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the Full Court, who held that the plaintiff did not come under the provisions of the *Public Service Act*, and that his services were not dispensed with by the Public Service Board, and they therefore set aside the verdict and entered judgment for the defendant: *Markham* v. *Williams* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

O'Reilly, for the appellant.

Loxton K.C. and *Pickburn*, for the respondent, were not called upon.

BARTON A.C.J. I think this appeal must be dismissed. There are two things for the plaintiff to establish in order to succeed in his claim under sec. 71 (*b*)—first, that he was permanently employed in the public service, and, secondly, that his services were dispensed with by the Public Service Board. It is perfectly obvious, and, indeed, it was almost admitted by Mr. *O'Reilly*, that the plaintiff's services were not dispensed with by the Public Service Board. Without going into the other matter it seems to me on that ground alone that the judgment of the Supreme Court was obviously right, and must be affirmed. Whether the plaintiff was permanently employed in the public service, which it is also necessary for him to establish, is a question we need not and do not decide. It is quite sufficient to say that his services were not dispensed with by the Public Service Board. Unless they were, he could not claim the gratuity provided for in the section referred to.

ISAACS J. I agree that the appeal should be dismissed. I think that the judgment of *Pring* J. is correct, and I would only add a reference to sec. 30 of the *Interpretation Act of* 1897.

GAVAN DUFFY J. I concur. I think the judgment of the Supreme Court was quite right.

(1) 13 S.R. (N.S.W.), 1.

RICH J. I also agree.

Appeal dismissed.

Solicitor, for the appellant, *John J. Carroll.*

Solicitor, for the respondent, *J. V. Tillett,* Crown Solicitor for New South Wales.

B. L.

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[HIGH COURT OF AUSTRALIA.]

TOOTH . . . . . APPELLANT;
PLAINTIFF,

AND

KITTO . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 10, 11, 12, 15.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Contract—Construction—Share-farming agreement—Provision for determination at end of any "harvesting season"—Meaning of "harvesting season."

The plaintiff agreed with the defendant for the term of 3 years 3 months and 12 days to sow with wheat certain portions of the defendant's land, and to reap the crop, clean the wheat fit for market, bag the wheat so cleaned, and cart it to a certain railway station and deliver it in the defendant's name as should be directed. The remuneration to be paid to the plaintiff was a sum of money equal to one-half the value of the wheat, fixed in accordance with the wheat market at the railway station on the day when the wheat should be sold. It was also provided that either party might terminate the agreement "at the end of any harvesting season by prompt notice in writing to the other party."

Held, that in this agreement "the end of any harvesting season" meant the end of the harvesting operations on this particular farm for any season within the term agreed.

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Decision of the Supreme Court of New South Wales: *Tooth* v. *Kitto*, 30 W.N. (N.S.W.), 86, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Harold Leo Tooth against Richard C. Kitto seeking by the first count to recover damages for breach of a certain contract, and by a second count to recover damages for conversion of certain hay. The contract in question was contained in a memorandum of agreement which was as follows:—

"Memorandum of agreement made this 19th November 1910 between R. C. Kitto of the South Yalgogrin Estate, New South Wales, hereinafter designated 'the proprietor,' of the one part, and Harold L. Tooth of South Yalgogrin (farmer), hereinafter designated 'the cultivator,' of the other part. Whereas the cultivator has agreed to work, farm and cultivate for the proprietor certain lands as agreed upon for three years three months and twelve days as and from 19th November 1910, at and for the hire and reward and upon the terms and in the manner hereinafter expressed. Now it is mutually agreed by and between the said parties hereto in manner following, that is to say, the cultivator shall properly cultivate and sow with wheat and manure which shall be supplied by the proprietor not less than 300 acres each year for the term of this agreement of the lands of the above described estate, and shall reap the crop grown upon the said land, clean the same fit for market, bag the wheat so cleaned and cart the same to the railway station and deliver it in the name of the proprietor as shall be directed by him or his agent. The cultivator shall provide himself with all stock and implements and other strength necessary for the carrying out of this agreement. It is further agreed that at each harvesting season the said proprietor shall supply the cultivator with half the bags and twine necessary for the carrying out of this agreement. That in the event of any addition being made to the area of the land of the said cultivator every such addition shall be deemed to be one farm with the original for all purposes of this agreement excepting only in the respective periods of currency. In case the proprietor shall make any *bonâ fide* advance of money

or goods to the said cultivator or any moneys become due by the said cultivator to the said proprietor for agistment of stock or otherwise the said proprietor shall have all the rights and privileges given to a lienee over the crops of the said cultivator as if a lien on the crops had been duly made and registered under the *Lien on Crops Act* 1862 with reference to entering into possession cutting carrying away and selling the crops and applying the proceeds as in the said Act as mentioned. That the cultivator will pay to the proprietor on all such advances interest at the rate £7 per centum per annum payable half-yearly, viz., on 1st March and on 1st September each and every year during the term of this agreement. The proprietor agrees to pay to the cultivator as remuneration as aforesaid such a sum of money as shall be equal to one-half of the market value of the wheat grown upon the said lands under this agreement, such value to be ascertained and fixed in accordance with the wheat market at the railway station where delivered on the day when the said wheat shall be sold. No smoking shall be permitted in the field during the harvest unless under authorized conditions and at specified times and the law relating to the 'careless use of fire' will be strictly enforced. That either party to this agreement may terminate the same at the end of any harvesting season by prompt notice in writing to the other party."

The nature of the defences and all the other material facts are stated in the judgment of *Barton* A.C.J. hereunder.

The action was tried before *Street* J. and a jury, who found a verdict for the plaintiff for £300 on the first count and for defendant for £214 7s. 9d. on the cross-action. On the motion of the defendant the Full Court set aside the verdict on the first count and ordered a new trial as to that count: *Tooth* v. *Kitto* (1).

From that decision the plaintiff now, by leave, appealed to the High Court.

J. Carlos (with him *John Hughes*), for the appellant.

Garland K.C. (with him *Norris*), for the respondent.

(1) 30 W.N. (N.S.W.), 86.

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Reference was made during argument to *Pierpoint* v. *Cartwright* (1); *Walsh* v. *Alexander* (2); *Dun* v. *Macintosh* (3).

Cur. adv. vult.

Dec. 15.

BARTON A.C.J. read the following judgment:—This is an action in which the plaintiff, now appellant, seeks damages for (1) breach of a "share-farming" contract by wrongfully discharging the appellant; (2) conversion of certain hay.

The claim under the second count failed at the trial, and the questions under appeal arise only on the first count. The agreement recited that the appellant had agreed to work, farm and cultivate for the respondent certain land "as agreed upon" for 3 years 3 months and 12 days as and from 19th November 1910. The first count of the declaration sets out that, in consideration that the plaintiff would do so, the defendant promised that during the term mentioned he would permit the plaintiff to work, farm and cultivate the said lands, and would pay to the plaintiff such a sum of money as would be equal to one-half of the market value of the wheat grown upon the said lands, such value to be ascertained and fixed in accordance with the wheat market at the railway station where the said wheat should be delivered on the date when the same was sold. The plaintiff accordingly entered upon, worked, farmed and cultivated the land in accordance with the terms of the agreement for a part of the term until breach. There is an averment of readiness and willingness to carry out the agreement, and of the fulfilment of all conditions, &c., and the breach alleged is that the defendant before the expiration of the term wrongfully discharged the plaintiff and refused to permit him to carry out the agreement on his part and prevented him from further working, farming and cultivating the land. Then the plaintiff claims his damages, as to which there is no question for this Court.

The fact of the discharge is not in dispute; the question of its wrongfulness is. The real answers to the first count are found in the third and fifth pleas. The third alleges that the respon-

(1) 5 C.P.D., 139.
(2) 16 C.L.R., 293, at p. 311.
(3) 3 C.L.R., 1134, at p. 1140.

dent terminated the agreement before breach by prompt notice in writing at the end of the harvesting season, as he was at liberty to do under its terms. The fifth plea is one of cross-action, under two heads: first, expenses incurred by the respondent in providing the appellant with stock, implements, &c., necessary for carrying out the contract, and with which the appellant had agreed, but had failed, to provide himself; secondly, advances of money and goods with interest, which the appellant had failed to repay in accordance with this contract.

The agreement, having regard to its term above mentioned, would end about 3rd March 1914. The appellant was to cultivate and sow with wheat not less than 300 acres each year, to reap the crop, clean and bag it, cart it to the railway station and deliver it in the name of the proprietor as should be directed. At each harvesting season the proprietor was to supply the cultivator with half the bags and twine necessary for carrying out the agreement. "In the event of any addition being made to the area of the land of the said cultivator every such addition" was to be "deemed one farm with the original for all purposes of this agreement excepting only in the respective periods of currency." The remuneration to the cultivator was to be half the market value of the wheat grown. No smoking was to be "permitted in the field during the harvest unless under authorized conditions and at specified times." The final provision, on which the third plea is founded, runs thus:—"That either party to this agreement may terminate the same at the end of any harvesting season by prompt notice in writing to the other party."

The respondent's estate, Yalgogrin, is about ten miles from the nearest place at which wheat had been cultivated previously to the farming of this land.

Work began under the agreement and went on until after the 1911-1912 crop had been got in. All work in relation to that crop except its despatch to the railway station, was over by 7th January 1912. On the 31st of that month the respondent gave the appellant notice in writing of that date that on the 29th February following the respondent would terminate the agreement for farming on shares, and required the appellant to hand

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over on or before the same date certain horses, implements, harness, &c., held by the appellant on hire under a separate agreement. On this appeal the Court is not concerned with the hiring agreement. It may be remarked in passing that the respondent in this notice refers to the clause in the share-farming agreement "which gives either party the power to terminate the agreement at the end of any harvest by giving prompt notice in writing to the other party."

The main question arises upon the words "the end of any harvesting season," in the concluding sentence of the share-farming agreement.

At the trial *Street* J. interpreted them as meaning the end of a harvesting season on the farm the subject of the agreement, and left it to the jury to say whether the notice given on the 31st January was "prompt." The real contest was whether the agreement, in speaking of the end of the harvesting season, intended its termination on this farm or "in the district." The respondent contended for the latter construction, and adduced evidence that the season in the district lasted till the end of January. That evidence failed to define or even to name any wheat district of which this farm was a part. The evidence for the appellant was that the harvesting operations on the farm ended in fact in the first week in January 1912—some witnesses said they ended on the 3rd, and the latest date mentioned by any witness was the 7th. There was also evidence for the appellant that the harvesting season in the neighbourhood ended usually about the end of December or the first week in January. The jury evidently concluded, in view of his Honor's reading of the disputed term in the contract, that the writing of 31st January 1912 was not "prompt notice," and they found on the first count for the appellant with damages £300. They gave the respondent a verdict on his plea of cross-action for £203 7s. 9d. with £11 for interest—in all £214 7s. 9d. As under the law of New South Wales the amount of the verdict on the plea of cross-action has to be set off against the amount of the verdict on the first count, the balance in the appellant's favour was £85 12s. 3d.

On appeal the Full Court held that it was the end of the harvesting season in the district that was in contemplation, and

that *Street* J. had misdirected the jury. They set aside the verdict for the appellant on the first count and directed a new trial on that count. They included in the reasons for their order a conclusion to which they came, that the learned Judge ought to have left but had not left to the jury the question whether the appellant should be allowed 6s. per acre for fallowing certain lands extraneous to the farm let to him, which question I will discuss presently.

In his view of the true interpretation of the contract I think, with great respect for the opinion of the Full Court, that *Street* J. was right. If he was, there was an interval of 24 days at least between the end of the harvesting season and the giving of notice, and it was in the circumstances quite open to the jury to take the view that the notice was not a prompt one.

The terms of the contract, when applied to its subject matter, do not appear to me to afford any holding-ground for the construction adopted by the Full Court. What do the words "at the end of the harvesting season" mean *primâ facie* in this contract? Does that time arrive as soon as the harvesting work of the farm for the season is over, that is, when the crop has been got in and secured? Does it arrive only when every farm has finished its harvesting work? And every farm for how far round? "In the district"—an expression which does not occur in the agreement—is the vaguest of terms when applied to it in the circumstances of its operation. How is the district definable? No guide exists in the terms of the contract. If we are to look at all the evidence, still there is no guide. "At each harvesting season the . . . proprietor shall supply the cultivator with half the bags and twine necessary for the carrying out of this agreement." On the respondent's construction the cultivator might have to wait for a long time after the completion of his reaping and cleaning for half the necessary bags, even if we are to calculate the period upon the average of the completion of the harvesting within an undefined number of miles around.

I think the end of the harvesting work on the farm—when the crop is all got in and secured—is the end of the harvesting season there, unless there is something in the agreement to show a different intention of the parties, and this has not been pointed

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out, nor can I find anything of the kind. The season is not made to extend till the produce is carted to the railway station by the fact that the appellant agreed to cart it there. The carting was a first step in the *disposal* of the crop, not a final step in its *production*. The prompt notice would give him time to seek another job, so as to have work to go to when the carting was completed. It may be noted that the respondent's manager did not regard carting to the railway as a harvesting operation, though he included in it carting on the field in the assembling of the crop. In my opinion, then, there was no misdirection on this point. The third plea has not been made out.

On the evidence as to the ending in fact of the harvesting season in the district, if the district means such of the surrounding farm lands as the witnesses on each side seemed to have in view, it was still open to the jury to find as they did. There is the evidence of three witnesses that in this sense the harvesting season was at an end twenty-four days at least before the respondent gave his notice of termination.

Then there is the question as to the fallowing, for which an item appears credited in the account of 27th May 1912. This transaction, as his Honor pointed out to the jury, had been recognized by the respondent as a matter independent of the agreement. The sum, therefore, was not claimable or claimed under the first count. That the respondent treated it as a separate matter is plain, for he had called for tenders for the doing of the work, for which he was prepared to pay 5s. or 6s. per acre. If it had been in any sense included in the agreement, he would certainly not have done this, since he would have been entitled to call on the appellant to do it without any extra payment.

In the respondent's account, on which the plea of cross-action was founded, the appellant was given credit as at 26th February 1912 for "310⅓ acres of fallow at 6s. per acre, £93 1s. 2d.," and this credit was quite without qualification. The learned Judge said that he saw no reason why, if the jury came to assess damages in favour of the appellant, the sum representing that work should be deducted from any sum they might think fit to award the appellant. I do not think that the question was taken

away from the jury by the mere expression of that opinion, for I think it was merely an opinion upon the bearing of the facts. The jury were quite at liberty to disregard it, and I do not think they could have mistaken it for a direction as to the law.

This sum standing to the credit of the appellant in the respondent's account, the latter cannot now have it, in effect, struck out of the credits. That would simply be to increase the claim and the verdict on the plea of cross-action, and we can hardly do that. The jury, by their finding of the amount payable by the appellant under that plea, decided that the latter was entitled to be allowed this sum; and seeing that in addition to the strong admission afforded by the credit there was explicit evidence that the appellant was instructed to do this work, I do not see that the verdict can be complained of in this regard, any more than I see that the consideration of this sum was taken away from the jury.

On the whole case I am of opinion that the direction and the verdict were right, and that the appeal should be allowed, and with costs.

ISAACS J. Practically two questions and two questions only were left for the final determination of this Court. The first is as to the meaning of the term "harvesting season," and the other is as to the alleged misdirection by the learned Judge with regard to the amount, £93 1s. 2d., that had been allowed by the respondent in his account in respect of the fallowing of 310 acres.

The meaning of the term "harvesting season" in this agreement must be determined according to a well known principle which cannot be better stated than in the words of *Abbott* C.J. in *The King* v. *Hall* (1), where he said that the meaning of words whether in Acts of Parliament or in other instruments "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, and the object that is intended to be attained." That was quoted with approval by the Privy Council in *The "Lion"* (2). Now, the subject and occasion upon which the expression was used here are, so far as is material, these. The

(1) 1 B. & C., 123, at p. 136.

(2) L.R. 2 P.C., 525, at p. 530.

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defendant was proprietor of an estate of about 4,000 acres called the South Yalgogrin Estate, which was practically all suitable for wheat growing. But up to 1910 practically no wheat had been grown within ten miles, and this contract was the first of its kind. There was, therefore, no local custom or usage or practice to be called in aid to modify the meaning of the words; and I agree that in their absence you must take the primary import of the words. But what is their primary import? In their primary import they do not connote any particular area nor do they connote a harvesting season in any particular district. The word "season" is qualified by the word "harvesting," which is defined by the defendant's own manager in these words:— "Harvesting a crop means stripping it, putting it into bags, sewing it, and sufficiently protecting it." So that "harvesting season" means the season for effecting these operations. But the question then arises, where? The subject as to which, and occasion upon which these words are used, will determine that question. They may be used with reference to a subject and upon an occasion which show that they signify the harvesting season throughout Australia, or throughout New South Wales, or throughout some portion of New South Wales, or throughout some particular district of New South Wales which would find its limitation in the subject and occasion to which it is referable. Here, if referable to a district at all, it might be the Yalgogrin district, or the South Yalgogrin district, or some district of which Yalgogrin or South Yalgogrin formed part. I do not know, and nobody can say. Or it may be this particular farm. There is nothing to show that the words were used in reference to anything but the farm. In other words, there is nothing to show that there was any subject in reference to which the words were used except the farm. If once the farm is exceeded, there is nothing to stay the application of the term when the limits of the district, whatever they may be, are reached. Why not, then, the whole State? Reading the agreement, the principal parts of which have been already read by my brother *Barton*, it appears to me that the words have reference to the mutual rights and responsibilities under the agreement. So construed, the words are, as *Street* J. said, fairly definite.

When the harvest is secured on that farm, the parties can form a reasonable impression of whether it will be to their advantage to go on further or to stop. The cultivator, on the one hand, may find that the work is too much for him, or that the ground is unsuitable, or that the price of wheat does not pay him, or for any other reason he may wish to discontinue, and not waste his labour or apply it to that particular piece of land. On the other hand, the owner may not be satisfied with the way in which the matter is progressing. He may wish to put his land to another use, or may wish to find another tenant. So, on the one side, the cultivator may not wish to continue his labour on the particular farm, and on the other side, the owner may not wish to entrust his capital, that is, the land, to that particular cultivator. That is the general intent and object of the provision, and that general intent and object is not likely to be served, but is likely to be defeated to some extent at all events, if either party had to wait upon what other people within an undefined area are doing. Seeing also that, according to the agreement, prompt notice had to be given, it is almost impossible to apply it to so undefined a moment as the completion by other people, within an undefined area, of their operations which may be conducted with more or less promptitude. That being the general intent and object, we may fairly call in aid the words of *Parke* B. in *Ford* v. *Beech* (1):—"It is a well approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction."

Upon these considerations I am of opinion that the plaintiff's view of the meaning of the words "harvesting season" in this agreement is the correct one.

Then, with regard to the second question, in my opinion there is no foundation for the alleged misdirection. In reading the Judge's charge, it is clear to my mind that he did not direct the jury. He gave the jury his opinion on the question, but he left the question to the jury for their ultimate determination. That is not misdirection. It related to a matter of fact, and was not objected to by counsel, and if counsel does not call attention to

(1) 11 Q.B., 852, at p. 868.

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an alleged error in fact on the part of the Judge, into which any one might fall, it is a very difficult thing, indeed, to take exception to it after the jury have given their verdict. There is also another consideration. The sum in question, £93 1s. 2d., was a sum in dispute as to which the onus of proving the right lay upon the defendant, as part of his affirmative case upon his set-off. When found, it would be deductible from the damages on the plaintiff's case, but up to the moment of finding it the onus lay on the defendant to establish it. Looking carefully at the evidence, I do not see any statement there which could be regarded as evidence fit to be submitted to a jury to overcome the ordinary presumption of law that work done by one person for another at the request of that other is to be paid for. Therefore, if it came to that particular point, I should still be in favour of the plaintiff. There are the other considerations I have mentioned, and, looking at the case on the whole, I agree that the appeal should be allowed.

GAVAN DUFFY J. I also think that the appeal should be allowed.

POWERS J. concurred.

RICH J. I agree that the construction placed upon the contract by *Street* J. is the correct construction.

It is a canon of construction that where a phrase recurs in any instrument the same meaning should be given to it unless the contrary intention appears. It is clear from the context that where the phrase "harvesting season" first occurs in the agreement in question, it means harvesting season on the farm the subject of the agreement. There is nothing in the agreement to show that any different meaning should be given to the expression where it appears at the end of the agreement. It is significant that this meaning was given to the contract by the letter of the respondent's agent dated 31st January 1912.

With regard to the item of £93 1s. 2d. for fallowing, for which the respondent gave the appellant credit in the statement of account dated 27th May 1912, I also agree that the onus of