1935 *Present :* **Poyser and Koch JJ. and Soertsz A.J.**

PERERA *v.* SILVA.

72—D. C. Colombo, 53,070.

Landlord and tenant—Lien over tenant's property—Enforcement of lien—Judicial process—Damages for wrongful detention.

A landlord's lien over the movable property in the possession of his tenant may be enforced only through judicial process.

A landlord who detained such property without judicial process is liable in damages.

CASE referred by Akbar and Koch JJ. to a Bench of three Judges.

This was an action by a landlord against his tenant for balance of rent due. The defendant denied that any sum was due for rent, and counter-claimed for damages in respect of the alleged wrongful detention of his motor car. The District Judge found that a sum of Rs. 240 was due to the plaintiff for rent. The question referred was whether plaintiff was entitled, in view of the fact that rent was due to him, to detain the defendant's car.

H. V. Perera **(with him *Kurukulasuriya, Aluwihare,* and *Mackenzie Pereira*), for defendant, appellant.—The landlord had no right to retain the car without first obtaining an order from Court. The landlord's lien over the goods of his tenant for arrears of rent is only a legal hypothec. Immediately rent becomes due, there is a right of hypothec. This hypothec will extend even after goods have left the premises, so long as they are with the tenant.**

A landlord has not actual possession of the personal belongings of a tenant; can it be said that he is in legal possession of such belongings? Voet is careful to say (*Voet, XX. 2, 3*) that the tacit pledge is of no force and avail (*i.e.*, not operative) until a certain thing takes place (viz., sequestration). This sequestration must be by public authority or judicial process—see *Ramanathan's Reports (1877), p. 63.* Till such sequestration takes place, this tacit pledge remains a right of preference only.

Voet's view is supported by other Roman-Dutch law authorities—vide *Maasdorp, vol. II., p. 285 (5th ed.); Van der Keessel (Lorensz' Trans.), p. 150; Wille on Landlord and Tenant (1910 ed.), p. 357; Nathan, vol. II. (2nd ed.), p. 1066.*

See *Voet (bk. XX. 1, 1)* for definition of *pignus* and *hypothec.* The word "pledge" is used to include both a pledge properly so-called (a pawn) and also a hypothec.

E. F. N. Gratiaen **(with him *H. N. G. Fernando*), for plaintiff, respondent.—It has always been believed that the landlord had a right to distrain on the property of his tenant for rent due. See *Meera Lebbe Marikar v. Bell*[1]—*per* Burnside C.J.**

The landlord's lien is based on an unqualified agreement between the parties that if, at any time, rent is in arrears, the tenant agrees that his

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[1] *2 C. L. Rep. at p. 94.*

property shall remain as security. It is greater than a purely hypothecary right. The landlord has a *jus retentionis*. There is a fictitious delivery of goods to the landlord himself, a tacit pledge (*pignus tacitus*).

In *The Anglo-Oriental Furnishing Company v. Samarasinha*[1], Grenier J. states that a landlord has a right to retain property of the tenant, where the latter has quitted, leaving arrears of rent unpaid.

Once goods have been removed, as against third parties who have obtained certain rights, the landlord cannot claim a preferential right without sequestration. The necessity of sequestration arose only when third parties' rights came into conflict with the landlord's legal hypothec; but between a landlord and a tenant, the hypothec is effectual for purposes of detention without any sequestration. See *Webster v. Ellison*[2].

Counsel also cited *Marikar v. Mohamed*[3] and *Pieris v. Sinnamuttu*[4].

H. V. Perera, in reply.—*Meera Lebbe Marikar v. Bell* (*supra*) cannot be followed in these circumstances. Our Common law is the Roman-Dutch law—see *per* Macdonell C.J. in *Sultan v. Peiris*[5]. This question has to be decided by Roman-Dutch law rules.

Cur. adv. vult.

September 13, 1935. POYSER J.—

This was an action by a landlord against his tenant for balance of rent alleged to be due. The defendant denied that any sum was due for rent and counter-claimed for damages in respect of the alleged wrongful detention of his motor car.

The material facts in the case are as follows:—In 1931 the plaintiff leased to the defendant certain premises known as "Palm Lodge". On May 4, 1933, the defendant vacated the premises without notice, at such time some rent was due to the plaintiff and the latter, in view of that fact, detained a motor car of the defendant which had been left on the premises.

The District Judge found that a sum of Rs. 240 was due to the plaintiff for rent and entered judgment for him accordingly. No question arises on appeal in regard to this finding. The point to be decided is whether the plaintiff was entitled, in view of the fact that rent was due to him, to detain the defendant's motor car.

On this point the following issues were framed:—

(10) Did the plaintiff wrongfully on or about May 4, 1933, lock up the defendant's saloon car in the garage on the premises in question ?

(11) What damages, if any, has the defendant suffered ?

On these issues the Judge found for the plaintiff. The following is the material passage in his judgment :—

> "I do not think the defendant was entitled to leave the house without notice and without paying the rent that was due. In these circumstances I would hold that the plaintiff was not acting wrongfully in locking up the car in the garage, and that he is not liable to pay any damages to the defendant."

[1] *7 N. L. R. 13.*
[2] *(1911) S. A. Law Rep. App. 73.*
[3] *17 N. L. R. 191.*
[4] *28 N. L. R. 449.*
[5] *35 N. L. R. 63.*

This appeal first came before Akbar and Koch JJ.; it was referred by them to a Bench of three Judges as the point to be determined, viz., the landlord's right to retain the car, without the order of a competent Court, was of great importance and the law on the point had not been settled by authoritative decisions.

It was stated, in the course of the argument, that it has always been believed that the landlord had a right to distrain on the property of his tenant for rent due. This belief may be due to the case of *Meera Lebbe Marikar v. Bell* [1], in which the following passage occurs in the judgment of Burnside C.J. :—

"Without going into the recondite mysteries of Roman-Dutch law and theorising about the *jus retentionis* under a tacit hypothec, it may be freely admitted that in this case the landlord had a lien for rent due and a right to distrain on the property of his tenant on the demised premises—quite as extensive a lien or right to protect it as any claimed for the landlord under the imperfectly understood mediaeval theories which have been invoked; . . . . Granted therefore that even to enforce his *jus retentionis* and to maintain his tacit hypothec he had the right to distrain these goods, it remains to be shown by what law he might lock up the house and keep the tenant dispossessed and evicted. The learned Counsel who argued this case for the respondents with his wonted earnestness and ingenuity, urged that the plaintiff had the right under the covenant to re-enter and terminate the lease as the covenant for payment of rent had been broken. I would be prepared to grant him that right although it is said that by the aforesaid Roman-Dutch law he cannot do so except by judicial process. I would prefer to adhere to the English law by which people themselves believed that they were bound . . . ."

This case, however, does not, in my opinion, assist us, for with the greatest respect, I cannot agree that the English Common law right of distraint can be applied. The Common law of Ceylon or the residuary law, as Macdonell C.J. prefers to call it—see *Sultan v. Peiris* [2],—is the Roman-Dutch law as it obtained in the Netherlands in 1799, and it is consequently necessary to consider what a landlord's rights are under that law.

According to *Voet, lib. XX. tit. 2, art. 3* (*Berwick's Trans. 311*) the landlord's tacit hypothec or lien could only be made effectual by judicial process. The following is the material passage :—

"We must remember, however, that now with us and in many other countries the right of tacit pledge in the *invecta et illata* of a tenement, whether rural or urban, has no force unless they are sequestered (*praecludantur*) by public authority while they are still in the tenement; or unless, when the tenant removes them, they are seized (*arresto detineantur*) by a vigilant creditor in the very act of removal, in which case the things which had been begun to be transferred, but had not yet reached the place destined for their concealment are to be taken back to the land."

[1] *2 C. L. Rep. 94.*

[2] *35 N. L. R. 63.*

Van der Keessel (*Lorensz' Trans. p. 150*) also supports the argument for the appellant :—

"The lessors of lands, in town as well as in the country have a tacit hypothec over things brought and carried into such lands. In respect of lands in the country, the fruits growing thereon, and even those which have been carried into barns are subject to the same right. This right should be exercised, or in order to preserve it, the things should be put under arrest, before they are carried away from the land. At some places it may be exercised even within a month after the removal."

The following passages from South African text books indicate that the law in South Africa on the point is as stated by Voet and Van der Keessel :—

"A landlord's tacit hypothec, in order to be made effective must be confirmed by attachment in pursuance of judicial process. The general rule is that the attachment must take place while the goods are on the leased premises. If, however, the goods have been taken away, they may still be attached while in the process of removal, unless they have been already delivered by a third person who acquired them for value without notice of the landlord's claim."—*Nathan's Law of South Africa (2nd ed.), vol. II., p. 1066.*

"The tacit hypothec or lien, which a landlord has over *illata et invecta* or movables brought into the leased premises and over the produce of the land, is inferior to the *pignus praetorium* in possessory rights, inasmuch as the possession of the land, and therefore of the *illata et invecta,* is not in the landlord, but in the tenant, and the landlord cannot therefore of his own motion prevent the tenant from alienating the property which is subject to the lien or from removing it from the premises, but can only do so with the assistance of the Court, that is, by obtaining an order of Court for the attachment of such property in enforcement of his landlord's lien, or otherwise interdicting the tenant from dealing with the same or removing it from the land . . . ."—*Maasdorp, Institutes of Cape Law, vol. II., p. 264.*

Further, the principles laid down by Voet have been followed in some local decisions. In D. C. Colombo, No. 66,920 [1], it was held that "The seizure or *preclusio* must be by 'public authority', that is to say, must be by a judicial proceeding".

In *Peiris v. Sinnamuthu* [2] the same principles are recognized as appear from the following passages in the judgment of Dalton J. :—

"With respect to the law on the subject it has been argued that the landlord's lien is merely a *jus retentionis.* It may, I think, generally be taken that the term *jus retentionis* is similar to the English law term lien, but as pointed out by Pereira J. in *Marikar v. Mohamed* [3] the tacit hypothec that a landlord has under the Roman-Dutch law over *invecta et illata* upon the premises rented is something more than a mere *jus retentionis,* although in some cases a *jus retentionis* attaches to it.

[1] *Ram. Rep. (1877) 63.* [2] *28 N. L. R. 449.*
[3] *17 N. L. R. 191.*

Whether in any particular case the lien shapes itself as a hypothec or a *jus retentionis* would appear to depend on the circumstances of possession ".

". . . . It is true that the hypothec, in order to be made effective, must be confirmed by judicial process."

". . . . In this case on the facts it seems to me there was a tacit hypothec with a *jus retentionis,* which was made effective by seizure in proper form . . . . "

As opposed to those decisions, in the case of *The Anglo-Oriental Furnishing Company v. Samarasinha*[1] Grenier A.J. stated in the course of his judgment :—

"The landlord cannot sell property, subject to his lien, without a decree of Court, but that is quite different from the right which the landlord has, in the case where the tenant has quitted the house leaving arrears of rent unpaid to retain the property, and if need be to sell it under a judicial decree and thus render his lien effectual ; and for this purpose it does not matter where the property is, so long as it is in the possession of the landlord, as in this case ".

This is the only case, with the exception of *Meera Lebbe Marikar v. Bell* (*supra*), which supports the argument for the respondent and, in my view, Grenier J.'s view that a landlord has without judicial process a right to retain his tenant's property is not supported by the authorities.

The preponderance of authority, in my opinion, leaves no doubt that under the Roman-Dutch law a landlord's lien on his tenant's property can only become effective by means of judicial process and that being so, the plaintiff's detention of the defendant's motor car, without first obtaining such process was wrongful and the defendant is entitled to damages.

I would allow the appeal so far as it relates to the defendant's claim for wrongful detention, and as there is no finding in regard to what damages the defendant has suffered, the case must go back to the District Court in order that such damages may be determined.

The respondent has pointed out that the District Judge has not given any decision on issues 4 and 5, viz., the plaintiff's claim in respect of the defendant negligently causing damage to the lighting fixtures. This matter must also be adjudicated on. The appellant will have the costs of this appeal. In regard to the trial in the Court below I think that each party should bear its own costs.

KOCH J.—

This appeal raises an important point of law and incidentally of procedure. The point arises as the result of an issue *inter alia* that has been framed between the parties. This issue (No. 10) runs thus :—

"Did the plaintiff wrongfully on or about May 4, 1933, lock up the defendant's saloon car in the garage on the premises in question ? "

It is common ground that some rent was due and in arrears to the plaintiff (landlord) from the defendant (tenant) on May 4, 1933, and that on that day when the defendant had vacated the premises and had

[1] *17 N. L. R. 13.*

removed his household furniture, &c., the plaintiff rushed up and finding the defendant's saloon car still in the garage and about to be removed, padlocked the garage door and thus prevented the removal of the car.

The defendant claims that the detention was an unlawful act on the part of the plaintiff, and that by reason thereof he has been deprived of the use of his car and has suffered damage which he estimates at Rs. 1,630.

It is also common ground that the attempt of the landlord to enforce his right of lien was not authorized by a Court or other public authority.

Now, up to very recent times it has been generally accepted in legal circles that a landlord in such circumstances as above stated could lawfully enforce his right in the way the plaintiff has done. This idea persumably arose as the result of an important decision in *Meera Lebbe Marikar v. Bell*[1] and was strengthened by the ruling of Grenier J. in *The Anglo-Oriental Furnishing Co. v. Samarasinha*[2].

In the former case the learned Judge Burnside C.J. applied the principle of the English common law of distraint; in the latter case Grenier J. seems to have taken for granted that the legal hypothec of the landlord gave him this right against the tenant, but that the necessity for a Court order arose when the situation developed and the effectuality of a sale under this right was contemplated.

There was also the decision in D. C. Colombo, 66,920 reported in *Ramanathan's Reports (1877), p. 62,* but the point before the Court in that action was really the landlord's right to preference over a creditor who seized the tenant's goods under a writ of execution and sold them.

The point, however, now comes up before us in specific form for final determination, and it is argued with all seriousness that this so-called landlord's lien over the *invecta* and *illata* of his tenant for arrears of rent is strictly only a legal hypothec and nothing more; the *invecta* and *illata* are still in the ownership of the tenant and in his possession, rather different from the case of such artificers as carpenters, repairers, &c., over materials furnished them for the purpose of repairs, which have come into their possession.

This hypothec, it is contended, is not different from other hypothecs, and in order to render it effectual the intervention of a Court or other authority must be sought. Till this is done, it is only a right to preference and must remain at that.

This view is strongly supported by Roman-Dutch authority, and it is this law that must apply. Voet in *lib. XX., tit, 2, art. 3,* says, " We must remember, however, that now with us and in many other countries the right of tacit pledge in the '*invecta et illata*' of a tenement whether rural or urban, has no force unless they are sequestered (*praecludantur*) by public authority while they are still in the tenement; or unless, when the tenant removes them, they are seized (*arresto detineantur*) by a vigilant creditor in the very act of removal, in which case the things which had begun to be transferred, but had not yet reached the place destined for their concealment, are to be taken back to the land ".

The seizure he refers to is undoubtedly by permission of a public authority.

[1] *2 C. L. Rep. 94.*

[2] *7 N. L. R. 13.*

Van der Keessel (*Lorensz' Trans. p. 150*) is to the same effect. So are *Maasdorp, vol. II, p. 285* (*5th ed.*), *Wille on Landlord and Tenant* at pp. 361 and 365, *Lee p. 192* (*3rd. ed.*), and *Nathan, vol. II., p. 1066* (*2nd ed.*).

The case of *Webster v. Ellison* [1] was cited by Counsel for the respondent in support of his argument that the necessity for *praeclusio* (attachment) only arose when rights of a third party came into conflict with the landlord's legal hypothec, but that between lessor and lessee (landlord and tenant) the hypothec was effectual for purposes of detention without a sequestration. I cannot see that this case goes to that length. The dispute was in fact between a landlord and a third party into whose possession the *invecta et illata* had passed and the doctrine of "*mobilia non habent sequelam*" was discussed and given effect to, De Villiers C.J. expressly stating "Whether with us the landlord's lien is in the nature of a tacit hypothec and attaches to the *invecta et illata* without arrest or other judicial process, or whether it only takes effect when a judicial order has been obtained does not call for decision in the present case".

The weight of authority does seem to be in favour of the view that the landlord's "lien" on his tenant's property can only be effective for the purpose of detention after obtaining sequestration by public authority or judicial process.

The appeal must therefore be allowed and the case must go back for determination on the matters referred to in my brother Poyser J.'s judgment. I agree with the order he has made as to costs.

SOERTSZ A.J.—I agree.

Sent back.