NORMA ATHOL FERRIER-WATSON *v.* SHER MOHAMMED

[Appellate Jurisdiction (Hyne, C.J.) July 27th, 1953]

Rules 6 and 7 of Order 32 of the Magistrates' Courts Rules—notice to quit—whether Magistrate had jurisdiction to make order in regard to cane on land.

The appellant sued for possession of part of certain land owned by her. The action was heard by the 1st Class Magistrate at Nadi who ordered that the appellant should have possession of the land within 30 days, and further ordered that no writ of possession be issued until the plant cane on the land had been cut, subject to security being given within seven days for rent claimed, £34, and rent from 1st March to date of cutting at £4 per acre per annum, and costs amounting to £6 7s. 6d.

It was agreed that the notice to quit took effect on 31st December, 1951, and at the hearing of the appeal that the plant cane referred to in the judgment must have been planted as late as March, 1952.

The grounds of appeal were:—

(1) That the Magistrate had no jurisdiction to make such further order.

(2) That if the learned Magistrate had a discretion to make such further order it was not rightly used, and such order is not justified.

HELD.—That the Magistrate could not properly make the second order for the reason that the tenancy agreement and the provision to hold over had expired.

Cases referred to:—

Air Ministry v. Harris [1951] 2 A.E.R. 862.
Jones v. Savery [1951] 1 A.E.R. 820.
Polini v. Gray (1879) 12 Ch., 438.
Sheffield Corporation v. Luxford [1929] 2 K.B. 180.

J. S. M. Parke for the appellant.

P. Rice for the respondent.

HYNE, C.J.—Clause 12 of the tenancy agreement gives the tenant the right to hold over in certain circumstances. The clause reads as follows:—

> "In the event of the tenancy being determined by notice to quit given by the landlord to the tenant, the tenant may hold over until the standing crops on the land have been harvested subject nevertheless to the payment of rent at the said rate for such period. Provided that this shall not apply to ratoon crops nor to crops planted after such notice to quit."

It has been admitted that the crops on the land at the time the action was brought were planted after the notice to quit. The respondent could not therefore hold over in respect of the crops.

It was conceded by the appellant's Counsel that the Magistrate's order giving possession in thirty days is proper and authorized by rr. 6 and 7 of Order 32 of the Magistrates' Courts Rules. He submitted further, however, that even if the Magistrate could stay execution, he could only do so in accordance with certain principles. A stay of execution is only granted, he submitted, on the application of a person seeking the stay, and then only for the preservation of property, pending an appeal.

Counsel referred to the case of *Polini v. Gray* (1879) 12 Ch. 438 at p. 443. This was a case in which an application for an injunction was made pending appeal.

At p. 443 *Jessel, M.R.*, said:—

> "The question before us is this: An action is brought to determine the rights of claimants to a fund. The plaintiffs fail in the Court of first instance and in the Court of second instance, but are about, bona fide, to prosecute an appeal to the Court of ultimate resort. The plaintiffs allege that that appeal will be nugatory if the fund is paid out to the defendants, and that if the plaintiffs should ultimately succeed in the House of Lords, that success will be useless to them unless an interim order is made for preserving the fund. I say they so contend, and, assuming that contention to be correct in fact, the question is whether this Court has jurisdiction to prevent such a consequence. It appears to me on principle that the Court ought to possess that jurisdiction because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success."

Learned Counsel argued that in the present case this principle has been ignored because it is the unsuccessful party—a trespasser—who benefited by the further order granting a stay of execution.

That the respondent is a trespasser is not denied by his Counsel. That he is a trespasser canot be disputed. His tenancy was lawfully terminated, he remained in possession against the will of the owner, and he was not protected by the "holding over" provision for the reason that the cane on the land was planted after the notice to quit.

Learned Counsel for the respondent contended that the order was a proper order and cited the case of the *Air Ministry v. Harris* [1951] 2 A.E.R. p. 862 at p. 863.

In this case the tenant occupied premises the property of the Air Ministry. He was given two months' notice to quit. He refused; and in an action in the County Court the learned Judge made the following Order:—

> "Order for possession in one month: no warrant to issue without leave of the registrar."

Application for a warrant was made after six months, when it was refused on the ground that the tenant had nowhere to go.

The Air Ministry appealed. *Somervell, L.J.* said this was not a case to which the Rent Restriction Acts applied.

Denning, L.J. agreeing with *Somervell, L.J.* that the appeal must be allowed and the stay removed, said:—

> "The order for possession was in a form which is quite proper: 'Order for possession in one month: no warrant to issue without leave of the registrar.' On such an order the party has to go to the Court to ask for leave before a warrant can be issued, but I do not think that the proviso should be used so as to give an indefinite extension of time. Any additional extension should be only of very limited duration. In the present case it has gone beyond all bounds."

The respondent's Counsel contended that the order made by the County Court Judge was identical in terms with that made by the learned Magistrate.

While I cannot altogether agree, there is at any rate this which the orders have in common, namely that although a date for execution has been given, a further stay was in effect granted.

Learned Counsel has agreed too that County Court procedure applies where the Magistrates' Courts Rules are silent, and that, since no provision for recovery of possession is found in the Magistrates' Courts Rules, recourse must be had to County Court law and practice.

As Counsel for the appellant pointed out, however, it would seem that the County Court, in the case of the *Air Ministry v. Harris,* was under the impression that the Rent Restriction Acts applied. They did not apply nor does the Fair Rents Ordinance apply to the present case.

In a note to section 48 of the County Courts Act, 1934, on p. 61 of the *County Court Practice,* 1952, the learned editors state:—

> "Once a date, however, has been fixed for execution it is doubtful whether there is power to grant a further stay. Order 24, r. 22 and Order 25, r. 8, would appear to apply only to money claims. No doubt the effect of a stay would be obtained by directions under Order 13, r. 3 (1), that the warrant should 'lie in the office' or 'not be executed' before a certain future date. Though in a proper case the Judge might order that a warrant should not issue without leave this could not be done to extend the time of possession unreasonably: *Air Ministry v. Harris* [1951] 2 A.E.R. 862."

The question as to whether there is in such cases, that is to say where a date has been fixed, jurisdiction to make a further order is therefore not free from doubt.

As to the second ground of appeal, if the Magistrate had discretion to make such an order, was the discretion rightly used? Counsel for the respondent submitted it was, and cited *Sheffield Corporation v. Luxford* [1929] 2 K.B. at p. 180.

In this case the County Court Judge in the one instance refused to make an order and in the other made an order for possession, but postponed its operation for twelve months.

On appeal it was held that this was not a judicial exercise of discretion in either case.

Counsel pointed out that the County Court did, under the County Courts Act, 1888, have power to defer possession, while admitting that no such express power exists under the County Courts Act, 1934. In *Jones v. Savery* [1951] 1 A.E.R. p. 821, *Somervell, L.J.*, referring to

Sheffield Corporation v. Luxford, said that at that time Parliament had clearly given the County Court a discretion in the matter. He then quoted *Talbot, J.* as saying:—

> "It is of course to some extent a question of degree, but I think the period must not be more than is reasonably adjusted to the circumstances of the case, including the nature of the tenancy, the term (in this case a weekly term) and the object which I think the legislature must be taken to have had in this enactment, that is to say, to relieve the judge of the necessity of making an order for possession to be given then and there without further warning to the tenant. I rather hesitate to name any time for giving possession, and we do not give judgment fixing any definite time: but I think that some such period as four or five weeks, in the absence of any altogether exceptional circumstances quite different from the facts here, would represent the outside limit of the postponement which under this power a judge would be justified in granting."

The learned Lord Justice then went on to say:—

> "I will assume that in cases of this kind a County Court Judge and a High Court Judge have a discretion similar to that indicated by Talbot, J. It would seem that this discretion can be no greater where there is no statutory provision than where there was an express statutory provision."

I do not think that these cases are in point so far as the present case before this Court is concerned.

In the cases cited notice to quit was given, and the tenants refused to give up possession. There was no question of holding over until the happening of a certain event, nor was there any question of a further order.

In the case before the Magistrate the tenant was entitled to hold over until he had harvested cane planted before the notice to quit. The cane in respect of which the Magistrate made the further order was not planted until at least nine months after the noice to quit was given and he was, it seems to me, precluded on this ground alone from making any such further order. The learned Magistrate seems to have assumed that the cane growing at the time of the order was cane which was planted before notice was given. This was not so. The tenant had obtained all the benefits to which he was entitled under Clause 12 of the agreement, and it seems to me, therefore, that the only discretion which the Magistrate could exercise was exercised by him when he made the first order, namely, the order for possession within thirty days. This discretion was properly exercised.

The learned Magistrate could not properly make the second order for the reason that the tenancy agreement and the provision to hold over had expired. There was therefore nothing further in respect of which he could exercise discretion, and the further order granting a stay of execution cannot be upheld.

Counsel has argued that the tenant is entitled to the fruits of his labour. At the time he planted the cane, however, he was a trespasser, and as such he cannot be entitled to cane planted on another's land.

This appeal is allowed.