent to be levant and couchant, or detained for any time."

It is true that the learned Resident Magistrate found that the officer in charge disputed the fact that the cows were owned or in the custody of Government and so informed the plaintiff directing him to send the notices of assessment to the owners of the cattle. However, irrespective of the other four cows, there is evidence that two cows belonging to Carnegie and Campbell were on the farm for the purposes of the revolving herd scheme and therefore the unqualified duty of keeping them from straying rested upon the owner or occupant of the land, which is Government, on which they were with consent to be levant and couchant. Once they were on the property in such circumstances and with consent, which the officer in charge had authority to give, for the purposes of the revolving herd scheme, depasturing them in a different area on the property to that where they should have been placed could not affect liability for restraining them from escaping.

In Arniel v Patterson (1931) A.C. 560 the decision of the House of Lords was that where damage was done to sheep by two dogs then each of the owners of the two dogs was responsible for the whole of the damage which had been done. In the instant case irrespective of what damage was done by the other four cows the damage done by the two which I find were depastured on the property with the consent of the officer in charge made the Respondent liable for the whole of the damage. In the circumstances it is not necessary to decide whether or not liability attached with respect to the other four cows.

In her judgment the learned Resident Magistrate referred to the case of Lindsay v Sinclair and Dickson delivered by this Court on the 9th February 1968. As I concurred in that judgment, I may say, that case is clearly distinguishable from the instant case. In that case there was uncontroverted evidence that the properties and the cows thereon belonged

not to defendant appellant, Lindsay, personally, but to Spring Valley Estates Ltd., a limited liability Company. The Resident Magistrate was therefore wrong in placing liability on Lindsay as the person in possession and control, he being the Managing Director of the Company. The evidence disclosed that he personally owned neither the property nor the cows.

I would allow the appeal and set aside the judgment entered in the court below and enter judgment for the plaintiff for $89.50 and Costs.

The appellant to have the Costs of appeal fixed at $30.

EDUN J.A. (ag)

I agree that the appeal be allowed. I wish to add that a person who keeps a domesticated animal is liable for any harm committed by it as the result of its trespassing upon the land of another, provided of course, such harm is not too remote.

The principle of liability in cattle trespass is based upon the maxim, sic utere tuo alienum non laedas. As early as the case of Tenant v. Golding 91 E.R. 20 it was held "As one is bound to keep his cattle from trespassing on his neighbours' ground, so he must a heap of dung if he erects it". In 1866, Lord Blackburn in Fletcher v. Rylands 35 L.J.R. p. 154, delivering the judgment of the Court of Appeal, examined and followed Tenant v. Golding. At p.158 of that report, he said:

> "As has already been said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth or stenches, or any other thing which will if it escape naturally do damage, to prevent their escaping and injuring his neighbour; and the case of Tenant v. Golding is an express authority that the duty is the same, and to keep them at his peril."

The House of Lords in Rylands v. Fletcher reported at (1861 - 1873) AER (Reprint) p 1 held that the rule of law was correctly stated by Lord Blackburn. At p. 14 Lord Cranworth said:

> "If a person brings or accumulates on his land anything, which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible however careful he may have been, and whatever precautions he may have taken to prevent the damage. This is all well explained in the old case of Lambert v. Olliott v. Bassey. The doctrine is founded on good sense, for when one person is managing his own affairs causes, however innocently, damage to another it is obviously only just that he should be the party to suffer. He is bound sic utere tuo ut non laedat alienum. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it."

Winfield on Tort 8th Edition (1967), the author has this to say at p.462

about the parties who can be sued in cattle trespass:

> "As to the defendant, the possessor of the cattle is the person liable: (citing, Dawtry v. Huggins (1635) Clayton 32). So, of course, is the owner if the circumstances are such to make him a joint tortfeasor or vicariously responsible; but probably not beyond that, for it can hardly be that an owner who has bailed cattle to a railway company for carriage or to a dairyman for hire can be held liable for the bailee's defaults."

It was expressly ruled in Dawkins v. Huggins at York Assizes in 1635 by Barkley J., that "upon an evidence, if A, hath custody of the goods of B, as here it was, hoggs put into defendant's yard, if these do a trespasse to the land of C., adjoining, A. shall be punished in trespasse,...." (reported in Glanville Williams Liability for Animals, 1939 ed. p.176).

So too, where an agister fails to keep in owner's cattle, a person whose crops have been damaged by such straying cattle can sue the agister in cattle trespass. So long, therefore, as liability in cattle trespass is based upon the principle expressed in the maxim, sic utere tuo non alienum laedas (so use yours as not to harm others) an owner or occupier of land cannot bring upon his property cattle belonging to another and escape liability if such cattle strayed upon his neighbour's land and there damaged the neighbour's cultivation.

Sec. 12 of the Trespass Law Ch. 392 in the main stipulates the duty of the proprietor or owner of any stock to take proper and effective measures to prevent such stock from trespassing on to the land of other persons. Section 14 provides that if the owner of stock shall prove that (i) his land was enclosed by good and sufficient fences; (ii) he has adopted all other reasonable and proper precautions for the confinement of his stock and (iii), nevertheless, through some cause or accident beyond his control and which he could not reasonably have provided, escaped from his land, the party complaining cannot recover any damages unless he can show that he has fenced his land with a fence sufficient to keep out ordinary tame cattle and horsekind.

The duty of an owner to keep in his stock by good and sufficient fences does not mean that a person in possession, custody or control of other persons' cattle on his land, is immune from liability in cattle trespass. The local case of Hendricks v. Singh J.L.R. (Clark's Edition)

p. 252 supports this view.

The real issue in the case of Lindsay v. James Sinclair and Dickson R.M.C.A. No. 42/67 delivered on 9th February 1968, was whether upon the evidence there was any liability on the defendant personally for damage done by cows. The Court held that there was uncontroverted evidence that the properties and the cows thereon belonged not to the defendant personally but to a limited liability company and that there was nothing in the evidence to show that there was any holding out by the defendant that he was the owner of the properties or of the cattle thereon in such circumstances as to estop the defendant from denying he was the owner. Where, therefore, the Judgment reads:

> "It is my view that liability for trespass by cattle rests on the proprietor or owner of such cattle";

that passage must be read in the context of the evidence and issues involved, that is, that liability in that case rested upon the proprietor or owner of such cattle. In my view, the learned Resident Magistrate in relying upon that authority for her decision in the instant case, erred in holding that Lindsay's case decided that in every case liability in cattle trespass rested upon the proprietor or owner of the straying cattle.

LUCKHOO J.A.

I also agree that the appeal be allowed.