Present: De Sampayo A.J.

1912.

LA BROOY *v.* RAMASAMY CHETTY *et al.*

452-454—M. C. Colombo, 8,487.

Suffering premises to be used for human habitation—Lease by administrator—Is heir of estate liable?—"Suffering" defined.

An heir of an estate whose administrator had leased a property cannot be convicted under rule 8 (2) of chapter XXII. of the by-laws of the Municipal Council of Colombo with suffering the house to be used for human habitation.

"Suffering" a thing to be done connotes the right or power to prevent it.

An owner of property which is legally leased to a third party, with exclusive right of possession, cannot of his own force prevent, while the lease subsists, the use of the property by the lessee or any person under him.

THE facts are fully set out in the judgment.

Wadsworth (with him *Retnam*), for the accused, appellants.

Hayley, for the respondent.

Cur. adv. vult.

July 9, 1912. DE SAMPAYO A.J.—

The appellants, who are the first, second, and fourth accused, have been convicted of the offence of having, in disregard of an order made by the Municipal Magistrate, continued to use certain tenements, or suffer the same to be used, for human habitation without a certificate from the Chairman of the Municipal Council, or written order from the said Magistrate withdrawing the prohibition, in breach of rule 8 (2) of chapter XXII. of the by-laws of the Municipal Council. It appears that the premises in which the tenements are situated belong to the estate of a person now deceased. The first and third accused are two of the heirs of the intestate, and the second accused is described in the evidence for the prosecution as "guardian *ad litem*" of another heir. The third accused has also been appointed administrator of the estate; and the fourth accused is the lessee of the premises under the administrator. At the instance of the Chairman of the Municipal Council, who considered the tenements in question to be unfit for human habitation, the Municipal Magistrate on July 10, 1911, made an order, under rule 8 (1) of chapter XXII. of the by-laws, prohibiting the use of the said tenements for human habitation from September 1, 1911. The tenements are in the occupation of tenants under the fourth accused, who

1912.

DE SAMPAYO A.J.

La Brooy v. Ramasamy Chetty

is the lessee of the entire premises. The causes rendering them unfit for habitation were the absence of windows and smoke vents, the lowness of the roofs, and the existence of certain walls which prevented proper ventilation. The operation of the prohibition was to date from September 1, in order that the necessary alterations might in the meantime be effected. This not having been done, these accused were prosecuted under rule 8 (2) in the case No. 5,158 of the Municipal Magistrate's Court, and were convicted and fined on November 3, 1911. It appears that the fourth accused petitioned the Chairman and obtained a month's extention of time to effect repairs. He commenced the work by breaking down the walls, but the third accused stopped him from proceeding further and undertook to do the work himself but did nothing. Accordingly, the accused have been prosecuted again in this case, the charge being laid as of April, 1912. The lease in favour of the fourth accused is still subsisting, and the third accused as administrator has continued to receive the rents up to date. I shall first deal with the case of the third and fourth accused. The third accused pleaded guilty to the charge, alleging in mitigation of sentence that he could not spend money on the repairs without an order of Court in the testamentary case, and that he subsequently obtained such an order and was diligently engaged in affecting the repairs. The fourth accused pleads in excuse the interference on the third accused's part with his attempt to do the necessary work. The fourth accused is lessee, and has possession and control of the premises, and the tenants are his and pay him rent. He continues to use the tenements for human habitation, or suffers the same to be used for that purpose, within the meaning of the by-law in question. The interference of the third accused does not, in my opinion, exempt him from liability, though it may possibly give him a claim against the third accused; and I think he was rightly convicted.

The case of the first and second accused is quite different. The second accused is, as I said, the guardian *ad litem* of an heir of the estate, apparently representing the minor in some past or pending litigation, but how a guardian *ad litem* as such can have anything to do with the possession or use of the property I fail to understand. The situation of the first accused as heir pending the administration of the estate, is equally distinguishable from that of the third accused. It is not said that the first and second accused joined in the lease to the fourth accused, or even that they receive any rent from the fourth accused. On the contrary, it is the third accused that receives all the rent and holds the property, apparently until the distribution of the estate among the heirs. I do not lose sight of the fact that the first and second accused were also convicted in the previous prosecution, but that does not alter their legal position as regards the present charge. The question, therefore, is whether they can be said to " use or suffer

to be used " the premises in question within the meaning of rule 8 (2). I do not think they can. In answer to questions from the Magistrate, the first accused said that he was not prepared to forego the rent due by the lessee, and the second accused said he had given no indemnity to the administrator against any loss the estate might incur by the ejectment of the tenants, and this was apparently considered by the Magistrate sufficient to make them responsible for the continued occupation of the premises by the lessee's tenants. The first and second accused may or may not be right in their claim to a share of the rent of this property, even if the tenements are rendered vacant by ejectment of the tenants, but such claim has no bearing on the question of their liability. In *Blacker v. Saibo,*[1] which was a prosecution under section 1, sub-section (1), of Ordinance No. 15 of 1862 against the owner of premises for suffering the same to be in a filthy condition, this Court doubted whether a lessor on a notarial lease would be liable, unless the terms of the lease gave him power to take the necessary steps to put the premises in good order. The position of a mere heir of an estate whose administrator leases the property is much more secure. " Suffering " a thing to be done connotes the right or power to prevent it, and an owner of property which is legally leased to a third party, with exclusive right of possession, cannot of his own force prevent, while the lease subsists, the use of the property by the lessee or by any person under him. This principle has been recognized in cases under similar provisions in English Statutes. In *R. v. Staines Local Board,*[2] it was held that a Local Board which only permitted certain sewers to be used by inhabitants who had acquired a prescriptive right to use them did not " cause or suffer " sewage to flow into the Thames within the meaning of " The Thames Navigation Act, 1866," and could not be convicted of a misdemeanour under that Act. Field J. observing that " a man cannot be said to suffer another person to do a thing which he has no right to prevent." Again, in *Lea Conservancy Board v. The Tottenham Local Board,*[3] the facts were that the Local Board, together with another local authority, had appointed a joint committee, to which the exclusive control and management of the sewage and sewerage works were given, and the sewage having been allowed to flow into an adjoining river, the Conservancy Board served a notice upon the Local Board to discontinue the nuisance, and upon failure to comply with the notice instituted proceedings before the Magistrate under " The Lea Conservancy Act, 1868," sections 92 and 93, to render the Local Board liable to the penalty provided by the Act; and it was there held that the Local Board were not liable, as they had ceased to have control over sewers after the appointment of the joint committee, and so could not have " caused " or " suffered " the overflow into the river.

[1] *(1905) 2 Bal. 13.*

[2] *(1889) 60 L. T. 261.*

[3] *(1891) 64 L. T. 198.*

1912.

DE SAMPAYO A.J.

La Brooy v. Ramasamy Chetty

In this case the first and second accused, as I have said, have not been shown even to be lessors of the fourth accused, who is in actual possession of the property by virtue of the lease. In my opinion they are not liable under the by-law in question, and I set aside their conviction. As regards the fourth accused, there remains to be considered the question of sentence. The Magistrate fined each of the accused Rs. 150. The penalty provided by by-law 2 of chapter XXV., as amended by Proclamation of September 13, 1910, for breaches of the by-laws, is a fine not exceeding Rs. 50, and in case of continuing breach a further fine not exceeding Rs. 25 a day for each day such breach is continued. It was contended that under this the Magistrate could only impose a fine of Rs. 50, and order a further fine of Rs. 25 to be paid for the days during which the breach may be continued after the conviction; but that he could not award a sum for the number of days passed before the conviction. I cannot uphold this contention. In the result I uphold the conviction and sentence of the fourth accused. As above stated, the third accused was convicted on his own plea, but he has made an application in revision for mitigation of the sentence, and his counsel also relied on the same argument as to the construction of the above by-law No. 2. For the reason already given the application is disallowed.

First and second accused acquitted.