1904.
December 1.

PERERA *v.* THALIFF.

C. R., Colombo, 27,620.

Lessor and lessee—Relief against forfeiture for breach of stipulations—Non-payment of taxes by lessee—Refusal by Court to cancel lease on that account, inasmuch as lessee had paid up all arrears.

The Court will grant a lessee relief against a provision in the lease giving the lessor a right to claim a cancellation in the event of a breach of stipulation by the lessee, if the breach thereof did not involve a notably grave and damnifying misuse of the property leased.

The nature of the misuse that ought to be punished by expulsion, or condemnation in damages, or even be passed over on account of its insignificance, is entirely a matter that must be left to the discretion of a careful and circumspect Judge.

Where a lessee had committed breach of a stipulation in the lease by failure to pay certain Municipal taxes on the property leased, but when sued by the lessor for a cancellation of the lease for breach of the stipulation aforesaid brought the full amount of the unpaid taxes into Court, and further proved payment of all subsequent taxes until the end of the term of the lease, the Court refused to allow the lessor's claim for a cancellation.

The default was not intentional and obdurate, but only due to careless inadvertence which could be immediately remedied by payment, and has been so remedied.

CERTAIN premises in Gabo's lane, Colombo, were leased to the defendant for two years. During the continuance of the lease the plaintiff purchased the leased premises, and also procured an assignment of the lessor's interest in the said lease. One of the covenants of the lease ran as follows:—"That the said lessee shall pay all the taxes due on the said premises, and shall at his own cost and expense effect all the repairs of the demised premises during the term of his lease."

The lessee failed to pay the Municipal taxes for the four quarters of 1903, whereupon the lessor paid them.

This being a breach of the afore-mentioned stipulation, the plaintiff brought this action for the cancellation of the contract of lease and for ejectment of the defendant from the premises.

The learned District Judge dismissed his action.

The plaintiff appealed.

The case came up for argument on 23rd September, 1904.

Allan Drieberg, for appellant.

E. W. Jayawardene, for respondent.

[The following cases and authorities were cited by counsel:—*Silva v. Dissanayake*, 3 *N. L. R. 248; Allis v. Sigera*, 3 *N. L. R.*

5; Wijeratne v. Hendrick, 3 N. L. R. 158; Ameresinghe v. Cader, 2 Br. 397; Fonseka v. Fernando, 2 S. C. R. 35; Punchi Appuhami v. Punchi Appuhami, Ram. (1872-1876) 293; Andris v. Rajapakse, 2 Br. 100; Rolfe v. Harris, 2 Price, 206; Hill v. Barclay, Vesey, 58 and 61; Kotze's Van Leeuwen, vol. II., 175; Grotius' Opinions, 262, 3, 4; Sanden v. Pope, 12, Vesey, 282.]

Cur. adv. vult.

1st December, 1904, MIDDLETON, J.—

This was an action for the cancellation of a contract of lease and for ejectment of the defendant from the premises on the ground that defendant had committed a breach of covenant in not paying the Municipal taxes on the property leased.

The breach was admitted, but it was contended on the strength of the ruling of Bonser, C.J., in *3 N. L. R. 248*, that the Court would only order the lease to be cancelled on the ground of "fraud, accident, or mistake," and that in the present case the Municipal taxes had not been paid owing to the mistake of the defendant in not seeing that his sub-lessee, who had covenanted to pay them, did so.

The plaintiff paid the taxes and brought this action and defendant brought the sum of Rs. 30 into Court, and it was alleged and not denied that defendant had subsequently paid the taxes up to the end of the term of the lease. *Rolfe v. Harris* (*2 Price, p. 206*) and *Hill v. Barclay* (*Vesey, 58, 61*) were relied upon for the plaintiff.

In the former case it was held that the grounds on which the English Courts would relieve in equity a forfeiture at law for breach of covenant of a lease by a lessee were where the forfeiture was the effect of inevitable accident and the injury or inconvenience arising from it capable of compensation.

There is no inevitable accident here, but rather a careless omission to see that the taxes were paid. The sum is a trifling one, and I should certainly not apprehend the danger the plaintiff appears to contemplate of the premises being sold up by the Municipality for non-payment under Ordinance No. 6 of 1873, considering the movables and interests seizable and salable before the property itself can be sold.

The injury or inconvenience arising from the non-payment of Rs. 13.74, which was the sum enforceable when plaintiff intervened, could certainly be compensated for by payment before the premises could possibly be sold.

Story, vol. II., sect. 1316, says: "The true foundation of the relief in equity in all these cases is that, as the penalty is designed as a mere

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security, if the party obtains his money or his damages he gets all that he expected and all that in justice he is entitled to." Again, at p. 217 *of Berwick's Translation of Voet* (*19, 2, 18*) we find it stated: "Lastly it must be noticed that what has been said as to expelling the tenant of a land on account of his abuse of it is not to be taken as referring to every trifling matter or neglect of the party respecting the manner of use, but only to notably grave and damnifying misuse ..... As to the kinds of misuse, it must be left entirely to the discretion of a careful and circumspect Judge to decide whether the abuse is such that it ought to be punished by expulsion or only condemnation in the *id quod* interest (*i.e.*, damages), or even be passed over on account of its insignificance."

It is true here that the parties agreed that default in payment of taxes should entitle the lessor to cancel the lease and re-enter but as the doctrine of equitable relief peculiar to the English Law has been recognized by the Court in the case reported in *3 N. L. R. 248* and *2 Browne, 397*, and as the principle of the Roman Dutch Law, as Withers, J., says in the former case, seems to be that which would be observed in cases of penal stipulation in contracts, my view is that I ought not to decree the cancellation of this contract.

The default was not intentional and obdurate, as in the case of the refusal to insure in *Rolfe v. Harris*, but practically a piece of somewhat careless inadvertence which could be immediately remedied by payment, and which has been so remedied.

I therefore dismiss the appeal, but under the circumstances of the case I order that each party pay his own costs of this appeal.