ATTORNEY-GENERAL *v.* KUDATCHY.

1903.
October 14.

D. C., Galle, 6,347.

Crown and toll renter—Default of payment of toll rent due to the Crown—Right of the Crown to re-enter—Locatio conductio.

The farming of a toll is a case of *locatio conductio.*

Therefore, upon default committed by the conductor, he cannot be expelled by the private authority of the locator except after obtaining a judicial decree for the purpose.

Where the Crown is the locator, it does not enjoy any exemption from the necessity of obtaining such a decree.

Re-entry by the Government Agent on behalf of the Crown without a decree of court renders the Crown liable to damages suffered by the conductor.

The main question for determination in this case was whether the Crown (represented by the Attorney-General as plaintiff) was entitled without a decree of a competent Court to re-enter upon

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the toll which is the subject of this action, and the rent of which from 1st January, 1901, to 31st December, 1901, was purchased by the defendant.

The Crown sought to justify the re-entry under article 13 of the conditions of sale, which runs as follows:—

"In the event of default being made in payment of the rent, or performance of any of the conditions of sale, the Government Agent shall be at liberty to re-enter upon the said toll, and the same to have again, collect, receive, retain, and enjoy as of his former estate, and the said purchaser, his executors and administrators, and all others from henceforth utterly to expel, put out, and remove, and thenceforth to vacate and determine the sale as to the Government Agent shall seem meet."

The defendant admitted that he made default in the payment of the instalments for February, March, and April, 1901, which fell due respectively on the last day of each of the said months, and which amounted to Rs. 512.20; but pleaded that he was not liable to pay any part of the plaintiff's claim (which included all the instalments in regard to which default had been made, and the loss sustained by the Crown having to re-sell the toll to a third party) on the ground that, on the order of the Chairman of the Municipal Council of Galle, the bridge over the canal called Moragoda was pulled down on the 1st February, 1901, and was not repaired till the 7th May, 1901. The defendant also pleaded that during this period all cart traffic on the road was stopped, and he suffered great loss as renter of the toll. He lastly pleaded that, as the bridge was pulled down with the acquiescence of the Government, he was not liable to pay the plaintiff's claim.

Several issues were framed by the District Judge on the pleadings, but the case was ultimately decided by him against the Crown, on the ground that the Crown had no right to re-enter upon the toll in question without a decree of Court.

The Attorney-General appealed.

Rámanáthan, S.-G., for appellant.

Van Langenberg, for respondent.

Cur. adv. vult.

14th October, 1903. GRENIER, A.J.—

I am clearly of opinion that the District Judge was right in the view he took of the Crown's right to re-enter. The Crown when it enters into a contract of the character in question is in no better position than the subject. This Court has held that in regard to land which had been conditionally granted the Crown

had no power, upon a breach of the conditions, to resume possession without having first obtained a decree from a competent Court (*7 S. C. C. 171*). We feel bound to follow this decision. The Solicitor-General argued that the right to re-enter is a prerogative right which the Crown possesses, and that in this case there was a special agreement between the Crown and the subject that the Crown should re-enter on a breach of the contract by the defendant.

Such authorities as the Solicitor-General has referred us to do not support his contention. It has never been held here or elsewhere that the Crown is at liberty to provoke a breach of the peace, and " to utterly expel," to quote from article 13, any person who is lawfully in the possession of a corporeal or incorporeal right, without first seeking and obtaining the decree of a competent judicial tribunal. We are familiar with cases where the lessor stipulates with his lessee that he should have the right of re-entry on failure by the latter of payment of rent, but the law is quite settled that the former cannot re-enter without the authority of a competent Court. If he does re-enter with the consent of the lessee, he can have no further claim for rent not in arrear, but can recover damages actually sustained by the breach of the covenant to pay rent (*1 S. C. C. 237*).

We can draw no distinction, for there is none in the Roman-Dutch Law between re-entry upon land and re-entry upon an incorporeal right, such as the right to levy tolls and duties. Between the contract of purchase and sale and that of letting and hiring there is a very close relation in the Roman-Dutch Law, a relation which is due to the fact that they have certain essential elements in common between them. As a rule, whatever may be the subject of sale may also form the subject of hire. The farming of tolls as known to the Roman-Dutch Law corresponds to the practice in this Colony of taking on hire what is popularly known as the toll rent, or, in other words, the right to levy a tax, sanctioned by legislation, on vehicles, animals, and passengers at a particular spot. In the language of the Roman-Dutch Law this farming of tolls is an incorporeal thing, and may form the subject either of purchase and sale or of letting and hiring (*Vand. p. 236*). The fact that the Crown is invariably the person from whom the toll rents are farmed does not invest it with any special prerogative rights, and place it in a more advantageous position than the subject, so far as the right of re-entry is concerned. The Crown must have recourse to the proper judicial tribunals to regain the incorporeal thing which it has parted with to the subject in just the same way that it is bound to invoke such tribunals in

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order to recover possession of a corporeal thing, whether it be a house, land, or any movables. We are constrained, therefore, to hold that the re-entry by the Government Agent acting on behalf of the Crown at the end of April, 1901, was not justified, and that the removal of the defendant was a wrongful act.

The only question which remains is whether the Crown is entitled to a decree for arrears of rent and damages. The defendant adduced evidence to show that during the months of February, March, and April all cart traffic on the road was stopped by the blocking of the bridge over the canal called Moragoda-ela, and that in consequence he received hardly any toll. There was no denial of this by the plaintiff, who led no evidence at all contradicting or explaining that of the defendant. We must conclude, therefore, that the defendant's statement is true: that he received very little toll for the months of February and March and April. I gather from the petition of appeal that the plaintiff relies upon a statement made in cross-examination by defendant's witness, Alexander de Silva, to show that the defendant did receive some toll for February, March, and April. Alexander de Silva, however, does not say more than that " the stoppage of the bridge " did not absolutely stop cart traffic, but it greatly reduced the collections. His evidence is valueless as affording any test as to what the defendant really got, or as to the extent to which defendant suffered by the bridge having been pulled down. It certainly contains no particulars upon which any assessment can be reasonably based of the amount of toll collected by the defendant during the months in question. On the other hand, we have the defendant's evidence in which he states that the toll collection was reduced by Rs. 150 a month, and that, although he petitioned the Government Agent on the subject, he refused to allow him any reduction. We are thus left in a state of uncertainty as to what the actual collections were. and as the evidence is all one way, we see no reason to interfere with the finding of the District Judge on this question of fact.

The appeal must be dismissed with costs.

WENDT, J.—

It is clear that the farming of a toll is a case of *locatio conductio* (*Juta's Vanderlinden, 2nd Edition, 141*), and therefore the well-established principle applies that the conductor cannot, upon default committed, be expelled by the private authority of the locator, but the latter must first obtain a judicial decree for the purpose. No authority has been cited to us to show that, where the Crown is the locator, it enjoys the privilege of exemption from

that principle. On the contrary, in the strictly analogous case of a sale, the Crown has been expressly held bound by it (*Abeysekara v. Seneviratna, 7 S. C. C. 171*), and that case is binding upon us.

I agree with my brother Grenier that the appeal should be dismissed.