1931 *Present :* **Drieberg J.**

SANGARAPILLAI *v.* BERRY.

134—C. R. Colombo, 70,599

Landlord and tenant—Notice by tenant—Tenant overholding wilfully—Damages.

Where a tenant gave his landlord notice of his intention to quit at the end of a month and in consequence of his overholding for a day the landlord was unable to give possession to a new tenant,—

Held, that the landlord was entitled to recover a month's rent as damages from the tenant.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

Navaratnam, for the plaintiff, appellant.

December 15, 1931. DRIEBERG J.—

The respondent, who was the tenant of a bungalow belonging to the appellant, gave notice that he would leave at the end of March. He failed to do so and the appellant sued him for damages.

The respondent was not present at the trial and the learned Commissioner has accepted the evidence of the appellant which is that in February he received notice from the respondent that he would leave at the end of March. The respondent paid Rs. 160 rent. In anticipation of his leaving the appellant secured another tenant, Naidu, to whom he agreed to give the house from April 1, on the same rental. Naidu asked the appellant for the keys at 9 A.M. on April 1 and the appellant says he went at 9 A.M. to the respondent and asked him for the keys. The respondent said he would not return them until that night and he gave them to the appellant at 8.30 P.M. As he could not get the keys until that evening Naidu said he would not take the house, which remained without a tenant during April. The appellant claimed as damages Rs. 160, the rent he lost by the respondent's default.

The learned Commissioner gave the appellant Rs. 5.33 as damages, basing it on a day's rental. His reason was that a case like this did not call for exemplary damages and further, that when there is a change of tenancy the old and the new tenants usually arrange between themselves the taking over of the house. He held that Naidu had no right to be scared away by the respondent overholding the keys for a day and that this is an ordinary and trifling circumstance incidental to a change of residence. There was no evidence led for the respondent, and Naidu had left the Island before trial. It appears to me that the learned Commissioner has not given full legal effect to his finding on the facts. If it was not true that Naidu gave up the tenancy because he could not

get possession at a reasonable hour on April 1 then the appellant did not suffer damages to the extent of a month's rent. If this is true and if the appellant did lose rent for April, is there any reason why the appellant should not be entitled to recover that amount from the respondent ?

The learned Commissioner referred to a judgment of his in which he says he dealt with this point. I have sent for and examined the record in that case, C. R. Colombo No. 63,508. There was in that case a tenancy at Rs. 23 a month and the landlord gave the tenant notice to quit on March 31 and that if he did not he would have to pay a rental of Rs. 50 a month. The tenant left on April 2. There was no evidence that the landlord had secured a new tenant for April. The Commissioner quite rightly refused to give the landlord judgment for Rs. 50 and entered judgment for two days' rent on the Rs. 23 basis. Rs. 50 in such a case would have been "exemplary damages" and not the actual damages sustained by the landlord.

Where a tenant holds over after a notice to quit or pay increased rent the question arises in the first instance whether by so doing he assents to a new tenancy on the new terms, and if it is held that he did he will be liable for the enhanced rent. If it is held that a new tenancy was not created then he is liable for use and occupation and the increased rent may afford fair material on which to determine what that is worth (*Jacobs v. Peter* [1]).

But we have here a case where there is evidence of the actual loss sustained by the landlord, and that loss is the direct and natural consequence of the respondent's default, and a default which according to the evidence was wilful.

The case of *Metz v. Simmonds*[2] noted on page 361 of Vol. 7 of the *South African Digest* (1915-16) is an authority in point, for there the landlord as a result of the tenant overholding was obliged to cancel a lease which he had granted another. The landlord was allowed to recover as damages the loss of rent he would have recovered under the lease and expenses incurred in the preparation of it. Further authority for this is afforded by the cases cited on pages 434 and 435 of *Wille on Landlord and Tenant in South Africa.* The principle is the same in the case of a fresh monthly tenancy which the landlord has lost by the tenant overholding. I think the learned Commissioner would have acted on these authorities which he referred to, except for the reason that, in his opinion, the delay of a day was an ordinary incident in a change of tenants. It is no doubt customary for the outgoing and ingoing tenants to arrange between themselves their movements, but if they cannot agree I do not see how the landlord can be prejudiced. It was possible for the respondent to have inquired from the appellant whether he had let the house from April 1 and to have got permission to stay on for a day and if he was told that the house had been let to come to an arrangement with Naidu. He did not do this but sought to give the appellant all the trouble he could in the exercise of what he no doubt conceived to be his legal right. He would not allow the appellant

[1] (1883) *Wendt's Reports 307.*

[2] (1915) *C. P. D. 34.*

to put up a notice that the house was to let and when asked for the keys on the morning of April 1 merely said that he would not give them up until that night.

I set aside the judgment appealed from. Judgment will be entered for the appellant as claimed, and the respondent will pay the appellant the cost of this appeal.

Appeal allowed.