J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 77/75

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

BETWEEN	ROY FACEY	- PLAINTIFF/RESPONDENT
AND	W. J. THOMPSON & STANFORD ROBINSON	-- DEFENDANTS/APPELLANTS

J. A. Dabdoub for Defendants/Appellants.

E. Hill for Respondent.

March 26 and April 9, 1976

Watkins, J.A. (Ag.): This is an appeal from the judgment of His Hon. Mr. T.N. Theobalds, a resident magistrate for the parish of St. Catherine in which he found in favour of the plaintiff/respondent in an action arising out of an execution of distress for rent.

The following are the facts. Roy Facey, the plaintiff/respondent was head-lessee of land at 43 Monk Street, Spanish Town, St. Catherine of which the first-named defendant/appellant W.J. Thompson was the freeholder. Originally, the annual rental of the demise was $30 but upon enlargement of the said demise in 1971, the rental was increased to $60 per annum. Facey had expected the execution of a written agreement but wher this was not forthcoming he decided to withhold payment of the rent due notwithstanding his continuance in occupation and enjoyment of the demise. In fact, Facey erected a four-apartment house thereon, three of which he occupied and the fourth

he underlet to one Miss Vera Edwards. A description of this house limited to purposes of suit may be interposed. One door afforded entrance and exist to Miss Edward's room which was separated from the rest of the residence by a door so bolted or locked on either side that neither of the respective occupants could obtain entrance to the other's abode. By May 1973, rent totalling $150 had become due and the second-named defendant/appellant Robinson on the orders of the first-named defendant/appellant executed distress upon the goods of Facey, not however, for $150, but for $180. Gaining entrance without force (and there was no issue on this point) through the door to Miss Edward's room, the landlord bailiff forcibly unlocked the intervening door, entered that portion of the house occupied by Facey and there distrained upon his goods. Taken away, these goods were subsequently redeemed upon payment of a sum which covered the rent claimed and incidental costs and expenses.

The Particulars of Claim in respect of which no further and better particulars were sought or supplied simply alleged -

(a) illegal levy, and

(b) negligence in the keep and care of the distrained goods,

and furnished particulars of special damage relating to (b) only amounting to $340. The defendants/appellants in their statement of defence affirmed the legality of the levy and denied the special damages alleged.

During the course of the trial the issue of excessive levy was also agitated and occupied no insignificant part of the learned resident magistrate's reasons for judgment. Of this more will be said anon.

Before us, as indeed before the court below, the three issues for resolution were clear -

(i) Was the levy illegal?

(ii) Was it excessive?

(iii) Was their negligence in the handling of the goods distrained, some of which, it was alleged, were damaged and others lost?

Was the levy illegal? This was of course the paramount question. "An illegal distress is one which is wrongful at the very outset, that is to say, either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings so as to render the distrain - or a trespasser ab initio." (Hals. Laws of England 2nd ed. Vol. 10 para 738). That learned author proceeded to give examples of illegal distress among which the following are relevant:

(i) when no rent is in arrear;

(ii) a distress made in an unlawful manner, as by breaking open an outer door.

In the instant case it was not challenged that rent was in arrear and indeed the single question was as to whether that door intervening between Miss Edward's and Facey's respective abodes which was admittedly forcibly opened was indeed an outer door. The answer is to be determined not only by a consideration of the structure of the house but also by reference to a consideration of the policy and purpose behind the ancient and long settled rule of law that a distrainor for rent may break an inner door but may not break open an outer door. (Browning v. Dann et al 95 E.R. Full Reprint KB 24 p. 107). In American Concentrated Must Corporation v. Hendry and Another (1893) L.J. Vol. 62 p.388, the matter was the subject of extensive and learned analysis by Lord Justice Bowen who at pages 389 and 390 said "The doctrine of the inviolability of the outer doors of a house and its precinct has long been established by English Law. The principle is one which carries us back in imagination to wilder times, when the outer door of a house, or the outer gates and enclosures of land, were an essential protection, not merely against fraud, but violence .....

All creditors and all aggrieved persons who respected the king's

peace, the sheriff in a civil suit, and the landlord in pursuit of his private remedy for rent and services, were both of them held at bay by a bolted door or barred gate. To break open either was to deprive the owner of the protection against the outer world for his family, his goods and furniture and his cattle." (See also Lee v. Gansel (1558 - 1774) All E.R. Rep. 467 at p. 468). Applying this purpose of the ancient law to the facts of the instant case, could it be really asserted with any conviction that this intervening door served the purpose of a protection against the outer world for the plaintiff/respondent? The outer door to the area in his occupation was by way of a verandah which the landlord bailiff had tried but having found barred and bolted had left untouched. It was contended, however, that whilst that intervening door constituted an inner door looking at the house as a whole, it in fact constituted an outer door in relation to the area occupied by the plaintiff/respondent and this indeed was the ground on which the decision of the learned resident magistrate in his favour rested. "For all practical purposes" he said "this was the plaintiff's outside door for it separated his holding from that of the sub-tenant Vera Edwards." With respect to the learned resident magistrate and to Counsel at the Bar, this, it seems on the authorities, is not the test at all. First of all the right of distress extends over all the demise out of which the rent issues. The entire house in the instant case formed a part of the relevant demise and not merely the portion in actual occupation by the plaintiff/respondent. Next the real test is as to whether the door or other apparatus, whatever it may be, which has been broken or forcibly unbarred served as a protection against the outer world. This intervening door served only to provide privacy as between the respective occupants of the rooms on either side thereof. The American Concentrated Must Corporation Case illustrates this point vividly. There the plaintiffs occupied a warehouse within a courtyard as sub-lessees. The courtyard was included in their sub-lease, and the usual

access to it was by a gate opening on a lane. The entire premises demised by the head landlord to his immediate lessees were larger than and comprised the premises sub-let to the plaintiffs. The plaintiffs had paid their rent, but the immediate lessees were in default to the head landlord, who distrained on the plaintiffs as being in possession of part of the premises. In levying the distress the broker of the head landlord left the outside gate untouched and effected his entry into the courtyard by passing through the building in the occupation of the immediate lessees. Once in the courtyard, he broke open the main door of the Plaintiff's warehouse and distrained: It was held by Lord Justice Bowen in an action to recover damages for illegal distress that the plaintiffs were entitled to succeed. On appeal Counsel urged that the door of the plaintiff's warehouse which was broken open by the broker was in one sense, an outer door, but it was not the "outer door" of the demised premises. " The whole of the property demised to the immediate tenants must be taken to be the demised premises and, as the broker entered peaceably through the warehouse which was not sub-demised to the plaintiffs, the other doors and gates which the broker broke opened were really inner doors within the meaning of the expression with regard to leaving a distress." Confessedly the argument there as here is both facile and impressive. The fact of the matter, however, is that the question whether a door is outer or inner is not to be determined simpliciter by reference only to a consideration of the geography of the demise, but moreso by reference to the function of the door. Lord Justice Smith said "The question here is whether the door into plaintiff's warehouse is the outer door, and there can be but one answer to that question, namely that it is clearly the outer door of their warehouse." It was so, not by reference either to a consideration of the structure or of the extent of the demise, in either of which instance, it could be reasonably described as an inner door, but by reference to its function. It was that by which the warehouse offered protection

to itself against the outer world. (See also the judgment of Lord Esher M.R. in Long v. Clarke (1894) 1 QB. LR. 119 at p. 122. As already observed, in the instant case the intervening door which was forced open by the second named defendant/appellant was by reference to the structure of the house and by reference to the demise as a whole an inner door. More importantly, however, it did not serve to afford protection from the outer world to the plaintiff/respondent. The conclusion of law on this issue in favour of the plaintiff/respondent is, therefore, wrong, and the levy accordingly was not ab initio illegal.

Was the levy excessive? There was no dispute that more rent was claimed than was due and there was tendered in evidence as exhibit 1 Plaint No. 757/73 wherein the plaintiff/respondent had sued the first named defendant/appellant for "thirty dollars being amount due and owing for rent overpaid by the plaintiff to the defendant on premises situated at 43 Monk Street, Spanish Town, St. Catherine", and had obtained a judgment by consent for the sum claimed, which was satisfied, with costs. This judgment then constituted a bar as between the parties and their privies to all subsequent proceedings in the same cause. Accordingly, the learned resident magistrate fell into error when in his reasons for judgment he observed "I rejected the contention by the defence attorney that by repayment of the $30 irregularly levied the plaintiff was adequately compensated. Such a contention accords neither with common sense nor with any interpretation of the powers of the landlord under the Landlord and Tenants Law. Pursued to its logical conclusion it would simply mean that even if no rent at all is owing the landlord could direct a levy for a fictitious amount and exonerate himself by merely tendering to the tenant (who has been embarrassed by having his goods taken away) the fictitious amount for which the levy was originally authorised. It would provide an avenue for unnecessary and unjust harassment of a tenant." Whilst totally

sharing the very proper concern of the learned resident magistrate for the maintenance of a just balance between the interests of landlords and tenants, I cannot accept his exposition of the relevant law. A levy may either be illegal, irregular or excessive. If no rent at all is due and a levy is executed that levy is illegal and the distrainor is a trespasser ab initio and is subject not alone to the repayment of any monies extracted but to substantial damages as well, subject, of course, to the gravity of the trespass. (See Interoven Store Co. v. Hibbard et al (1936) 1 All E.R. 263). Other consequences also follow from this trespass ab initio but they do not now concern us. On the other hand a levy is not illegal stricto sensu merely because the rent claimed is in excess of what is truly due. Indeed, the mere fact that goods are distrained for an amount of rent in excess of the amount actually due is not per se evidence that the levy was excessive in the strict sense of the word, and will not give rise to a cause of action if the value of the goods seized were not disproportionate to the amount of rent actually due. (See Francis v. Daley; Francis v. Heron (1964) 6 W.I.R. 256). Where, of course, as here, the tenant recovered his goods by paying the sum claimed including the excess with incidental costs and expenses he can and did recover the sum overpaid. A levy is excessive when it is clearly out of all proportion to the amount of rent due and costs having regard to the conditions under which the sale must take place. (See Willoughby v. Blackhouse (1824) 2 B. and C. 82). It was not contended nor shown in the instant case that the value of the goods seized were disproportionate to the amount of rent actually due. The single issue was the fact of overpayment, the quantum of which was not in dispute, nor indeed, the fact that the prior claim was settled with the consent, and presumably at the time with the satisfaction, of the contending parties. It is difficult to see how in the circumstances the matter could properly be

re-opened. The issue as to excessive levy must therefore fail.

Was there negligence in the handling of the goods distrained? The learned trial judge did not advert to this in his reasons for judgment and this court, as well as the plaintiff, is entirely without benefit of any relevant finding of fact by the trial judge. His award of damages include a sum of $51.50 for special damages. Whilst, as already noticed, special damages were pleaded and claimed only in relation to the claim in negligence it would be unsafe and unsatisfactory to attribute this award to the claim in negligence in the absence of any findings of fact.

The appeal so far as the claims in illegal levy and excessive levy are concerned must, therefore be allowed and the judgment of the court below in respect thereof is set aside. The matter is remitted for the learned resident magistrate to come to a determination on the issue of negligence. There will be costs of appeal to the defendants/appellants in the sum of $50 and costs also in the court below to the defendants/appellants on the issues on which they have succeeded to be agreed or taxed.