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(ii) no sufficient cause had been shown to justify the courts setting aside under the proviso (c) the liquidator's right with the consequence that the garnisheed monies must be paid to the liquidator.

In his judgment HARMAN, L.J. ((17), [1966] 1 All E.R. at p. 185) said:

"The general rule in winding-up as observed by PENNYCUICK, J., in *Re Redman (Builders), Ltd.* (3) is that all creditors rank *pari passu* if not secured, and weighty reasons are needed to set this aside. I do not feel that the court knows enough of the merits or demerits of the other creditors to justify an intervention."

In the instant case the learned judge said:

"The court knows nothing of the position of any other creditors save and except the Shell Co. They alone issued a writ, they alone issued action for seizure and sale, they alone have done anything to assert their rights. They have gone far with their action and suffered great expense . . . With the material before me I see no reason why I should not accede to the application and allow the Shell Co. to profit from their acts and endeavours."

There was no evidence that the appellant company had done anything to hinder or impede the respondent in any way from proceeding with the collection or caused any delay in the execution. These were the considerations that affected the exercise of the discretion in the cases of *Re Grosvenor Metal Co., Ltd.* (1), and *Re Suidair International Airways Ltd.* (2).

In the instant case the learned judge was impressed with the activities in which the respondent was engaged in collecting the fruits of its judgment, but together with those activities there would have had to be shown some weighty reasons for the exercise of the discretion which would displace the general rule that all unsecured creditors rank *pari passu, vide* HARMAN, L.J., in *Caribbean Products, Ltd.*'s case ((7), [1966] 1 All E.R. at p. 185).

The activities on which the respondent was engaged were not of themselves sufficient.

It is our view that the learned judge in the exercise of his discretion acted on a wrong principle and there was no material sufficiently weighty to enable him to hold that the other creditors could justly be deprived of their ordinary rights. We would allow the appeal and set aside the order made. The appellant should have the costs of the summons at chambers with certificate for counsel as also the costs of this appeal.

Appeal allowed. Order set aside.

Solicitors: *Lake, Nunes and Scholefield & Co.* (for the appellant); *Judah, Desnoes & Co.* (for the respondents).

PERCY HARDWARE *v.* EDWARD LEVY

[COURT OF APPEAL (Luckhoo, Edun and Hercules, JJ.A.), January 14, 15, February 26, 1971]

Land—Licence—Licence to enter land and plant catch crops—Licensee remaining on land after expiry of licence—Licensor thereafter entering land and destroying licensee's cultivation—No right in licensee to damages.

The respondent sought to recover damages from the appellant in the circumstances following. The appellant agreed to allow the respondent to use and occupy a portion of his land for the purpose of planting catch crops. In pursuance of that agreement the respondent went into rent-free occupation of one acre of the appellant's land. No date was agreed upon as to the time at which the respondent should quit the premises, nor was any notice to quit served on the respondent. After reaping his crops the respondent remained in occupation and planted new crops. The appellant entered the land and cut down these new crops. The resident magistrate awarded judgment in favour of the respondent holding, *inter alia*, that his occupancy of the appellant's land was caught by the provisions of the Agricultural Small Holdings Law, Cap. 8, since he was in occupation of one acre at least, and the respondent was, therefore, entitled to be served with a proper notice to quit. On appeal,

Held: that it was clear on the evidence that the nature of the respondent's occupancy was that of a mere licensee; that licence expired at the end of the period for which it was agreed and the respondent had no right, therefore, to remain in occupation and to plant new crops; he could not, in the circumstances, complain of the appellant's entry and was not entitled to judgment.

Appeal allowed. Judgment entered for the appellant with costs.

Cases referred to:

(1) *Thompson* v. *Park*, [1944] 2 All E.R. 477; [1944] K.B. 408; 113 L.J.K.B. 561; 170 L.T. 207.
(2) *Wood* v. *Leadbitter*, [1843–60] All E.R. Rep. 190; (1845), 13 M. & W. 838; 14 L.J. Ex. 161, 9 Jur. 187; 4 L.T. (O.S.) 433; 67 R.R. 831; 153 E.R. 351; 9 J.P. 312.
(3) *Kerrison* v. *Smith*, [1897] 2 Q.B. 445; 66 L.J.Q.B. 762; 77 L.T. 344.
(4) *Kilbourne* v. *Caymanas Estate Ltd.* (1962), 4 W.I.R. 461.
(5) *Inwards* v. *Baker*, [1965] 1 All E.R. 446; [1965] 2 W.L.R. 212; [1965] 2 Q.B. 29.

Appeal from a decision of the resident magistrate for Clarendon in an action for damages for trespass.

Dr. A. Edwards for the appellant.
Roy Taylor for the respondent.

EDUN, J.A., delivered the judgment of the court: On January 29, 1971, we gave our decision allowing the appeal and promised to put our reasons in writing. We do so now.

The plaintiff (hereinafter referred to as the "respondent") brought an action in the Resident Magistrate's Court for the Parish of Clarendon claiming damages against the defendant (hereinafter referred to as the "appellant") for having entered upon and destroyed the respondent's cultivations growing upon lands owned by the appellant and without having given the respondent notice to quit. At the trial the appellant admitted that he had re-entered his land and cut down catch crops but said (i) that he had allowed the respondent to occupy an acre of his land rent free for the purpose of planting and reaping one only catch crop, and (ii) that without any further permission or agreement the respondent planted further crops despite requests for him to remove from the land.

The learned resident magistrate gave judgment for the respondent and in a part of his reasons stated that: (i) the appellant agreed to allow the respondent to use and occupy a portion of his land to plant catch crops; (ii) in pursuance of that agreement the respondent went into occupation of about one acre, rent free, as from September, 1968, but no date was agreed upon when the respondent should quit the premises, and no notice to quit and deliver possession was served by the appellant on the respondent.

Learned counsel for the appellant submitted that the agreement between the parties did not establish a contract of tenancy or an excepted holding within the meaning of ss. 2 and 8 of the Agricultural Small Holdings Law, Cap. 8. When, therefore, the facts of the instant case were examined the learned resident magistrate did not direct his mind correctly to the real issues. Learned counsel for the respondent on the other hand submitted that whether or not the agreement between the parties established a contract of tenancy or an excepted holding there was at least a licence created and there was

some evidence that the respondent did plant catch crops with knowledge of the appellant. He urged that the respondent was therefore entitled to reasonable notice to reap his crops and as the learned resident magistrate found that the respondent received no notice he, the respondent, was entitled to damages for his cultivations so destroyed.

We are of the view that on a proper consideration of the relevant provisions of the Agricultural Small Holdings Law the agreement between the parties did not establish a contract of tenancy or an excepted holding, because there was undisputed evidence which showed (i) that the act of the appellant in permitting the respondent to occupy his land was one of indulgence, out of charity and grace, and that (ii) there was no intention in the parties of creating the relationship of landlord and tenant between them. But the question whether or not the appellant was justified in re-entering his land and cutting down the cultivations thereon can only be answered by a careful examination of the evidence and the findings of the learned resident magistrate.

Mr. Eric Chambers, a barrister-at-law, gave evidence on oath on behalf of the appellant. He said that between the period of January to July 1969 he visited the appellant's land on several occasions as his aunt was interested in buying it. In February 1969 when accompanied by a brown man he asked the respondent if the cultivations on a portion of the land were his, the respondent replied that it was but he (the respondent) understood that the brown man had bought the land. The brown man replied that it was so, whereupon the respondent said he got notice to leave and he wondered if the new owners would allow him to stay when they took over the land. Mr. Chambers replied that he could not then discuss the matter.

In April 1969 Mr. Chambers said he again visited the land and observed new things such as corn, yams, oranges, breadfruit and mangoes planted. He asked the respondent how it was that he had planted permanent crops when he was supposed to be off the land. The respondent replied that he was not coming off the land and that he (Chambers) could go and do what he liked. In May 1969 he made another visit and noticed the cultivations cut down. Under cross-examination by counsel for the respondent Mr. Chambers said: "It was in February 1969 plaintiff told me that he got notice. I am not mistaken. He never told me how he got notice."

The learned resident magistrate did not say whether he accepted or rejected Mr. Chambers' evidence but found that the respondent "got no proper notice to quit". We are not for one moment saying that the learned resident magistrate was not entitled to reject the evidence given on oath by a barrister-at-law, or by any witness for that matter, but in the face of the respondent's own admission we are at a loss to know on what basis he accepted without reservation the respondent's evidence. Before, however, examining the respondent's evidence, that of Basil Bent, led on behalf of the defence, also has relevance and importance. Basil Bent said on oath that in July 1968 the respondent was present when the appellant allowed the respondent, Sydney Reid and himself to cultivate a season of catch crops. Nothing was mentioned about permanent crops, but they were told that "should be off by February". He said he planted his catch crops, reaped them and left in February 1969, while the respondent reaped most of his catch crops at that time.

The respondent on oath said, *inter alia*, that he knew Basil Bent and Sydney Reid. They planted one month before he did and "they reaped before I did about one month. They pulled up and left." He did not, however, agree that his occupation was on the same terms as Bent and Reid. Under cross-examination he said:

> "Yes. I told him [meaning appellant] a tall brown man had given me permission to cultivate clear the plants and stay . . . Yes. Defendant did tell me barrister Chambers wanted the land. Yes. I saw Mr. Chambers one day. Yes. I did tell Chambers that defendant promised to sell me the land but he sold it to someone else. No. I never asked Mr. Chambers to let me remain on the land."

There are two aspects of the findings of the learned resident magistrate which, in the light of the evidence referred to above, need particular scrutiny: (a) no date was fixed for the respondent to leave; and (b) no proper notice to quit was given.

(a) *No date fixed to leave*

Though the respondent claimed he was not on the same terms of occupancy as Bent and Reid yet he admitted that Bent and Reid reaped one month before he did. The respondent told the appellant that the brown man had given him permission to cultivate, clear the plants and stay. The respondent said that the appellant told him Chambers wanted the land. He told Mr. Chambers that the appellant promised to sell him the land. It is obvious that the learned resident magistrate misdirected himself on the facts of the case when he concluded that no exact date was fixed between the parties for the respondent to leave the land. In giving his reasons for so concluding he stated he believed there was a discussion about the appellant selling the land, otherwise the respondent would not have known that the appellant had two titles for his land and therefore the respondent's arrangement with the appellant must have been on a different occasion and not on the same terms as Bent and Reid.

We fail to see how knowledge in the respondent of the appellant seeking to sell his land could have any significance in view of the undisputed terms of agreement which amounted to no more than a gratuitous permission to occupy and cultivate catch crops on the appellant's land. The obvious manoeuvre of the respondent was that having no permission from the appellant to continue his occupancy and having failed to obtain permission from the new owners to continue his occupancy, nevertheless he proceeded to plant new crops.

(b) *No proper notice to quit*

On this aspect of the case the learned resident magistrate in his reasons for judgment stated:

> "I hold that plaintiff's occupancy of defendant's land was caught by the provisions of the Agricultural Small Holdings Law, Cap. 8, as he was in occupation of one acre at least and was therefore entitled to be served with a proper notice to quit. I consequently hold that the defendant's act in chopping down the plaintiff's growing crops was illegal as the plaintiff had the protection afforded tenants coming under the definition of an 'excepted holding' in section 2 of Cap. 8."

The learned resident magistrate having found in law that the evidence established an excepted holding within the meaning of the Agricultural Small Holdings Law he must have relied upon s. 20 of that law to hold that the termination of the respondent's occupancy must be by a notice in writing. As stated already, we hold that no relationship of landlord and tenant, or an excepted holding was established within the meaning of the Agricultural Small Holdings Law. The learned resident magistrate was therefore wrong in law in holding that the respondent was not served a proper notice to quit and that consequently the appellant's act in chopping down the cultivations was illegal.

In our view the nature of the respondent's occupancy was that of a mere licensee and as such the licence stood as revoked at the end of the period for which the licence was agreed unless renewed or its continuation acquiesced in. But if the respondent had property on the appellant's land he was entitled to a reasonable time for removing same: see 23 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 431, para. 1026. On the respondent's own admission Bent and Reid had reaped before he did, about one month. Even assuming, as Bent said, that the respondent had reaped most of his catch crops at that time, the respondent had no lawful right to plant anew on the appellant's land without any further agreement or licence.

The following statement in SALMOND ON TORTS (9th Edn.), p. 258, has found approval in *Thompson* v. *Park* (1) and with which we agree:

> "He who is ejected from land by the licensor in breach of his licence, or is otherwise disturbed by the licensor in the exercise of it, has even at common law, and notwithstanding *Wood* v. *Leadbitter* (2), a good cause of action in contract—*Kerrison* v. *Smith* (3). If, however, the licensee insists, notwithstanding the revocation of his licence (even though it is thus premature and wrongful), in entering or remaining on the land or otherwise exercising his licence, he becomes at common law a trespasser

or other wrongdoer, and liable in an action accordingly at the suit of the licensor. The rule is an illustration of the difference between a legal power to do a thing effectively, and a legal right or liberty to do it lawfully. A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term."

When, therefore, the respondent's occupancy was properly determined and the respondent given more than ample time to remove the remnants of his catch crops the respondent became a trespasser, and apart from any agreement or right in law or equity what was planted on the land by a trespasser belonged to the owner of the land. Upon the evidence in the instant case:

(i) there was no claim to any interest by the respondent in or over the appellant's land legally, equitably or otherwise;

(ii) at no time and nowhere in the evidence did the appellant acknowledge or acquiesce in any right or ownership by the respondent in the crops that were severed;

(iii) the respondent being a trespasser on the land at all material times had no right of action against the appellant for the re-entry on his own land or for the removal of whatever was growing thereon; and

(iv) there was no conversion in law by the appellant of any goods belonging to the respondent.

See *Kilbourne* v. *Caymanas Estate Ltd.* (4).

In the course of his arguments, learned counsel for the respondent submitted that where the respondent was induced to expend monies on land, equity would extend protection over a tenant at will or a licensee. He cited the case of *Inwards* v. *Baker* (5) in support. In any event he added the respondent was entitled to damages at common law because he was entitled to emblements and was wrongly deprived of same. First of all, there is no evidence in the instant case that the respondent was induced by the appellant to expend money in planting new things on the land or was ever assured of the fruits thereof. And secondly, the law of emblements has no application to trespassers.

For the reasons given we allowed the appeal, set aside the judgment of the learned resident magistrate and entered judgment in favour of the appellant with costs in the court of trial and the sum of $30 in the appeal.

Appeal allowed.

ATTORNEY-GENERAL ET AL. v. STANLEY WILLIAMS

[COURT OF APPEAL (FOX, Smith and Hercules, JJ.A.), March 3, 1971]

Costs—Case called on for trial—Insufficient number of special jurors attending—Defendants unwilling to proceed to trial in manner not authorised by law—Case adjourned sine die—*Costs awarded against defendants.*

Where there is no material upon which the discretion of a trial judge in respect of the award of costs may be exercised he will not be justified in making an award to either party to the proceedings, and the Court of Appeal will set aside any such award.

Appeal allowed.

No cases referred to.

Appeal from an order of PARNELL, J., awarding costs on the occasion of the postponement of the trial of a civil cause by reason of the attendance of an insufficient number of special jurors.

A. L. Davis and *Mrs. S. Playfair* for the appellants.
D. McFarlane for the respondent.

FOX, J.A., delivered the judgment of the court: When this case came on for trial before PARNELL, J., and a special jury on June 13, 1968, only four of the seven jurors answered to their names. Mr. Mundel who appeared as leading counsel for the defendants, indicated his willingness to have the case tried by the judge and a common jury, as provided by s. 29 of the Jury Law, and to abide by any order which the judge might have considered proper under the provisions of s. 334 (1) of the Judicature (Civil Procedure Code) Law. Mr. Dudley Thompson, leading counsel who appeared for the plaintiff, did not oppose this course. The time was then 10.21 a.m. At this stage the court was informed that the common jurors were not available; apparently they had been discharged earlier that day from another court. Mr. Mundel then said that he was willing to waive trial by judge and special jury or by a judge and a special jury supplemented by common jurors. Mr. Thompson was not willing to have the case tried by a judge alone. He pointed out that on the application of the defendants, an order had been made under the provisions of s. 338 of the Judicature (Civil Procedure Code) Law for trial with a jury, and made it plain that in his view the issue should be resolved in that way and not by a judge alone. At 11.15 a.m. five jurors were available. Mr. Thompson said that he was prepared to accept two talesmen to supplement the five special jurors then in attendance and he called attention to ss. 43 and 44 of the Jury Law. The relevant section is 43. Mr. Mundel pointed out that under the proviso to s. 43 whenever it happened that the requisite number of jurors did not appear in the case of a special jury, the persons to be added, "shall be such as have been impanelled upon the common jury panel to serve in the same court, if a sufficient number of such persons can be found". He did not agree to the five special jurors being supplemented by two bystanders. In his view that position was not capable in law. We agree with him. Mr. Thompson then drew the court's attention to s. 32 of the Jury Law which provides:

> "In all civil cases the jury, whether special or common, shall consist of seven persons, and the verdict shall be that of five jurors at the least."

Mr. Thompson said that he would agree to the case being tried by the five special jurors present. Mr. Mundel pointed out that s. 32 did not provide for five jurors sitting, but at least seven, and he did not agree to this course.

At this stage the final impasse was reached. The case was adjourned *sine die*. The learned judge made a note in which he said that he thought that the attitude of defence counsel, in all the circumstances and having regard to the defence relied on, most unreasonable and he ordered the defendants to pay the plaintiff the costs of this adjournment in any event. The action was one of damages for false imprisonment and the defence was that the plaintiff was arrested on a warrant.

This appeal is concerned with the order made by the judge awarding the plaintiff the costs of the day in any event. This form of order is commonly met in interlocutory proceedings. It is usually made when the court is of the opinion that an action taken by one or other of the parties was unnecessary or improper, or when a party is clearly at fault, which puts the other party to inconvenience. No such situation exists here. Mr. McFarlane who appeared on behalf of the respondent did not seek to justify the judge's order on this ground. He submitted that, in the circumstances, the refusal of Mr. Mundel to have the case tried in the way suggested by Mr. Thompson or as provided under s. 334 of the Judicature (Civil Procedure Code) Law, was unreasonable. This may be a good ground for an order for "Plaintiff's costs in the cause", but we cannot agree that a party who insists upon a strict adherence to the provisions of a law has acted unreasonably. Mr. Mundel was willing to have the case tried by the judge alone. Mr. Thompson was not so willing. Through the fault of neither party the jury could not be properly constituted. We see nothing unreasonable in Mr. Mundel's unwillingness to agree to a course which is not authorised by law.

We think that the order of the learned judge is contrary to the principle whereby costs