IN REVIEW.

1909.
February 23.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

Bawa (with him *B. F. de Silva*), for the defendant, appellant.

Walter Pereira, K.C., S.-G. (with him *Maartensz, C.C.*), for the Crown.

February 23, 1909. HUTCHINSON C.J.—

I think that the decree which is under review should be affirmed with costs. If the words in paragraph 5 of the document D 3, beginning "It is not the intention of Government," do not constitute a contract, the judgment of Wood Renton J. is right. If, on the other hand, those words do constitute a contract, the plaintiff is entitled to succeed for the reason which I gave in my former judgment. Paragraph 5 is in these terms: "It is not the intention of Government to recover this amount," that is, the balance of the rent due from the defendant, "or any portion thereof, if it is satisfied that the rent taken as a whole has been worked at a loss," &c. There is no allegation that the Government is so satisfied, or that it ought to be satisfied, or that the rent has been worked at a loss; and there is no issue and no evidence on any of those points. A man owes you a debt payable at a future date; you promise him that you will not sue him for it, if you are satisfied that in the meantime he has had losses; when the debt falls due, you sue him for it, and he does not even allege that any of the conditions have been fulfilled which would entitle him to be released from it, or that you are or ought to be satisfied that he has had no losses; his only plea is that you made the promise. Obviously that is no defence.

WENDT J.—

The facts out of which the present hearing in review arises are so fully set out in the judgments already pronounced in the District Court and in this Court that there is no necessity for recapitulating them. The District Judge decided the case upon the footing that the document D 3 was admitted by the parties and dealt with the subject-matter of the action. The record shows that the issues were "agreed to," the first of which expressly mentions that document; that thereupon defendant's counsel "read the document in evidence," and that it was "admitted by Mr. Loos" (plaintiff's counsel); that at the adjourned trial defendant's case was closed by his counsel "relying on the documents already read in evidence by Mr. Bawa" on the first day of trial, and that plaintiff's counsel then addressed the Court and put in a document of his own. There is no note of any objection of any sort to the admission of the document

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D 3. Also, we were informed that the attention of the District Judge was not at any time called to any alleged mistake or omission in the record, and that the objection to the document in question was first stated in the petition of appeal to this Court, to which were annexed the affidavits of plaintiff's two counsel.

The chief question argued before the Court sitting in review was whether, assuming the relevancy of document D 3, it established an agreement binding on the Crown, whereby the Crown modified its rights under the original obligation to the extent of undertaking, if certain conditions were fulfilled by its debtor, to accept payments on what was described as the "Rs. 4·50 system" in lieu of the monthly instalments exigible on the defendant's bond. (The alleged estoppel of the Crown was not insisted on before us.) This question is a question of the construction of the written instrument, and although at one stage of the argument I entertained some doubt upon the point, I have come to the conclusion that the view of my brother Wood Renton was right, and that the instrument was not intended by the parties to be a present and absolute waiver by the Crown of its right to recover the instalments. It is drawn with some degree of formality and precision, and if the intention contended for by defendant had existed, I should have expected it to be unequivocally expressed. While the earlier clauses use the expressions "Government will accept," "the renters must comply," "the renters must pay," the crucial clause (No. 5) merely says "it is not the intention of Government to recover ..... if it is satisfied." And this immediately preceded by the intimation that the difference between the payments on the Rs. 4·50 system and the instalments payable under the bond "will be carried forward as a debt due to Government by the renter." Further, clause 9 definitely binds the Crown, in the event specified therein, to recover no more on account of that difference than the sum of four monthly instalments on the bond. In the view I have taken document D 3 afforded the defendant no defence to the action.

The next question argued was whether, if D 3 had the effect attributed to it by defendant, he had made out his right to rely upon it. It is clear to my mind that the answer was drawn irrespective of that document. It sets up, instead, the documents D and D 1 dated two months earlier, and the averment in paragraph 5 that the defendant "in all respects and conditions conformed to the terms of the said agreement" has reference to the agreement constituted by the two earlier documents. That agreement did not contain, and accordingly the answer does not mention, a term which appears in D 3 as a condition of the Crown's undertaking, viz., "If the Government is satisfied that the rent taken as a whole has been worked at a loss; that the renters have adhered strictly to the Government regulations issued to them; have acted honestly in their dealings with Government; and that no arrack other than that issued under the

supervision of the Excise Officers has been sold by the renters or persons in their employment or by others with their connivance." The fulfilment of that condition precedent was essential to defendant's relying on the agreement in D 3, but he did not plead such fulfilment. Nor is it alleged that, when D 3 was included in the issues, defendant stated the condition had been fulfilled, and that plaintiff let it pass without denying it or asking for an issue to be framed on the point. It cannot, therefore, be contended that the fulfilment of the condition was admitted, and only the existence of the agreement denied by issue (1). I think it is obvious that, if there was no such admission, the burden of proof was on the defendant. He had to establish that Government was satisfied, or at least, according to the case cited by Mr. Bawa, that defendant had done everything necessary to satisfy a reasonable man. The main item in the condition was the fact of a loss on the rent, which was a matter peculiarly and exclusively within the knowledge of the defendant, and that is an additional reason for placing the onus of proof on his shoulders.

In my opinion, therefore, assuming there was a conditional waiver by the Crown, there was neither allegation nor proof by the defendant that the condition had been fulfilled. In this view it is unnecessary to consider the affidavits, or plaintiff's application based upon them. I think that the judgment under review should be confirmed, and the defendant's application dismissed with costs.

MIDDLETON J.—

This was an action to recover the sum of Rs. 28,533·98 as balance due to the Government from the estate of the defendant's intestate of rent in respect of the privilege to sell arrack for seven months by retail in the Kalutara District. The District Judge held that the plaintiff was estopped from asserting the present claim by a memorandum marked D 3 alleged to be signed by A. M. Ashmore, then occupying the position of Lieutenant-Governor of the Island. The Supreme Court held that there was no estoppel, and set aside the judgment of the District Judge, and gave judgment for the plaintiff, limiting the amount to be recovered under paragraph 9 of D 3 to four monthly instalments amounting to Rs. 23,944·64. The defendant being dissatisfied with this judgment brings the same in review before this Court previous to an appeal to the Privy Council.

The Solicitor-General on the first appeal had contended that D 3 had been improperly admitted in evidence by the District Judge as applicable to the present case, and had asked the Supreme Court to read an affidavit of the Acting Solicitor-General and Crown Counsel on the point, which this Court declined to do.

In opening this appeal in review, the learned counsel for the defendant started with the contention that documents admitted in evidence without objection must be taken to be relevant. Having

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now heard the affidavits, together with a letter written by the learned District Judge read, I am of opinion that even if the learned Acting Solicitor-General did not in so many words admit the applicability of D 3 to the present case, yet he did not object on that ground to its reception in evidence by the District Judge, and that, as his omission to do so was acquiesced in and apparently followed by Crown Counsel, the District Judge had no alternative but to suppose that D 3 was in effect admitted as relevant to the case.

The contention of counsel for the appellant was that, as there was no plea here that the appellant was not satisfied under paragraph 5 of D 3, he was entitled to judgment on the pleadings. It is not by any means clear to me that D 3 is relied upon by defendant in his answer, which appears to me to refer to D and D 1. D 3 is, however, referred to in the first issue. The appellant's counsel relied on *Braunstein v. The Accidental Death Insurance Co.*,[1] *Parson v. Sexton and another*,[2] and *Dallman v. King*,[3] as showing that where there was a condition precedent (as he alleged there was here) to be performed by the plaintiff previous to recovery in an action, the plaintiff was bound to allege and prove the performance of such condition, and further argued that from his point of view section 106 of the Evidence Ordinance, Pothier, Vol. I., p. 4, and Van Leeuwen (Kotzé), Vol. II., p. 32, quoted by the Solicitor-General, were in his favour, and put the burden of proof on the plaintiff. Counsel, however, for the appellant admitted during his arguments that he did not press the question of estoppel. The Solicitor-General argued that D 3 did not constitute a binding agreement on the authority of Pothier, Vol. I., p. 4, Van Leeuwen (Kotzé), Vol. II., p. 32, but, if so, that the burden of proof lay on the defendant.

In my opinion D 3 is to be construed as a declaration of the terms upon which the Government would work in carrying out an indulgence given to the renters in respect to their contractual obligations, and not as a hard and fast agreement, by which they would be legally bound. If this opinion is correct, there is no necessity to consider the question of the relevancy of D 3 on either of the two grounds on which it is objected to by the Solicitor-General.

Assuming that D 3 was applicable to this case as a binding agreement, we have to consider on whom was the burden of proof. There is no distinct averment in the answer, as the Solicitor-General alleges, that all the terms and conditions in D 3 have been complied with by the defendant. This omission; it seems to me, would entitle the plaintiff to judgment on the pleadings. Even however, if it can be said that D 3 has been pleaded by the defendant, it seems to me that section 106 of the Evidence Ordinance puts the burden of proof, as regards the alleged vital conditions in paragraph 5, on the defendant.

[1] *31 L. J. Q. B. 17.* [2] *4 Common Bench Reports 899.*
[3] *4 Bingham's New Cases 105.*

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The fact that the Government brings the action is, I think, sufficient evidence that it is not satisfied with the acts of the defendant, and the condition as to the rent having been worked at a loss is a fact specially within the knowledge of the defendant.

Reference to page 92 of the record shows distinctly that the Crown Proctor, on June 19, 1907, had some belief in the relevancy of D 3, while page 94 shows that on July 2, 1907, the defendant's Proctor indulged in a similar belief, though I take leave to think he had not for some reason or other pleaded D 3 in his answer.

I would dismiss the appeal with costs.

Judgment in appeal affirmed.