1933 *Present :* **Koch A.J.**

ATTORNEY-GENERAL *v.* CADER.

271—C. R. Colombo, 79,979.

Telephone—Contract with Postmaster-General—Agreement to rent telephone—Rent in arrear—Right to recover damages—Liquidated damages not penalty.

By an agreement entered into for the rent of a telephone, the Postmaster-General reserved to himself the right to terminate the contract by notice in writing, if, at any time, the renter was in arrear in respect of the payment of the annual rent for one month after it was due.

The right to recover from the renter as liquidated damages and not by way of penalty a sum equal to one-fourth of the annual rent was also secured to the Postmaster-General on such determination of the contract.

Held, that the sum stipulated as recoverable from the renter on the termination of the contract for failure to pay the rent was in the nature of liquidated damages and recoverable as such in law.

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

M. F. S. Pulle, C.C., for plaintiff, appellant.

L. A. Rajapakse, for defendant, respondent.

Cur. adv. vult.

September 5, 1933. KOCH A.J.—

This appeal raises an interesting point of law as regards the interpretation of a term in agreements in respect of telephones read in conjunction with the conditions contained in the schedule annexed thereto, to which such term is expressly made subject. I am informed that although the

[1] *2 C. L. R. 84.*

sum involved in the case is not considerable, quite a number of disputes have arisen between the Postmaster-General and renters of telephones, which will be set at rest as the result of this appeal. The point is, therefore, of some importance.

The facts are briefly these. The defendant had rented a telephone under an agreement with the Postmaster-General. This agreement was executed on November 11, 1929. According to its terms, the defendant had agreed to rent the instrument and telephone line for one year commencing from the aforesaid date and thereafter until determined, subject to the conditions in the schedule aforesaid. The schedule is annexed to the contract. The agreement provided for either party determining the lease at the end of the term of one year or at any time afterwards by giving to the other three calendar months' previous notice, whatever the reason may be. In addition the Postmaster-General, under the schedule of conditions, further reserved to himself the right to terminate the contract by notice in writing, if at any time the renter was in arrear in respect of payment of the annual rent for one month after the same ought to have been paid. The renter undertook to pay to the Postmaster-General annually in advance a rent of Rs. 130. The right also to recover from the renter as liquidated damages and not by way of penalty a sum equal to one-fourth of the annual rent was also secured to the Postmaster-General on such determination of the contract. After two years of use the defendant, although attention had been previously called to the matter, failed to pay his third year's rent in advance. The latest date on which this rent was payable was November 11, 1931. In fact the 1931-32 rent was never paid at all, and the Postmaster-General after the expiry of one month after the date of default terminated the agreement by a notice in writing dated December 17, 1931. The seventh clause of the schedule further provided a right in the Postmaster-General to disconnect the telephone without notice, *inter alia,* if the subscription is overdue. Acting under this power, the telephone rented by the defendant was disconnected on November 23, 1931.

The Attorney-General thereafter as plaintiff instituted this action against the renter on May 4, 1932, for the recovery of a sum of Rs. 71.33. In this is included a sum of Rs. 32.50, which was claimed as liquidated damages calculated on the basis of one-fourth of the annual rent. The learned Commissioner allowed the claim less this sum of Rs. 32.50, which he held the plaintiff was not entitled to recover (1) by reason of the fact that the telephone was disconnected on November 23, 1931, only twelve days after the new year had commenced and within the period of one month from that date; (2) that this sum sought to be recovered was provided for in the agreement in the light of a penalty and not by way of actual liquidated damages. The breaches complained of and the dates of the determination of the agreement as well as the disconnection of the telephone are admitted.

On the first point the learned Commissioner was of opinion that reading clause 6 of the schedule as a whole there was an implication "that matters would be allowed to go without interruption for a period of one month before liquidated damages were claimed" (I am quoting the words of the judgment), and that as the service was interrupted within that

month, the plaintiff was not entitled to claim the damages he did. I cannot agree with this conclusion. No doubt ordinarily, in the absence of express provision to the contrary, it would be reasonable to suppose that damages should not be allowed for a period during which the party charged had been deprived of the use of the subject of the contract at the instance of the claimant, but in this case the amount of the sum claimed by way of damages for a breach of the contract instead of being specifically mentioned in rupees and cents is on grounds of convenience, presumably inasmuch as rents differ in regard to different telephones, estimated for purposes of computation as being the amount represented by a fourth of the annual rent. The words used are " a sum equal to one-fourth of the annual rent ". The power to disconnect the telephone at any time after the subscription is overdue, is specifically provided for and has been agreed to by the defendant. The subscription was overdue at the latest on November 11, 1931, and the telephone in my opinion was rightly disconnected on November 19, 1931. This is a clause by itself and invests this power in the Postmaster-General independent of the other provisions of the agreement including the schedule, and a disconnection effected by virtue of this power is not therefore relevant to the legality of the claim under the agreement for liquidated damages.

On the second point too the learned Commissioner has held against the appellant. I quite agree with the Commissioner that whatever the words employed in the contract are, whether " penalty " or " liquidated damages " it is open to the contesting party to show that the expression " penalty " was intended to be regarded as " liquidated damages " or *vice versa* that the expression " liquidated damages " was intended to operate as a penalty. The law differentiates the results that would accrue from the conclusion arrived at. If it be held that a " penalty " was intended, then it is for the claimant to prove that the sum set out as such penalty covers the damage alleged to be sustained as the idea was merely to hold the seeming liability " *in terrorem* " over the head of the other party as an inducement towards a compliance by him of the terms of the agreement. If on the other hand the amount mentioned was in the nature of a genuine pre-estimate of the damages likely to accrue to the party claiming, then the sum was to be regarded as liquidated damages and could be recovered without assessment.

The indicia of this question will vary according to circumstances. This in brief is the result of a number of important judicial pronouncements on the point. In the famous *Clyde Bank Case*[1] the Earl of Halsbury laid down that the Court must proceed according to what is the real nature of the transaction, and that the mere use of the word " penalty " on the one side or " damages " on the other would not be conclusive as to the rights of the parties. He gave as the reason why parties do in fact agree to such a stipulation that sometimes although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive.

This view was upheld by the Privy Council in a judgment of Lord Dunedin in a later case, *Commissioner of Public Works v. Hills.*[2] His

[1] *(1905) 1 A. C. 6.* [2] *(1906) A. C. 368.*

Lordship remarks that the question arises in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty" or "liquidated damages" does not conclude the matter.

In a still later case, *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co.*[1], the House of Lords accepted the dicta in the two previous cases referred to and suggested as tests *inter alia* the following :—

"(1) It will be held to be a penalty if the sum stipulated is extravagant and unconscionable in amount, in comparison with the greatest loss that could conceivably be proved to have followed the breach.

"(2) On the other hand it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary that is just the situation, when it is probable that pre-estimated damage was the true bargain between the parties".

The latter test was quoted from the judgment of Lord Mersey in *Webster v. Bosanquet.*[2]

It will be seen that the legal position is quite clear, and it only remains for me to consider whether in the circumstances of the agreement in this case the amount agreed upon as "liquidated damages" was a genuine pre-estimate of damage.

The defendant is a proctor who must be presumed to have appreciated the terms and conditions of the agreement he signed. In spite of notices being forwarded to him in regard to every single step taken by the Postmaster-General, he has made no remonstrance or questioned the legality of the claim. He has not given evidence or called a defence, and has not, so far as he was concerned, in any way helped the Court to conclude that the sum of Rs. 32.50 is harsh or unconscionable. It may well be that the damage was computed on the basis of three months' rent, as that was the period considered by both parties to be a fair length of notice that either party should give to the other before determination of the contract, and this period was hit upon, as it was considered that reasonably it might be expected that such a period would ordinarily elapse before a new renter was secured, certainly in these last few years of depression when telephones have been thrown up the difficulty of obtaining custom can be appreciated. I am unable to see that anything has been established to disprove that the sum of Rs. 32.50 was not a genuine pre-estimate of the damage anticipated, and I therefore uphold the claim of the plaintiff to this sum.

The order of the Commissioner will be varied so as to include this sum, and judgment will be entered for the appellant as prayed for with costs. The order made by the Commissioner as to costs is set aside. The appellant will also have his costs of appeal.

Appeal allowed.

[1] (1915) *A. C. 79.*

[2] (1912) *A. C. 398.*