1907.
July 8.

Present: Mr. Justice Wood Renton.

PERERA *v.* PERERA *et al.*

C. R., Pasyala, 3,292.

Lease — Clause of forfeiture — Enforcement — Relief — English Law — Roman-Dutch Law.

A clause of forfeiture in a lease for non-payment of rent is only intended as security for the due payment of the rent; and both under the English Law and under the Roman-Dutch Law a lessee is entitled to relief against such forfeiture, even where the lessor has regained peaceable possession without the assistance of any Court of Law.

A clause of forfeiture cannot be enforced, except by appropriate judicial proceedings, in the course of which it would be competent for the lessee to set up, as against his lessor or any one claiming under him, all equitable rights to compensation.

APPEAL from a judgment of the Commissioner of Requests (Peter de Saram, Esq.).

The facts and arguments are fully stated in the judgment.

Bawa, for the plaintiff, appellant

Van Langenberg, for the defendants, respondents.

Cur. adv. vult.

8th July, 1907. WOOD RENTON J.—

In my opinion, this appeal must fail. The plaintiff-appellant sued the defendant-respondents to recover the sum of Rs. 70, being the value of the ground share of a crop of paddy removed by them from a land called Pillewa in the village of Bataliya. The owner of this land, Paul Abraham Appuhamy, had leased it to the first respondent for five years from 18th April, 1902; and the second, third, and fourth respondents were cultivators under the first. The lease contained a clause of forfeiture in default of payment by the lessee of any of the yearly instalments by which the rent was made payable, and the lessor expressly reserved to himself the power of "releasing the lease after amicably settling the amount due to the lessee," if he desired to sell the land. By deed of 2nd December, 1905, Appuhamy sold the land to the appellant, free from incumbrances, and without any reference to the first respondent's lease. At the date of this sale the first respondent

was in arrear with the payment of his rent, but he alleges that Appuhamy, on his side, was indebted to him for the value of improvements. In view of the course that the case has taken, it is unnecessary for me to go into the state of accounts between the parties. On 4th December, 1905, Appuhamy wrote to the first respondent intimating to him that he had sold the land " and the remaining term of the lease " to the appellant, and requesting him to pay the rent to the appellant thenceforward. On the following day the appellant, through his proctor, wrote both to the first respondent informing him of the sale and requiring him to pay the rent for the then current month and to deliver up the premises on the 31st December, and also to the second, third, and fourth respondents demanding, by right of his purchase, the ground share of the existing paddy crop. The first respondent, by proctor's letter dated 24th January, 1905, agreed to deliver up possession on satisfactory proof of the appellants title and to pay rent to the appellant up to the date of such delivery. The appellant has obtained possession of the land. The paddy crop has, however, been reaped by the respondents. The appellant admits the claim of the second, third, and fourth respondents to the cultivators' share, and he sues only for the ground share, which has been assessed by the Police Vidane of Bataliya and three minor headmen at Rs. 70. The Commissioner of Requests has dismissed the appellant's action substantially on the ground that the first respondent's lease was still in force at the date of the sale, and that therefore the appellant had no right to the ground share of the crop, which appears from the evidence to have been sown about the Sinhalese New Year, 1905, and to have been nearly ripe in the following December. In effect I think that this decision is sound, although I propose to state my own view of the law and the facts in somewhat different terms.

By his deed of sale the appellant acquired the rights of his vendor and nothing more. On 2nd December, 1905, the rent due by the first respondent was in arrear. It was, therefore, open to Appuhamy at that date, if he had thought proper, to have taken proceedings against the respondent, in virtue of the forfeiture clause, for the cancellation of the lease. It was open to him also to sell the land demised. But under the lease he had no power, as between himself and the first respondent, to execute any deed of sale which had the effect of cancelling the lease, unless and until the amount, if any, due by him to the lessee had been settled. If it could be settled amicably, good and well. There is no law to prevent a lessee from surrendering his lease. If not, it would have to be settled judicially in an action for cancellation. Appuhamy availed himself of neither of the courses which I have indicated. He took no proceedings under the forfeiture clause. He made no proposal for a settlement of accounts. On the contrary, in his leter of 5th December, 1905, he tells the first respondent that he has sold the land and the residue

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of the lease, and calls upon him to attorn to the appellant. It follows that at the date of the sale the first respondent was entitled as against Appuhamy to the ground share of the growing crop, and that the appellant can stand in no better position than his vendor. It is true that the first respondent must be taken to have, by his letter of 24th January, 1906, attorned tenant to the appellant until the delivery up of possession of the subject of the lease. But attornment affects the landlord as well as the tenant. It involves, so long as the relationship lasts, an acceptance by the former of the rights of the latter under the lease: and in the present case one of those rights, as I have shown, was the right to the ground share of the paddy crop now in dispute. An attempt was made at the trial to prove that the appellant had been in possession of the crop, by his watchers, since the beginning of January, 1906. The learned Commissioner of Requests did not accept the evidence adduced by the appellant on this point, and I see no indication on the face of the record of any intention on the part of the first respondent, while surrendering the residue of his term, to abandon his rights as an outgoing tenant The appellant, if so advised, may sue the first respondent for the recovery of any rent due to his vendor, and in such an action the question of compensation for improvements can be considered. But it is the clear right of the first respondent, and even more clearly the right of the other respondents, who are sued merely for the part that they played in reaping the crop, to have this action dismissed, and I dismiss accordingly, with all costs here and below.

I desire to add that, in my opinion, such a condition in a lease as existed in the present case could not be carried out—otherwise than by consent—except by appropriate judicial proceedings, in the course of which it would be competent for the lessee to set up, as against his lessor or any one claiming under him, all equitable rights to compensation. I think that this view is supported both by English and by Roman-Dutch Law, and as the question was argued before me in the present case, and has frequently been touched upon in other cases, I propose to deal with it here. The Court of Equity in England was from an early period accustomed to grant relief against the payment of the whole penalty on money bonds; and the Statutes 4 and 5 Ann. c. 16, ss. 12 and 13, and 8 and 9 Will. III. c. 11 conferred a similar jurisdiction on the Courts of Law. In the course of time this equitable jurisdiction was extended to forfeiture clauses in leases for non-payment of rent. This extension proceeded on the theory that the forfeiture clause—like the penalty in the bond—was only a security for the recovery of money. The Statue 4 Geo. 2 c. 28 recognized this jurisdiction, but limited (section 3) the time within which the lessee in default might claim relief. An attempt was at one time made to extend the jurisdiction in equity to relieve against forfeiture for non-payment of rent to breaches of other conditions in leases, *e.g.*, covenants to insure. But this was

effectually checked by the decision of Lord Eldon in *Hill v. Barclay*[1] and cf. *Bowser v. Colby*[2] *and Barrow v. Isaacs & Son*,[3] Later on the Legislature interposed, and first the Court of Equity (22 and 23 Vict. c. 35, ss. 4—9) and afterwards Courts of Law (23 and 24 Vict. c. 126) were enabled to grant relief against breaches of covenants to insure if (*a*) no damage had resulted from the default, (*b*) the default was due to accident or mistake, or in any event not to gross negligence on the part of the lessee, and (*c*) there was an adequate insurance on foot at the time of the application to the Court. The Conveyancing Acts, 1881 and 1892, have completed the work of the Legislature in developing this branch of the law, the former requiring (s. 14) a lessor before re-entry for breach of condition (other than non-payment of rent) to notify the breach to the lessee and call upon him to remedy it ; the latter conferring (s. 4) on sub-lessees an independent right to relief (*Gray v. Bonsall*[4]) for breach of any of the conditions in the head lease. Non-payment of rent is still dealt with by the Court in the exercise of its old equitable jurisdiction, and relief has been granted to a lessee even where—as in the case before me in the present appeal—the lessor had regained peaceable possession without the assistance of any Court of Law. From the foregoing survey it will be seen that in England both the Courts and the Legislature have long been working steadily together (the Legislature stepping in where the arm of equity or of law was shortened) to prevent the forfeiture of leases for breach of condition.

The same spirit is to be found in Roman-Dutch Law. Voet (19, 2, 18) expressly declares that the tenants of rural and urban tenements are not to be ejected without judicial authority, and that the question of ejectment or damage is one that should be left entirely to the discretion of a careful and circumspect Judge. The necessity for judicial authority for the cancellation of a lease results from the decision in *Silva v. Dasanayaka* ;[5] relief against forfeiture even for a careless omission to perform a covenant has been granted (*Perera v. Thalif*;[6] and cf. *Amarasinghe v. Segoe*;[7] *D. C., Kurunegala*, 3,704 ;[8] *Siribohamy v. Rattranhamy* ;[9] while the rights of lessees to compensation for improvements have been affirmed in a series of decisions, of which the latest is *Mudianse v. Sellandyar*,[10] a case in which the right was upheld even against third parties.

Appeal dismissed.

[1] (1811) 18 *Ves.* 56.
[2] (1841) 1 *Hare* 109.
[3] (1891) 1 *Q. B.* 417.
[4] (1904) 1 *K. B.* 601.
[5] (1898) 3 *N. L. R.* 248.
[6] (1904) 8 *N. L. R.* 118.
[7] (1902) 2 *Browne* 397.
[8] *Ram.* (1877) 254.
[9] (1891) 1 *C. L. R.* 36.
[10] (1907) 10 *N. L. R.* 209.