1941 *Present :* **Howard C.J. and Soertsz J.**

DE SILVA *v.* KURUPPU.

1—D. C. Colombo, 11,260.

Hire-purchase agreement—Right to retake possession on breach of agreement—no decree of Court is necessary—Roman-Dutch law.

The owner of a thing let on a hire-purchase agreement is entitled to exercise his right to retake possession given to him under the agreement without the intervention of Court, provided he uses no more force than is reasonably necessary for the purpose.

THIS was an action brought by the plaintiff on an agreement dated February 4, 1939, whereby the plaintiff took a lorry on hire-purchase from the defendant. The plaintiff alleged that on September 19, 1939, the balance due on the agreement had been paid and the agreement discharged. Despite such discharge, the defendant had on November 29, 1939, without any orders from Court forcibly removed the lorry from the possession of the plaintiff to the latter's damage of Rs. 3,000.

The defendant pleaded that on November 29, 1939, the plaintiff was in arrears of instalments due on the lorry and that he was entitled to retake possession of the lorry. He claimed a sum of Rs. 409.08 due by way of instalments and a further sum of Rs. 1,000 as damages.

The learned District Judge held that a sum of Rs. 1,019.70 was due to the defendant by way of arrears of instalments under the agreement. He further held that the defendant could not have taken possession of the lorry without the orders of Court and that the seizure and removal of the lorry by him was unlawful for which the plaintiff was entitled to damages in the sum of Rs. 1,000.

H. V. Perera, K.C. (with him *N. K. Choksy* and *E. G. Wikremanayake*), for the defendant, appellant.—The plaintiff came to Court on the basis that she had become the owner of the lorry and claimed damages for the violation of her rights of ownership. The defendant denied that the plaintiff had become owner, and claimed that, according to the terms of the hire-purchase agreement, he could seize the lorry for non-payment of instalments. On the facts, the District Judge has found that no force was used by the defendant in the act of retaking possession of the lorry. He has, however, in spite of the 9th clause of the agreement (P 1), held that the retaking of the lorry without an order of Court was unlawful.

The District Judge was wrong in applying the Roman-Dutch law doctrine regarding realization of security in a mortgage. The plaintiff's right of possessing the lorry terminated at the moment we took possession under the terms of the agreement. The seizure was a proper exercise of a right which we had under the contract. See *Vol. I. of Halsbury's Laws of England (2nd ed.), p. 762, para. 1250 ; Mather & Son. v. de Silva et al.*[1] ; *Fernando et al v. Jayasinghe et al.*[2] ; *105—6, D.C. Colombo, 6,988.*[3]

N. Nadarajah (with him *V. F. Gunaratne* and *V. M. Coomaraswamy*), for the plaintiff, respondent.—The question is whether a hire-purchase agreement is governed by the English law or the Roman-Dutch law. If the English law is applicable it has to be conceded that, in a case like this, the owner is entitled to take possession in a peaceable manner. It is the Roman-Dutch law, however, which is applicable in Ceylon, for neither Cap. 66 nor Cap. 70 lets in the English law on the subject of hire-purchase agreements. The legal relationship between the owner and the hirer is similar to that which exists between a lessor and his lessee—*Wessels on Law of Contract in S. Africa (1937), p. 455.* There is no distinction between a lease of movable and immovable property—*Lee's Introduction*

[1] *(1933) 12 C. Law Rec. 211.*
[2] *(1933) 35 N. L. R. 231 at 237.*
[3] *S. C. Minutes of September 9, 1938.*

to Roman-Dutch Law (3rd ed.), p. 304 ; Morice's English and Roman-Dutch Law (2nd ed.), pp. 180–1. In a lease, even where there is a covenant permitting retaking of possession, intervention and assistance of Court is necessary when the hirer does not consent to the retaking of possession. One cannot take the law into one's own hands—*Voet 19.2.18 ; Silva et al. v. Dassanayake* [1]*; Perera v. Perera et al.* [2]*; Perera v. Thaliff* [3]*; Hongkong and Shanghai Bank et al. v. Krishnapillai* [4]*; Perera v. Silva* [5]. There is no such thing as parate execution in Ceylon—*re William Perera* [6]. A hire-purchase agreement is not a matter *sui generis* and should be treated either as a lease or a sale under Roman-Dutch law—*3 Maasdorp's Institutes (4th ed.), pp. 233, 272 ; Ross v. Ross & Co.* [7]

H. V. Perera, K.C., in reply.—So long as no force was used in retaking possession of the lorry the plaintiff had no cause of action—*Dustan's Law relating to Hire Purchase (3rd ed.), p. 59 ; Hemmings et al. v. The Stoke Poges Golf Club, Ltd., et al.* [8]

Although, in a mortgage of immovable property, a covenant for taking possession of the property without an order of Court is void as being contrary to public policy, such a covenant stands on a different footing where movable property is concerned—*Wille's Principles of S. African Law, p. 195 ; Kotze's Van Leeuwen (2nd ed.) p. 647 at 652 ; The Chartered Bank v. Rodrigo.* [9]

Cur. adv. vult.

July 29, 1941. HOWARD C.J.—

This is an appeal from a judgment of the District Judge of Colombo entering judgment in favour of the plaintiff for a sum of Rs. 1,000 and on the defendant's claim in reconvention for a sum of Rs. 1,019.70. The learned Judge further directed that, to make the decree of the Court effective, the defendant should forthwith return the lorry to the plaintiff and, if this was not done, the defendant should pay to the plaintiff a further sum of Rs. 1,000 by way of damages. With regard to costs the learned Judge stated that, the defendant's act being tortious and in view of the other circumstances of the case, the defendant should pay the plaintiff one-fourth of her taxed costs. The claim put forward by the plaintiff arose out of an agreement dated February 4, 1939, whereby the plaintiff took on hire-purchase from the defendant a lorry. The plaintiff alleged that on September 19, 1939, the balance due on the agreement had been paid and hence the agreement had been discharged. In spite of such discharge the defendant on November 29, 1939, without any orders of Court forcibly removed the lorry from the possession of the plaintiff and has wrongfully refused to return the vehicle to the plaintiff. For this wrongful seizure the plaintiff claimed as follows:—

(*a*) An order directing the return of the lorry or in the alternative the sum of Rs. 3,000 ;

(*b*) Damages Rs. 3,000 for deprivation of use of lorry and Rs. 2,500 reparation for pain of mind and body.

(*c*) Continuing damages at Rs. 20 per day from November 29, 1939, till defendant returns lorry or pays the sum of Rs. 3,000.

[1] *(1898) 3 N. L. R. 248.*
[2] *(1907) 10 N. L. R. 230.*
[3] *(1904) 8 N. L. R. 118.*
[4] *(1932) 33 N. L. R. 249.*
[5] *(1935) 37 N. L. R. 157.*
[6] *(1904) 1 Bal. Rep. 70 at 73.*
[7] *(1917) Cape P. D. 303.*
[8] *(1920) 1 K. B. 720.*
[9] *(1940) 41 N. L. R. 448 at 451.*

In reply to this claim the defendant pleaded that inasmuch as on November 29, 1939, the plaintiff was in arrears of instalments due on the lorry to the amount of Rs. 409.08, the latter had committed default under the said agreement. The defendant in these circumstances maintained that he was entitled to retake and recover possession of the lorry and denied that such act of retaking was wrongful, forcible or unlawful. He asked for the dismissal of the plaintiff's action and claimed the amount of Rs. 409.08 hereinbefore mentioned in reconvention and also a further sum of Rs. 1,000 damages sustained by the defendant for wrongfully and unlawfully preventing his registration as the person in possession of the lorry and thereby depriving him of the use thereof.

A number of issues were framed, but it is unnecessary to consider them all. The learned Judge has found in reply to issue (9) that an amount of Rs. 1,019.70 is payable to the defendant by way of arrears of instalments under the hire-purchase agreement. In reply to issue (1) he holds that the defendant is entitled to recover this sum from the plaintiff. In reply to issues (4), (5) and (6) the learned Judge finds that the defendant on or about November 29, 1939, forcibly seized and removed the said lorry from the possession of the plaintiff, that the defendant could not have taken possession without the intervention of the orders of Court, and such seizure was wrongful and unlawful. In reply to issue (7) he, therefore, holds that the plaintiff is entitled to Rs. 1,000 as damages. With regard to the defendant's claim in reconvention the learned Judge states that, the seizure of the lorry being unlawful, the Rs. 1,000 claimed as damages by the defendant goes by the board, but the plaintiff being in arrear with her instalments must pay them to the defendant and they will be set off against the damages payable to the plaintiff.

The learned Judge has held that on September 19, 1939, the agreement —P 1—was not mutually terminated and that the plaintiff was in arrears with her instalments. This finding of fact has not been impugned by either party in this Court. The only questions, therefore, that arise for consideration are whether the learned Judge was right in holding that in such circumstances the retaking of the vehicle by the defendant on November 29, 1939, was wrongful and unlawful, and if so, whether the plaintiff was entitled to Rs. 1,000 as damages and whether an order granting a further sum of Rs. 1,000 if the vehicle was not returned could be made.

In holding that the retaking of the lorry without the intervention of Court was unlawful the learned District Judge applied the law laid down with regard to forfeiture clauses in leases. He cited the case of *Sanford v. Don Peter* [1], in which it was held that a forfeiture clause in a contract of lease or hire is nothing more than a mere security for the payment of rent. *Silva v. Dassanayake* [2], in which it was held that for non-payment of rent the lessor has no right to re-enter without an order of Court, was also referred to by the learned Judge. The same principle was laid down by Wood-Renton J. in *Perera v. Perera* [3], where the learned Judge stated that "the necessity for judicial authority for the cancellation of a lease results from the decision in *Silva v. Dassanayake*". The learned Judge

[1] *2 S. C. R. 35.* [2] *3 N. L. R. 248.*

[3] *10 N. L. R. 230.*

also relied on the decision of the Full Court in *Perera v. Silva* [1], where Poyser J. in the course of his judgment stated as follows :—

> "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."

After citing these cases the learned District Judge states that in his opinion the same principles apply to a forfeiture clause in a hire-purchase agreement. He also considers that the enforcement of such a penalty clause without a decree of a Court appears not only to be against the law, but it may give rise to other undesirable consequences. The person in possession may resist the seizure of the vehicle on the road and a fight may take place which may endanger the lives not only of the persons in the vehicle but also of innocent passers by. No authority is cited in support of this opinion. The only local authorities to which we have been referred indicate a contrary view. In *Mather & Son v. de Silva* [2], no question was raised as to the right of the owner of a car under a hire-purchase agreement to retake possession on failure of the hirer to comply with the conditions of the agreement. In S.C. Nos. 105 and 106/D.C. (F) Colombo, 6,988, a Court constituted by Hearne and Keuneman JJ., held that the owners of a car let out to a hirer by virtue of a hire-purchase agreement were acting within their rights in retaking possession. Moreover the English authorities do not lend support to the view of the learned Judge that the same principle applies to a retaking of possession for non-payment of instalments under a forfeiture clause in a hire-purchase agreement as to forfeiture of a lease for non-payment of rent. In *Volume 16 of Halsbury's Laws of England (Hailsham ed.), para. 783,* it is stated as follows :—

> "Although the owner may have the right under the agreement to enter upon the premises where the chattel may be and retake possession of it, yet he must do so in a peaceable and orderly manner and not with force, as it is a misdemeanour, both at common law and by statute, to enter forcibly upon any lands or tenements without due warrant of law."

In paragraph 784 the following passage occurs :—

> "Apart from any special stipulations to the contrary, if the owner retakes possession of hired chattels under powers conferred by the hire-purchase agreement for non-payment of hire-rent he is not disentitled from recovering arrears which have accrued at the date of resuming possession unless the agreement is in truth not one of hire with an option to buy, but one of purchase and sale in which case his remedy is to sue for damages for breach of contract, as by seizing the chattels he determines the original contract."

The same view with regard to the law is expressed in the *3rd Edition of Dunstan's Law* relating to hire-purchase at page 59, where it is stated as follows:—

> "If the hirer makes default in the payment of any instalment the owner may resume possession of the goods and this right he can exercise, but in exercising it he must guard against rendering himself liable to the hirer in trespass."

[1] *37 N. L. R. 157.*

[2] *12 C. L. R. 211.*

In *Hewison v. Ricketts*[1], and *Brooks v. Beirnstein*[2], the right of the owner on the hirer being in arrear with his rent to retake possession of the property hired was not questioned. In both of these cases the phraseology of the clause in the agreement conferring such power on the owner was very similar to the corresponding clause in the hire-purchase agreement for the lorry in this case. The case of *Hemmings and wife v. The Stoke Poges Golf Club, Ltd., and another*[3], also merits attention. In that case the plaintiffs, a man and his wife, lived in a cottage belonging to the defendants, the man being in their service and being required by them to live in a cottage as part of his service and for the performance of his duties. He left their service, but refused to give up the cottage after notice to quit duly given. Thereupon, by command of the defendants, several persons entered the cottage and removed the plaintiffs and their furniture, using no more force than was necessary for that purpose. In an action by the plaintiffs for assault, battery and trespass it was held that the defendants were not liable, their right of entry being a defence to civil proceedings for the acts complained of. From the decision in this case it would appear that under English law, even in the case of premises occupied by a tenant, a landlord who is entitled to possession can retake possession without recourse to the intervention of the Courts provided he uses only a reasonable amount of force. So far as hire-purchase agreements are concerned a clause in the agreement giving a right to retake possession on non-payment of instalments due gives the owner under English law the right to exercise this remedy without the intervention of the Court.

The next point for consideration is whether a similar position with regard to hire-purchase agreements exists under Roman-Dutch law. It has to be borne in mind that the hire-purchase agreement is a contract of modern development. Hence the treatment of the subject in the text-books to which we have been referred is somewhat scanty. No doubt the law with regard to immovables makes it clear that a lessor cannot take the law into his own hands and expel the lessee from the leased premises without first obtaining an order of Court for that purpose, *vide Maasdorp (4th ed.) on "The Law of Obligations", Book III., p. 270.* Counsel for the respondent relies to a certain extent on a statement in the *3rd Edition of Lee on "Roman-Dutch Law", p. 304* to the effect that the rules with regard to the contract of hire of land are in many respects applicable to the hire of movables as well. With regard to land we find the following passage in *Voet, Book XIX., tit. II., s. 18* :—

> "In those cases in which the expulsion of tenants before the expiry of the lease is allowed by law or usage, it has to be observed, that tenants of rural and urban tenements are not to be disturbed by private authority nor withou the public auhority of a judge, when they refuse to quit after private warning; and otherwise the persons ejecting them are liable to the interdict *de vi et vi armata.* It must be observed that tenants must not be expelled abruptly, but only after previous timely notice to quit at the next usual term established by local custom or law, so that the tenant may in the interval consult his own interest by renting another land suitable to his purposes and condition. The right

[1] *(1894) 63 L. J. Q. B. 711.*
[2] *(1909) 1 K. B. 98.*
[3] *(1920) 1 K. B. 720.*

of ejecting the tenant is not prevented by the circumstance that the very land leased has been mortgaged to the tenant as security against his being deprived of it before the expiry of the lease. A tenant cannot be ejected for every abuse, but only, in the discretion of the Judge, for those of a serious character."

The hiring of movables is also considered at pages 180-181 of the 2nd edition of *Morice's Treatise on English and Roman-Dutch Law*. I can find nothing in this treatise to indicate that the Roman-Dutch law with regard to hire-purchase agreements differs from the English law. In fact the author states that the English and Roman-Dutch law on the subject of the hire of movables closely resemble one another. In *Wessels on the Law of Contract in South Africa, Vol. 1., p. 456* the following passage occurs :—

"Parties are free to make any contract they like, provided it is not illegal, and if they agree that a thing is to be let by the one to the other until a future event occurs, and then to be regarded as having been sold by the former to the latter, there is nothing to prevent them from doing so."

In Book V., Chapter VIII. of Vol. II. (Appendix) of *Van Leeuwen's Roman-Dutch Law (2nd ed.)*, the question of the validity of an agreement for parate execution is considered. At page 652 the author cites the view of *Bynkershoek* to the effect that there is nothing invalid in an agreement of parate execution, its object being to avoid expensive methods of judicial execution. It is also stated that the spirit of modern jurisprudence is in favour of the liberty of contract. An observation of Villiers C.J., in *Henderson v. Hanekom* [1], is also quoted as follows :—

"All modern commercial dealings proceed upon the assumption that binding contracts will be enforced by law. However anxious the Court may be to maintain the Roman-Dutch law in all its integrity, there must in the ordinary course be a progressive development of the law, keeping pace with modern requirements."

After a careful consideration of the views expressed in the various text books on Roman-Dutch law I can find no authority for the proposition that the law with regard to hire-purchase of movables differs from the English law. Having regard to the extracts I have cited from *Van Leeuwen* it cannot be urged that a clause inserted in a contract of hire-purchase providing for the retaking of possession by the owner after default by the hirer in paying instalments is contrary to public policy. In fact the following passage from *Van Leeuwen, pp. 647-648*, negatives any such idea :—

"Our author here lays down that in Holland a creditor cannot stipulate for the right of selling a thing pledged to him, but the pledge must be sold after a judicial decree or sentence to that effect. A two-fold reason is generally assigned for the introduction of this rule in Dutch practice. It is said to have been introduced in order to protect

[1] *20 S.C. at p. 519.*

debtors and prevent creditors taking undue advantage of the impecunious position of their debtors. An additional reason is sometimes also given for not recognizing a stipulation in favour of parate execution, inasmuch as we are told that such a right cannot be acquired and exercised by a creditor, for that will be tantamount to his taking the law into his own hands, which no one is permitted to do. We need not, however, attach any importance to this latter objection. A pressing creditor, who, for instance, obtains from his debtor the right to take a horse or cow from his field in order to sell it to the best advantage in settlement of the debt due, and to hand over any balance of the proceeds to the debtor, is in no different position from one who has stipulated for parate execution, yet he is at full liberty to sell and give legal title to the purchaser. In neither case can it with reason be said that the creditor is taking the law into his own hands, for in both instances he is acting with the full consent of the debtor and owner. There is more weight in the first ground advanced in support of the rule. A careful consideration, however, of what has been said and written on the subject shows that the practice in Holland was apparently not uniform, for there existed a difference of opinion among the Dutch jurists of the seventeenth century and those of the eighteenth century in regard to the observance of the correct rule"

Moreover in *Maasdorp, Book III. (4th ed.), at p. 234* it is stated as follows :—

"It has also been provided that if the lessor resumes possession of the goods the lessee may within twenty-one days thereafter reclaim them upon payment in full of the balance of the price."

This is a statement of the South African law and indicates that its Legislature recognizes the right of the lessor in a hire-purchase agreement to resume possession without the intervention of the Court subject to the right of the hirer to claim relief. Hence the validity of a clause allowing the owner to retake possession cannot be challenged.

In these circumstances the defendant was, under the terms of the agreement, entitled to seize the lorry provided he used no more force than was reasonably necessary for this purpose. The evidence of the plaintiff's husband indicates that no force was employed in the seizure of the lorry. It is impossible, therefore, to support the judgment of the learned District Judge. His order is set aside and there must be judgment for the defendant for the sum of Rs. 909.08, an amount made up of Rs. 409.08 on account of arrears of instalments and Rs. 500 on account of loss accruing from being prevented from registering the lorry, together with costs in this Court and the Court below.

SOERTSZ J.—I agree.

Appeal allowed.