1935 *Present :* **Maartensz and Koch JJ.**

PUNCHISINGHO *v.* DE SILVA.

247—D. C. Kurunegala, 17,468.

Landlord and tenant—Leased premises closed by local authority under proclamation—Prohibition order pending structural alterations—Remission of rent—Roman-Dutch law.

A tenant is entitled to claim a remission of rent when the leased premises are closed by order of an Urban District Council under a proclamation issued under the Quarantine and Prevention of Diseases Ordinance.

Where an order was issued prohibiting the occupation of the premises until certain structural alterations were effected and it was not the duty of the tenant to effect such alterations,—

Held, that the tenant was entitled to a remission of rent during the period.

APPEAL from a judgment of the District Judge of Kurunegala.

R. L. Pereira K. C. (with him *N. E. Weerasooria*), for plaintiff, appellant.

H. V. Perera, for defendant, respondent.

Cur. adv. vult.

October 29, 1935. MAARTENSZ J.—

The plaintiff-appellant sued the defendant for the recovery of a sum of Rs. 720 which he claimed to be due to him in terms of a deed No. 989 dated July 1, 1929, granted by him to the defendant. By this deed the plaintiff transferred to the defendant his interest in indentures of lease No. 10328 dated April 5, 1921, and No. 7437 dated September 10, 1923, executed by Roland de Silva in favour of the plaintiff and defendant.

By indenture No. 10328 Roland de Silva demised to the plaintiff and defendant premises bearing assessment No. 37 in Bazaar Street in the town of Kurunegala for a term of 8 years and 9 months from April 1, 1921, for a sum of Rs. 3,150 which was paid in advance. By indenture No. 7437 the lessor leased the same premises to the plaintiff and defendant for a term of 20 years from January 1, 1930, for a sum of Rs. 3,600 which was paid in advance.

Both indentures provided that the lessor shall effect the necessary repairs during the continuance of the lease.

The plaintiff and defendant were carrying on business in partnership as general merchants at the dates when the identures were executed. The partnership was dissolved by indenture No. 986 dated July 1, 1929. Indenture No. 989 was executed on the same date.

This deed recites the terms of the indenture of lease No. 10328 and No. 7437 and that Punchi Sinno (the plaintiff lessee) had agreed to

convey to Don Hendrick de Silva (the defendant lessee) his leasehold interest in premises No. 37 (now altered to 42) for the unexpired term and continues as follows :—

"Now this indenture witnesseth that the said party of the first part in consideration of the sum of Rs. 40 only being one month's rent in advance well and truly paid to the said party of the first part (the receipt whereof the party of the first part hereby acknowledges) and of the further covenants hereinafter on the part of the party of the second part to be performed doth hereby let, demise, and sub-lease unto the party of the second part his heirs, &c., the premises hereinafter fully described in the schedule hereto together with the tiled buildings and trees and everything standing thereon.

"To hold the said premises unto the said Lokuge Don Hendrick de Silva and his aforewritten for the term of 20 years and 6 months commencing from the first day of July, 1929.

"Yielding and paying therefor the clear monthly rent of Rs. 40 only by the said party of the second part to the said Hewawedige Punchi Sinno (the party of the first part above referred to) at the end of each and every month".

This indenture provided that the party of the second part shall effect all repairs . . . . as covenanted to be done observed and performed to and with the said Roland Thomas Douglas Christopher de Silva in the above recited indenture of lease in respect of the said premises and shall at the expiration of the lease hereby granted deliver up the said premises to the said party of the first part in the same state and condition as same is now delivered to the party of the second part.

The sum sued for, Rs. 720, represents the rent payable under the indenture 989 from August 1, 1932, to January 31, 1934.

The defendant's answer to the claim is that he was deprived of the use of the premises from August 15, 1932, up to date by reason of (*a*) the Urban District Council proclaiming the Bazaar street a plague-infected area under the Quarantine and Prevention of Diseases Ordinance and evacuating the premises in Bazaar street including the premises in question of their inmates, (*b*) a prohibition order dated December 24, 1932, served upon the landowners to effect various structural alterations and prohibiting occupation of the said premises unless and until such alterations were made.

The proclamation was withdrawn on April 27, 1933. It was conceded by Counsel for the appellant that the plaintiff was not entitled to the rent for the period during which the proclamation was in force.

The issues with which this appeal is concerned are the following :—

(1) Is a sum of Rs. 720 due to the plaintiff on account of rent ?

(2) Did the U. D. C. prohibit the reoccupation of the building during the period in question until certain alterations mentioned in document D 1 were effected?

(3) Is it incumbent on the plaintiff or the lessor to effect these alterations under the lease referred to in the plaint?

(4) Had the defendant the use of the premises during the period in question ?

(5) If not is he liable to pay rent?

The first question to be decided is whether the indenture 989 is a sub-lease or an assignment of the plaintiff's rights in the indentures of lease numbered 10328 and 7437.

It was contended by appellant that the recital showed that the parties intended the deed No. 989 to be an assignment of the leases and that it should be so construed. I am quite unable to accede to this contention as it is quite inconsistent with the terms of the operative clause which is in all respects appropriate to a sub-lease. In fact the words let demise and sub-lease are used in the passage which sets out the interest conveyed to the defendant, the consideration for the transfer is described as rent; and provision is made for the surrender of the premises at the termination of the term of the lease in the same state and condition as it was when demised.

I accordingly hold that the indenture 989 is a sub-lease and that the liability of the defendant must be determined by the Roman-Dutch law governing the relations between a lessor and lessee.

The law is laid down in *Wille on Landlord and Tenant, p. 391,* thus :—

Vis major or *casus fortuitus.*—A tenant is entitled to remission of rent either wholly or in part where he has been prevented either entirely or to a considerable extent from making use of the property for the purposes for which it was let, by some *vis major* or *casus fortuitus,* provided always that the loss of enjoyment of the property is the direct and immediate result of the *vis major* or *casus fortuitus,* and is not merely indirectly or remotely connected therewith. This statement of the Common law was deduced by Solomon J. from the leading authorities on the subject in the case of *Hansen, Schrader & Co. v. Kopelowitz* [1].

In view of legislation in the Cape it was held there that a tenant was not entitled to claim remission of rent where the leased premises were closed by the authorities acting under an Act of Parliament such as the Public Health Act—*Wille, p. 392.* We have no such legislation.

If the duty of making the alteration directed by the prohibitory order D 1 lay on the plaintiff the defendant would in my opinion be entitled to resist the claim on the ground that he was prevented from having beneficial use of the premises leased to him.

The next question is whether the duty of making the alterations lay on the plaintiff or the defendant.

The appellant contended that it was the defendant's duty to carry out the directions of the phohibitory order as the indenture provided

[1] *(1903) T. S. 718.*

that he should effect all repairs. The respondent's reply to this contention was that the order D 1 was not a direction to make repairs but to make constructional alterations which did not come under the category of repairs.

The order D 1 is in the following terms :—

"THE QUARANTINE AND PREVENTION OF DISEASES ORDINANCE, 1897."

Buildings evacuated during the Plague Epidemic.

It is hereby notified that the improvements shown below should be carried out before the building bearing assessment No. 42′ situate in Bazaar street is reoccupied.

2. On completion of the works, written permission will be given by me for the use of the said building for human habitation.

Repairs and alterations referred to :—

(Sketch not reproduced.)

Requirements—Ventilation.

Rooms at the back of wall should be demolished and rebuilt if necessary with windows and doors in walls, and joined to main roof thus :

Two dormer windows should be inserted in wall.

Floors to be concreted 4″ thick. Wall should be cement-rendered ¾″ thick and top edges splayed.

Corners of walls should be rounded off.

Roof timbers should be clay washed.

No lofts will be allowed.

Kitchen may be built as per type 8 ft. away from the last wall, and also the bath room.

Latrine is situated within back lane and should be shifted to a point bordering the back lane.

P. TAMBIRAJA,
Chairman, U. D. C.

N.B.—Any reconstructions should be carried out behind the street line indicated by a black line on the wall.

The order clearly requires architectural changes in the building—a process which is not implied in the term repairs. Repair is defined in the Shorter Oxford English Dictionary as the act of restoring to a sound or unimpaired condition; the process by which this is accomplished; the result obtained by the restoration of some material thing or structure by the renewal of decayed or worn out parts by refixing what has become loose or detached. This definition would not apply to the changes directed in the order.

Wille on Landlord and Tenant, pp. 428 and 429, lays down that " If the tenant has converted or altered the leased property or a portion of it without the landlord's consent, and he fails to reconvert it to its

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Wille on Landlord and Tenant, pp. 428 and 429, lays down that "If the tenant has converted or altered the leased property or a portion of it without the landlord's consent, and he fails to reconvert it to its

original condition by the expiration of the lease, he will be liable in damages to the landlord" (*Voet 19, 2, 9*), and he refers to a case where "a building with a wooden floor was leased, and the tenant expressly agreed to restore the premises at the expiration of the lease in 'like good order and repair'; owing to the plague the town council required that a cement floor should be substituted, and the tenant, at his own expense, and with the landlord's knowledge, made the requisite alteration" and it was held that as the landlord had not waived the condition that the premises should be restored to him in 'like good order and repair' the tenant was liable to him for damages through not restoring the premises to their original condition before the expiry of the lease. On the principle laid down in this case any alteration of the premises by the defendant would be a breach of the condition in deed 989 that the lessee "shall at the expiration of the term hereby granted deliver up the premises to the said party of first part in the same state and condition as same is now delivered to the party of the second part".

This provision in the lease manifestly excludes any interpretation of the term repairs as applying to alterations.

I am accordingly of opinion that the appeal should be dismissed with costs.

KOCH J—I agree. *Appeal dismissed.*