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tion. He has contended that the whole of the Crown's case turned upon the identification of the bicycle and that the mere evidence of the taking away of a bicycle would have been a very weak case and no jury would have inevitably convicted upon that evidence.

Learned counsel for the Crown ultimately conceded that the evidence of identification may have substantially affected the minds of the jury, and he has conceded that in those circumstances one cannot tell to what extent the jury's minds were affected by the inadmissible evidence and therefore the conviction cannot be supported.

We are unable to say that with that evidence removed the jury would inevitably have come to the same conclusion of guilt and we therefore hold that the conviction must be quashed.

The question then arises, is this a case in which a new trial should be ordered? Upon this evidence we are of the view that in the interest of justice a new trial ought to be ordered. We will therefore grant this application for leave to appeal, treat the application as the appeal, quash the conviction and order a new trial. In view of the fact that the appellant has been in custody since the trial of this case, on May 7 last year, and we would make the observation that he had been on bail prior to this trial, we think that this is a case in which the appellant should be granted bail pending the new trial. Bail will be fixed in the sum of £50, with a surety in a like sum.

Appeal allowed and a new trial ordered.

GEORGE HENRY *v.* JAMAICA TELEPHONE CO., LTD.

[COURT OF APPEAL (Waddington, Eccleston and Fox, JJ.A.), March 19, 1969]

Court of Appeal—Application to dismiss appeal for want of prosecution—Discretion of court to make such order as may be just—No material on which discretion exercisable—Court of Appeal Rules 1962, *r.* 30 (1) (a).

Under r. 30 (1) of the Court of Appeal Rules 1962 the court may dismiss an appeal for want of prosecution or it may make such other order as the justice of the case may require. In this latter case the court must be furnished with some material on which to exercise its discretion, and in the absence of such material the court will dismiss the appeal.

Appeal dismissed.

No cases referred to.

Motion to dismiss appeal for want of prosecution.

N. Hill for the applicant.
N. Wright for the appellant.

WADDINGTON, J.A.: This is an application by the respondent for the dismissal of the appeal for want of prosecution.

The affidavit filed in support of the application discloses that the notice of appeal was filed on August 11, 1966. The record of the appeal was settled on August 29, 1966, but the record was not filed as it appears from an affidavit by the solicitor for the appellant that the notes of evidence which formed part of the record were not available. An application was, accordingly, made by the appellant for an extension of the time

within which the record should be filed, and an order was made on that application granting an extension of the time to January 8, 1969. The record has, however, up to the present time, not been filed, and no affidavit has been filed by the appellant explaining why the record was not filed in accordance with r. 30 (1) (a) of the Court of Appeal Rules.

It appears also from the affidavit which has been filed in support of the application to dismiss the appeal that an affidavit of service of the notice of appeal as required by r. 30 (1) (b), has not been filed.

Counsel for the appellant agrees that this is the position, and he concedes that Mr. Hill's submissions as regards non-compliance with these rules are indisputable; but he asks the court to exercise its discretion under r. 32 (1), and instead of dismissing the appeal make such other order as the justice of the case may require.

The position of the court in so far as r. 30 (1) is concerned is quite clear. The court can do one of two things. It may either dismiss the appeal, or it may make such other order as the justice of the case may require. But in the exercise of its discretion to make such other order as the justice of the case may require, the court must be furnished with some material on which it can exercise its discretion. No such material has been placed before the court, and the court is therefore constrained to act in accordance with the first part of the rule by dismissing the appeal for want of prosecution.

The respondent will have the costs of the application.

Appeal dismissed.

KENNETH WHITE *v.* DOROTHEA BROWN

[COURT OF APPEAL (Shelley, Eccleston and Fox, JJ.A.), March 21, 1969]

Landlord and Tenant—Monthly tenancy—Notice to quit given by landlord—Holding over by tenant after expiration of notice to quit—Ejectment proceedings by landlord—Removal by tenant after service of ejectment summons—Distress for rent by landlord at new premises occupied by tenant—Whether removal by tenant "fraudulent or clandestine"—Whether distress lawful—Landlord and Tenants Law, Cap. 206 [*J.*], *s.* 3—*Rent Restriction Law, Cap.* 341 [*J.*], *s.* 20

The plaintiff appellant rented a room from the defendant respondent on a monthly tenancy, rent being due on the 28th of each month. The defendant served the plaintiff notice to quit "on July 28, 1965, next or at the end of the month of your tenancy which will expire next after the end of August 28, 1965—month from the date of the service of this notice on you." The plaintiff continued to occupy the room and the defendant filed ejectment proceedings against him. The plaintiff having been served with the summons, moved to new premises on either September 24 or 25, 1965, and handed the defendant the key for the room that afternoon. The defendant caused a landlord bailiff to levy on the plaintiff's furniture at his new residence on October 26, 1965, for arrears of rent to September 28, 1965. The plaintiff sued the defendant for trespass consequent on an illegal levy, and to this action, the defendant pleaded a special defence by virtue of s. 3 of the Landlord and Tenants Law, Cap. 206 [J.]. The resident magistrate found that the distress was lawful, and entered judgment for the defendant. On appeal,

Held: (i) on the facts of the case the tenancy was determined when the defendant accepted the key for the room from the plaintiff;

(ii) the plaintiff's failure to give prior notice of his removal to the defendant was not in breach of s. 20 of the Rent Restriction Law, Cap. 341, and did not in any way prejudice his rights;

(iii) the removal by the plaintiff of his goods was not clandestine or fraudulent or with a view to elude distress. The distress was therefore illegal and the plaintiff was entitled to a judgment for the special damages proved, plus general damages.

Appeal allowed.

Cases referred to:

(1) *Smith* v. *Roberts* (1892), 9 T.L.R. 77, C.A.
(2) *Brown* v. *Draper*, [1944] 1 K.B. 309; [1944] 1 All E.R. 246, C.A.
(3) *Brown* v. *Brash and Ambrose*, [1948] 2 K.B. 247; [1948] 1 All E.R. 922, C.A.
(4) *Gray* v. *Stait* (1883), 11 Q.B.D. 668; 52 L.J.Q.B. 412, C.A.
(5) *Parry* v. *Duncan* (1831), 7 Bing. 243; 5 Moo. & P. 19.
(6) *Inkop* v. *Morchurch* (1861), 2 F. & F. 501, N.P.
(7) *Keeves* v. *Dean*, [1924] 1 K.B. 685; 92 L.J.K.B. 203, C.A.

Appeal from the judgment of a resident magistrate.

H. G. Edwards, Q.C., for the appellant.
R. N. A. Henriques for the respondent.

SHELLEY, J.A.: On October 11 last, we allowed this appeal and said we would put our reasons in writing. By way of explanation of the delay I should say that on November 15 the matter came on for the reasons to be given. We were then faced with a motion, in effect, to re-hear the appeal. That motion was heard this morning and has been dismissed. We now proceed to give our reasons for allowing the appeal.

The plaintiff/appellant rented a room from the defendant/respondent on a monthly tenancy, rent being due on the 28th of each month. The defendant served the plaintiff notice to quit "on July 28, 1965, next or at the end of the month of your tenancy which will expire next after the end of August 28, 1965—month from the date of the service of this notice on you." The plaintiff continued to occupy the room and the defendant filed ejectment proceedings against him. The plaintiff having been served with the summons, moved to new premises on either September 24 or 25, 1965, and handed the defendant the key for the room that afternoon. The defendant caused a landlord bailiff to levy on the plaintiff's furniture at his new residence on October 26, 1965, for arrears of rent to September 28, 1965.

The plaintiff's action is for trespass consequent on illegal levy. The defence is a special defence by virtue of s. 3, Cap. 206, The Landlord and Tenants Law, which provides—omitting the words that are not relevant:

> "In case any tenant . . . of any tenements . . . upon the demise or holding whereof any rent is or shall be reserved due or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises his goods or chattels, to prevent the landlord . . . from distraining the same for arrears of rent so reserved due or made payable, it shall and may be lawful for every landlord . . . or any person by him . . . for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found as a distress for the said arrears of rent."

The learned resident magistrate found, *inter alia*:

(1) the notices were valid;

(2) plaintiff moved on September 28, 1965, without leaving any goods to satisfy a distress after he had commenced another month without previously advising or giving any notice to the defendant under the provisions of s. 20 of Cap. 341, the Rent Restrictions Law;
(3) plaintiff moved clandestinely and fraudulently and handed her (defendant) the key thereafter;
(4) the tenancy was not determined;
(5) the distress was lawful.

Mr. Edwards contended and Mr. Henriques conceded, properly, in my view, that the appeal should be allowed for the following reasons:

(a) the tenancy was at an end before the levy was made, and
(b) the right to levy conferred by s. 3 of Cap. 206 was effective only so long as the tenancy lasted.

The end of the tenancy

The defendant said in evidence:

> "I had given plaintiff notice to quit the room. I desired him to remove and the earlier he removed the better. I eventually took out summons to eject the plaintiff. September 30 was return day of that summons. Plaintiff left premises before September 30. I was pleased that he had left. He brought the keys after he left. On my return from work about 5.00 p.m. I heard that plaintiff had removed. Plaintiff brought the key about half an hour after I came from work."

In these circumstances the commonsense view must be that the tenancy was at an end whether the notice was valid or not. To hold otherwise would be to permit the landlord to hold with the hare and hunt with the hound and grave injustice would be done to the tenant. However, one need not rely upon commonsense view, reliable as it may be. This is eminent authority supporting the view that the tenancy was at an end. In *Smith* v. *Roberts* (1), the landlord applied to the tenant for permission to send his workmen upon the premises to do repairs which the landlord was obliged to do under a magistrate's order. The tenant, through her solicitor, on March 4, 1891, informed the landlord that while she could not prevent the repairs she would not consent, and would treat it as a disturbance. On March 6, 1891, the tenant's solicitor sent the key to the landlord saying that the tenant's holding was determined. The landlord retained the key until sometime in June, 1891. The landlord brought an action to recover rent alleged to be due on March 25, 1891. The Court of Appeal (LORD ESHER, M.R., LOPES and KAY, L.JJ.) affirming the judgment of DENMAN, J., held the tenancy was put an end to by mutual agreement followed by the acts of the parties.

I am of the view that the facts of the instant case show clearly that the defendant wished to terminate the tenancy and when she accepted her key she intended to and did finally put an end to the tenancy, therefore the resident magistrate's finding that the tenancy was not determined cannot be upheld.

The plaintiff's failure to give prior notice of his removal to the defendant was not in breach of s. 20 of the Rent Restrictions Law, Cap. 341, and did not in any way prejudice his rights. The provisions of s. 20, Cap. 341, only applied to protect him whilst the tenancy was in existence. The section says the tenant "shall be entitled to give up possession of the premises only on giving such notice as would have been required under the original contract of tenancy." The plaintiff may have removed his goods but nevertheless have retained possession of the room. It was at the moment the landlord accepted the key from him that the plaintiff surrendered his possession to the landlord, determined the tenancy, and went out of the orbit of the Rent Restrictions Law. See *Brown* v. *Draper* (2), and *Brown* v. *Brash and Ambrose* (3).

The right to levy

At common law a landlord has a right to levy on goods (with certain exemptions) on the premises in respect of which rent is in arrears whilst the tenancy subsists. Section 3 of the Landlord and Tenants Law, Cap. 206, permits the landlord, within 30 days to follow and levy upon goods fraudulently or clandestinely removed to prevent the landlord from levying only where they would have been distrainable if they had remained upon the demised premises. To that extent *Gray* v. *Stait* (4) applies. For purposes of s. 3 of Cap. 206, the burden of proving that the removal of the goods was clandestine or fraudulent rests on the landlord. To justify the landlord in pursuing them, he must show that they were removed with a view to deprive him of a distress—*Parry* v. *Duncan* (5), and *Inkop* v. *Morchurch* (6).

With great respect to the learned resident magistrate, I am unable to find any evidence to support his view that the removal by the plaintiff of his goods and chattels was clandestine or fraudulent or with a view to elude distress. The mere proof that the defendant did not know of the removal until afterwards is not in my view sufficient to show that it was either clandestine or fraudulent. The defendant's evidence is silent as to how the plaintiff removed, except that he did so whilst the defendant was away at work, and that somebody told her so; there is nothing in the plaintiff's evidence to suggest that he left clandestinely or fraudulently.

Incidentally, the resident magistrate's finding that the plaintiff removed on September 28, 1965, is not supported by the evidence since the evidence as to the date of removal was that of the plaintiff that it was September 24 or 25, and that of the defendant that it was before September 30, which was the return day of the summons. September 24 or 25, it would seem, places the levy outside the period of 30 days allowed by s. 3 of Cap. 206. However, the point was not taken and it is not necessary to rule upon it.

In the instant case, when the plaintiff removed his goods and handed over the key to the defendant, who accepted it, on the 24th or 25th or 28th, for that matter, he was entitled to do so without incurring any further obligation to the defendant by way of rent. The tenancy having thus been then and there effectively terminated, the defendant's right to levy ceased altogether and thereafter she would have had to use some other method, for example, suit, to recover arrears of rent due and owing at the time the tenancy was terminated. Therefore, the levy on October 26 was illegal and the plaintiff was entitled to a judgment for the special damages proved, plus general damages.

ECCLESTON, J.A.: I agree with the judgment just delivered by my brother, Mr. Justice Shelley. I have nothing further to add.

FOX, J.A.: On the findings of fact which have already been stated in the preceding judgment, the learned magistrate seems to have arrived at the following conclusions:

(1) The tenancy was in existence at the date of the removal because "the mere receival of the key without evidence that the defendant treated the room as her own was not sufficient proof that she accepted the tenancy at an end";

(2) even after such removal the plaintiff continued to be in possession of the premises because he had not given notice to give up possession in accordance with the provisions of Cap. 341, s. 20 (1);

(3) being a tenant in possession, whose tenancy was still subsisting, the plaintiff was not in a position to avail himself of the protection of the rule in *Gray* v. *Stait* (4), which prevents a landlord from following and distraining his tenant's goods which have been fraudulently removed to escape a distress from rent due, if at the time of the distress the tenant's

interest in the demised premises has come to an end, and he is no longer in possession;

(4) the distress was therefore justified by virtue of the provisions of Cap. 206, s. 3.

It is true that acceptance of the keys of the premises by the landlord is not necessarily an unequivocal act evidencing an intention to accept surrender. However, where, as in this case, the landlord purported to give two notices to quit, took out a summons of ejectment, and admitted that she desired the plaintiff to remove, "the earlier the better", her acceptance of the keys from the plaintiff without protest, and with only an enquiry about the rent in arrears, coupled with the complete removal of the plaintiff from the premises, are inconsistent with the continuance of the existing tenancy, which must therefore be regarded as having been "surrendered by operation of law".

The second conclusion of the learned magistrate appears to be based upon his finding of fact that the "plaintiff moved on September 28, 1965 . . . after he had commenced another month". This finding is not supported by the evidence. The plaintiff said that he moved on either September 24 or 25, 1965. The defendant did not state the date of removal but she said that this was before Sepember 30, 1965. On this evidence, the learned resident magistrate could have found that the plaintiff moved on either September 24 or 25, but it was not open to him to find that he moved on September 28. This view is strengthened when it is noticed that the levy which the defendant caused to be effected on the plaintiff's goods was "for 3 months . . . rent due June 28, 1965, July 28, 1965, and August 28, 1965, in advance . . ." No levy was made in respect of the rent which would have become due if the plaintiff had commenced another month on September 28, and the only reasonable inference in the circumstances is that no such levy was made because the plaintiff removed prior to that date and no rent for that month was due.

In this factual situation, it is not at all clear that the defendant is entitled to the protection of the provisions of s. 3, Cap. 206, because the fact of the levy having been made "within the space of 30 days next ensuing such conveying away" of the plaintiff's goods, has not been satisfactorily established. The real significance of the situation, however, is that, if the plaintiff removed prior to September 28, 1965, he cannot be regarded as having held over after the termination of his tenancy so as to have become a statutory tenant. On this ground alone, he was therefore free to give up possession without giving the notice required by the provisions of s. 20 (1) of the Rent Restriction Act, Cap. 341.

But even if the magistrate's finding of fact was supported by the evidence, and the plaintiff is to be regarded as a statutory tenant, the magistrate's second conclusion misconceives the purpose and effect of the provisions of s. 20 (1), Cap. 341. These provisions apply only when the tenant "retains possession" of the premises. They convey a personal right in such a tenant not to have an order for possession made against him unless certain specified conditions are fulfilled; as Lush, J., observed in *Keeves* v. *Dean* (7) ([1924] 1 K.B. at p. 686), the tenant is given a "status of irremovability". Having once availed himself of the privilege of holding on as a statutory tenant under the act, the tenant cannot just leave when he chooses. If he does, he is liable for the payment of rent for the period of such notice as would have been required under the original contract of tenancy.

This is not to say that without notice he is unable to give up possession. If he vacates the premises without any intention of returning he forfeits his status as a statutory tenant, and deprives himself of the protection of the Act. *Brown* v. *Draper* (2), *Brown* v. *Brash and Ambrose* (3). This would be the position in this case if the plaintiff did in fact hold over after the termination

of his tenancy. He would have given up his personal right under the Act when he went out of possession. Consequently, even if he had assumed the "status of irremovability" which the Act creates, by becoming a "non-occupying tenant", he would have voluntarily surrendered this status and could neither claim its benefits nor be compelled to its burdens. As pointed out above, he would have to pay such rent as was due, but this would be an obligation flowing from the original contract of tenancy, and not from the provisions of the Act.

In the light of these considerations, it is obvious that the third and fourth conclusions of the learned magistrate are untenable. At the time of the distress the plaintiff's interest in the demised premises had come to an end, and he was no longer in possession. He was, therefore, entitled to the protection of the rule in *Gray* v. *Stait* (4).

I agree with, and have nothing further to add to the opinion which has been expressed in the preceding judgment that there is not sufficient evidence to support the finding of the learned magistrate that the removal was clandestine or fraudulent.

I agree that the appeal should be allowed.

SHELLEY, J.A.: For these reasons the court allowed the appeal and set aside the judgment and directed that judgment be entered for the plaintiff for £35 with costs to the court below to be taxed or agreed, and costs of appeal, £15.

Appeal allowed.

Solicitors: *R. A. Penso* (for the appellant); *J. H. N. Forrest* (for the respondent).

ASTON PANTON *v.* IRA BROWN

[COURT OF APPEAL (Waddington, Eccleston and Fox, JJ.A.), March 21, 1969]

Appeal—Application to file grounds of appeal out of time—Discretion—Appeal not shown to have merit—No ground for exercise of discretion in favour of applicant—Judicature (Resident Magistrates) Law, Cap. 179, s. 266.

The discretion vested in the Court of Appeal by s. 266 of the Judicature (Resident Magistrates) Law, Cap. 179, to permit grounds of appeal to be filed after the time for so doing has expired will not be exercised in favour of an applicant where the court is satisfied that there is no merit in the appeal.

Appeal dismissed.

No cases referred to.

Motion for leave to file grounds of appeal out of time.

W. B. Brown for the applicant.
N. Burgess for the respondent.

WADDINGTON, J.A.: This is an application for leave to file grounds of appeal after the date for doing so had expired. The judgment was delivered on July 15, 1968, and notice of appeal dated July 22, 1968, was filed by the solicitor for the appellant on July 24, 1968. The reasons for judgment were filed on July 29, 1968, but in the affidavit of counsel for the appellant, who also appeared for the appellant in the court below,

it is stated that the reasons for judgment were only received by the instructing solicitor on August 6, 1968.

In the meantime, according to the affidavit to which I have referred, counsel had left the island, on July 24, 1968, on vacation, and he did not return to his chambers until August 26, 1968. He returned to find the reasons for judgment which had been sent to his chambers by his instructing solicitor for the purpose of settling the grounds of appeal which, he said, he did on August 29, 1968, and which grounds were filed on September 9, 1968. It will thus be seen that the grounds of appeal which should have been filed on or before August 27, 1968, were not filed until September 9, 1968, more than twenty-one days after the filing of the reasons for judgment. Counsel says that the failure to file the grounds of appeal in time was due to his inadvertence, and he calls in aid s. 266 of the Judicature (Resident Magistrates) Law which provides that whenever any of the formalities prescribed by the Law shall have been inadvertently, or from ignorance or necessity, omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from.

It appears to this court that on the facts stated in the affidavit the failure to file the grounds of appeal was due rather to carelessness on the part of counsel who, at the time when he left the island, must have been fully aware of the fact that an appeal was pending or likely in this matter, and it was therefore incumbent upon him to have taken the necessary steps, in consultation with his instructing solicitor, to see that this situation did not arise.

The discretion which the court is being asked to exercise in favour of the appellant under s. 266 can only be exercised if the justice of the case shall appear to so require. It has been pointed out to counsel that in the affidavit which he has filed there is no reference whatever to the merits of the appeal. Learned counsel referred the court to the grounds of appeal which appear in the record to have been filed out of time, and he submitted that reference to those grounds of appeal would show that there was some merit in the appeal. The court does not agree with this submission. It appears that this appeal is one purely in respect of questions of fact on which the resident magistrate, in his reasons for judgment, said this:

> "This action is based wholly on fact, and after seeing the witnesses in the witness box and observing the manner in which they gave their evidence I found as a fact and came to the conclusion . . . "

and then followed the various conclusions to which he arrived and the reasons for his giving judgment in favour of the respondent.

In the opinion of this court no merit has been disclosed in respect of this application and, in the circumstances, the court refuses the application, with the result that there being no grounds of appeal before the court, the appeal is dismissed.

The respondent will have the costs of the appeal £15.

Appeal dismissed.