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October 11.

SILVA *et al. v.* DASSANAYAKE.

D. C., Kalutara, 1,757.

Landlord and tenant—Non-payment of rent on due date—Right of landlord to re-enter—Right of tenant to restoration of possession—Trial of case without oral evidence—Decision on pleadings.

BONSER, C.J.—According to the Roman-Dutch Law it is not contrary to public policy for A to contract with B that, if A does not pay rent to B duly for possession of his house, the lease should be determined.

But for non-payment of rent the lessor has no right to re-enter without an order of Court. If the lessor re-enters, the lessee is entitled to be restored to possession and to recover damages for unlawful dispossession.

WITHERS, J.—If a tenant desires to keep his premises, he must observe his obligations. If he fails to pay rent as and when he bargained to do so, and has consented to let the landlord resume possession, he cannot ask the Court to prevent the landlord from holding possession.

When a landlord comes to court to exact the payment of rent with interest and to demand the expulsion of the tenant as well, in terms of a stipulation to that effect in the contract, I am not sure that he would have a decree of re-entry as a matter of course.

When the pleadings cover all the points in dispute, there is no harm in leaving the case for the Court's decision on the pleadings.

THE defendant, being owner of a garden, leased it to the plaintiff by an instrument dated August 27, 1895, for a period of eight years and six months for the sum of Rs. 1,520, on the footing that no rent was to be charged for the first six months in consideration of plaintiff improving the first plantation; that the rent for the first four years out of the remaining eight years was to be at the rate of Rs. 180 for a year, and the other four years at the rate of Rs. 200 for a year. The plaintiff paid the first year's rent on the execution of the lease, and it was stipulated that the second year's rent should be paid on the 26th November, 1896, and the rent for the succeeding six years before the 26th day of November of each year.

The plaintiff failed to pay the second year's rent due on the 26th November, 1896, and on the 20th December, 1896, the defendant resumed possession of the garden.

On the 13th February the plaintiff commenced this action claiming to be reinstated in possession of the garden, and he brought into Court the rent due on the 26th November, 1896, with legal interest up to the date of the action, and he claimed Rs. 500 damages for wrongful dispossession.

He alleged that the non-payment of the rent due on the 26th November, 1896, was due to a misunderstanding of the terms of the lease.

On the 20th February, 1897, the defendant in this suit instituted a cross action in the same Court, claiming to have the lease cancelled on the ground of the non-payment of the rent due on the 26th November, 1896.

By consent the two actions were tried together. No evidence was called on either side, but the case was decided on the pleadings and the admissions of counsel.

The District Judge found (1) that the lessor was not entitled to cancellation of the lease; (2) that his re-entry on the land without lawful authority was unlawful; (3) that the respondents failed to fulfil the lease agreement in so far that they did not pay the rent on the day specified: (4) that in consequence of such failure they could claim no benefit under the lease until payment or proved tender of the amount, and that neither party is entitled to damages up to the institution of the action; (5) that the lessor had no ground for refusing to accept the rent when tendered, and has therefore remained in wrongful possession. The District Judge ordered that the lessee be restored to possession, and that the lessor pay damages at the rate of Rs. 25 a month from the date of the commencement of his action until restoration to possession, together with the costs of both suits, and that the money paid into Court be paid unto him.

The lessor appealed against this judgment.

Dornhorst, for appellant.

Wendt, for respondents.

11th October, 1898. BONSER, C.J. (after stating the facts of the case):—

There is no doubt that the appellant was wrong in taking the law into his own hands and re-entering without an order of Court, and the District Judge was quite right in so deciding. The respondents were entitled to be restored to possession and to recover damages for unlawful dispossession. But the question arises whether the appellant was not entitled to succeed in his cross action. Is there any reason why the Court should not enforce the express agreement of the parties that, if the rent was not punctually paid, the lessor should be entitled to benefit? The doctrine of the English Court of Chancery was that the object of such an agreement was only to secure to the landlord the

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payment of his rent, and the principle of the Court is—whether right or wrong is not the question—that if the landlord has his rent paid to him at any time it is as beneficial to him as if it were paid on the prescribed day (*Bowser v. Colby, 1 Hare, 130*).

The origin of this doctrine is not quite clear, but Lord Eldon, who strongly disapproved of it, styling it a principle utterly without foundation and unjust in its operation in most cases, found it too strongly established to be shaken (*Hill v. Barclay, 18 Ves., pp. 58, 61*). The Legislature, however, interferred to confine this doctrine within more reasonable limits, and by *4 Geo. 2, c. 28*, provided that the tenant should be barred of all relief unless he filed his bill within six months after execution of the judgment of ejectment. Before that statute he might at any indefinite time after he was ejected have filed his bill and been relieved against the effect of mere non-payment of rent.

Did the doctrine of the English Court of Chancery prevail in the Roman-Dutch Law? My brother WITHERS in *Sanford v. Don Peter* (*2 S. C. R. 35*) stated that he was unable to find any authority for the proposition. There is no doubt that the old English Chancery Judges went further than would at the present day be deemed consistent with sound public policy in interpreting agreements, not by the intention of the parties as expressed in the documents, but in accordance with their views of what was right and proper.

Van Leeuwen states the law thus: "The lease expires if, the "lease being made for some years on condition that the rent should "be paid on fixed periods without any delay, the tenant be negligent "in satisfying the same in due time" (*Van L. Cens. For., bk. IV., chapter 21, section 7*). From this it is clear that an agreement by a lessee that, if the rent were not paid punctually, the lease should be determined, was not considered by the Roman-Dutch Law as being contrary to public policy. Of course there may be circumstances of fraud, accident, or mistake which would render it inequitable that such an agreement should be enforced; and this is all that in my opinion was intended to be laid down by this Court in the case to which I have referred. I do not understand that the Court intended to hold that the unrestricted doctrine of the old English Court of Chancery was in force in this Island. In the present case I can find no circumstances, either alleged or proved, which would render it inequitable that the parties should be kept to their bargain.

In my opinion the appellant was entitled to judgment in this action. As regards the respondents' action, the proper order will be that it be dismissed without costs.

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I agree with the decision of the CHIEF JUSTICE. The parties have chosen to let the case be decided on the pleadings, and on the pleadings I think that the lessor is entitled to succeed.

When the pleadings cover all the points in dispute, there is no harm in leaving the case for the Court's decision.

But it is rarely safe in this country to adopt that course, for it happens far oftener than not that the pleadings do not exhaust all the points in dispute, and an examination of the parties is nearly always necessary to asceratin exactly what the facts are and what the contentions on both sides are. In this case I should have liked to ask the lessees what good cause they had to show why they should not surrender the premises which they had bargained to do in case they failed to pay the rent punctually.

The modern doctrine seems to be that parties to contracts should be bound by their bargains. It has a business-like ring, and the rule is a good working one, but I am not certain that it should be an inflexible rule. If the circumstances under which a contract is made remained constant, then it would be all very well, but a state of things may emerge in which it would be unconscionable to demand the ground leased. As to what our law on the point is, I have little more to say than what I did in the case of *Sanford v. Don Peter*. I am as little sure about it as I was then, and until the matter has been much more fully discussed I decline to commit myself to any positive opinion.

For the lessor a solitary passage of Van Leeuwen was relied on. In book IV. of the *Censura Forensis* (*chapter 22, tit. 3*) the author states this proposition of law as to letting and hiring: *Si "is qui ad quinquennium aut complures annos, ut plurimum in "prædiis rusticis fieri folet, prædium ea lege locavit, ut singulis "annis solvatur merces constituta, adersus conductorem, ut con- "ductionis jure cadat, et ædibus expellatur, actionem habet.*"

If this author means that in all circumstances the landlord would be entitled to have his leased buildings restored to him, I question if the authorities to whom he refers completely bear him out. The attitude of the Roman lawyer in dealing with a case of this kind would, I imagine, be somewhat like this: If a tenant wants to keep his premises, he must observe his obligations. If he fails to pay his rent as and when he has bargained to do, and he has expressly consented to let the landlord resume possession in the event of his failing to pay rent according to his stipulations, he cannot ask the Court to prevent the landlord from resuming possession of his premises if he, the tenant, does so fail to pay the rent (see *Dig. XIX., tit. 2, 54, section 1*). Justinian (in his *Institutes*,

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L. 3. T. 24, De Locatione et Conductione, 5) says, "*Conductor* "*omnia secundum legem conductionis facere debet et, si quid in lege* "*prætermissum fuerit, id ex bono et æquo debet præstare;*" but when a landlord comes to Court to exact the payment of rent with interest (*mora*) and to demand the expulsion of the tenant as well, in accordance with a stipulation to that effect in the contract of lease, I am not sure that he would have decree for re-entry as a matter of course.

I am inclined to think that the Roman-Dutch lawyers would govern themselves by the principles observed in cases of penal stipulations in contracts. Those principles are stated by Voet in his book on the Pandects (*L. 45, tit. 1, l. 13*) :—"*Denique moribus* "*hodiernis volunt, ingente poenâ conventioni apposita, non totam* "*poenam adjudicandam esse, sed magis arbitrio judicis eam ita* "*oportere mitigari, ut ad id prope reducatur ac restringatur* "*quanti probabiliter actoris interesse potest.*"

I prefer to think for the moment that each case should be decided on its own peculiar circumstances, it being clearly understood that very good cause must be shown by the party who desires to escape from the terms of his contract why those terms should not be strictly observed.