

Present: Schneider and Lyall Grant JJ.

1928.

WIJEYSINGHE v. VELOHAMY.

382—D. C. Negombo, 1,755.

Pactum antichresis—Liability of usufructuary mortgagee—Culpa levis.

A usufructuary mortgagee is liable for damage caused to the mortgaged property through his negligence (*culpa levis*).

THIS was an action to recover damages brought by the mortgagor of property against the usufructuary mortgagee for the neglect of the property while it was in the possession of the mortgagee. The learned District Judge awarded a sum of Rs. 244 as damages to the plaintiff.

H. V. Perera (with *Amerasekera*), for defendant, appellant.—The District Judge is wrong in holding that the duties of a usufructuary mortgagee are similar to those of a lessee in respect of the care to be taken of the property he possessed. The usufructuary mortgagee may perhaps be liable for acts of commission that cause damage but not for acts of omission.

The mortgage bond must be construed strictly. The words “to hold and possess and to receive, take, and enjoy the produce, rents, and income in lieu of interest” mean that the mortgagee undertakes to possess the land merely to the extent of taking the produce and income for his interest. The mortgagor may enter the land at any time and do the repairs and weeding necessary. The mortgagee has not undertaken to keep the property in repair. He is therefore not liable for ordinary negligence, viz., allowing the house to get into disrepair and not weeding the land.

Rajapakse, for plaintiff, respondent.—This is a *pactum antichresis* well known to our Common law. A usufructuary mortgagee is liable for acts of omission and for ordinary negligence in an *actio pignoratitia*. *Voet XIII.*, 7, 5; *Sandar's Justinian*, pp. 331-332; *Wille on Mortgages*, pp. 219-221.

The agreement is that the mortgagee should “hold and possess” the property. Full possession is with the mortgagee (*Lee, 1st ed.*, p. 179), and he can claim to possess every bit of the property as against the mortgagor till the bond is discharged.

March 12, 1928. SCHNEIDER J.—

In pursuance of an agreement in a bond that the mortgagor “will allow and permit the mortgagee to hold and possess and to receive, take, and enjoy the produce, rents, and income in lieu of

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interest" of the property mortgaged, which consisted of land planted with coconuts with a house standing thereon, possession was delivered and remained with the mortgagee till the debt was paid and discharged. The mortgagor thereafter brought this action claiming damages for the neglect of the property while it was in the possession of the mortgagee. He was awarded a sum of Rs. 244 as damages sustained by the house not having been kept in proper repair and by the land being overgrown with weeds. No exception could reasonably be taken to the amount of the damages awarded, but the appeal was pressed on the ground that the mortgagee was under no legal obligation to keep the house in necessary repair or to weed and tend the land. This contention is not sustainable. The agreement in question on part of the mortgagor is one specially permitted by our Common law as a pact which might be lawfully annexed to a hypothec. It is called the *pactum antichresis*. It may be express or tacit. By virtue of it the mortgagee is entitled to enjoy the use (*usus*) of the property himself by taking the fruit, living in the house, or cultivating the land, as the case may be, or he may let the property to someone else, even to the mortgagor¹. The ordinary rule of the Common law that a creditor to whom possession has been given of a mortgaged property is liable for *dolus et culpa lata* (fraud and gross fault) and also for *culpa levis* (ordinary negligence) applies to a usufructuary mortgagee.² That liability gives rise to his obligation not to be neglectful of the property pledged. Voet commenting on the *contraria actio pignoratitia* says "for as the creditor's liability for fraud and *culpa* does not suffer him to be neglectful of the thing pledged", &c.³ The whole of the law on the subject is summarized by Wille in *Mortgage and Pledge in South Africa*, p. 219.

The law is clear that it is the duty of a mortgagee to restore the property complete and undamaged to the mortgagor when the debt has been fully discharged, and it therefore follows that to fulfil that duty the mortgagee in this case should have effected the necessary repairs to the house and should have weeded the land in order to restore them to the state in which they were when he received possession of them.

The appeal is dismissed with costs.

LYALL GRANT J—I agree.

Appeal dismissed.

¹ Voet XIX. 2, 4; XX. 1, 21 and 23.

² Voet XIII. 7, 5.

³ Voet XIII. 7, 10 (*Berwick's Trans.*, p. 484).