

RAM CHARAN *ats.* WITHEROW.

[Appellate Jurisdiction (Thomson, J.) September 9, 1946.]

Agreement to lease—covenant to keep clean of noxious weeds—breach of covenant—damages for injury to reversion from failure to keep clear of noxious weeds—measure of damages—agreement not stamped—notice to produce original agreement served on defendant—defendant declined production—plaintiff forced to stamp original agreement—costs.

Ram Charan was in occupation of land owned by Witherow under an agreement for lease which contained a covenant "the said land to be kept clear of noxious weeds" this was not observed and Witherow, in an action for, *inter alia*, arrears of rent also claimed damages for breach of the covenant to keep clear of weeds. The Magistrate assessed damages on the cost of restoring the land to its condition as at the date of the agreement. For purposes of evidence at the trial Witherow gave Ram Charan notice to produce the original agreement. Ram Charan refused and Witherow had to pay stamp duty on a duplicate prior to producing it.

HELD.—(1) There is an actionable breach of a covenant to keep clear of weeds if at any time the property is not clear of weeds.

(2) In case of breach of a covenant to keep clear of weeds the measure of damages is the injury to the value of the reversion which must be assessed with regard to the time which will elapse before expiry of the lease; unless the term is about to expire it is not the amount it would cost a purchaser of the reversion to restore the land to a state of cleanliness.

(3) A party who has to stamp a document in order to produce it in evidence must bear the cost of stamp duty himself.

Cases referred to:—

Gardner v. Hirawanu [1927] A.C. 388.

APPEAL by plaintiff from the judgment of Magistrate for arrears of rent and damages. The facts fully appear from the judgment.

Haricharan, for the appellant.

W. L. Davidson, for the respondent.

THOMSON, J.—This is an appeal from the judgment of the Magistrate for the Nausori District.

On 6th June, 1945, the parties entered into an agreement for a lease of certain land for a period of ten years which contained *inter alia* the following covenants:—

" 3. The annual rent is to be £12 paid in advance.

" 4. Charley (i.e. the present appellant) has to securely fence the land and fence to be kept in good order by Charley.

" 6. Said land to be kept clean of noxious weeds by Charley."

On 5th June, 1946, the respondent commenced proceedings in the Magistrate's Court. He alleged breach of all the covenants set out above and claimed arrears of rent due and damages for injury to his reversion

caused by appellant's breach of the fencing and noxious weeds covenants. In the event he obtained judgment for £24 made up as follows:—

Arrears of rent	£6
Damages by reason of breach of the fencing covenant		1
Damages by reason of breach of the noxious weeds covenant	17
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		£24
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and costs which were allowed at £6 18s. 6d.

It is against that judgment that the appellant now appeals.

As regards so much of the judgment as relates to arrears of rent it is not unfair to say that the ground of appeal is that it is against the weight of the evidence and in particular that it failed to give sufficient weight to the two receipts (each for £6) produced by the appellant. On the perusal of the evidence, however, it is clear that there was sufficient evidence to support either possible view of the question in issue. The question was one of fact for the Magistrate to decide after hearing the evidence and so long as there was evidence to support the view he took (as I have said there was) it would be improper for this Court to interfere.

As regards the alleged breach of the fencing covenant, here again the question is purely a question of fact, there was sufficient evidence to support the conclusion at which the Magistrate arrived and again, in the circumstances, his decision must stand.

As regards the alleged breach of the noxious weeds covenant this, to my mind, resolves itself into three questions which it would be well to consider separately. (1) Did the appellant in fact fail to keep the land clean of noxious weeds? (2) If there was in fact such a failure on the part of the appellant did it on 5th June, 1946 constitute an actionable breach of the agreement between the parties? and (3) If there was an actionable breach of the agreement did the Magistrate apply a correct principle to the assessment of damages.

To the first of these questions the Magistrate has given an affirmative answer which there is sufficient evidence to support and that answer must be accepted here. The answer to the second question is equally clear. The covenant to keep the land clean was not to clean it at any specified or unspecified time and it was not to deliver it up in a clean condition on the expiry of the term of the lease; it was to keep the land clean. The Magistrate has found in fact (and I am bound to accept this conclusion) that respondent failed to keep it clean and I see no cause to except the case from the ordinary rule of law that in the absence of anything to the contrary there was a breach which became actionable as soon as it occurred.

I pause here to observe that I have considered but fail to see the relevance of *Gardner v. Hirawanu* (1927 A.C. 388) which counsel on each side mentioned in support of his case. The question in that case was in effect whether or not the lessee had taken steps to observe a covenant to clear too early in the term of his lease. Here the question was whether he had failed to observe the covenant early enough.

Having arrived at this stage it becomes necessary to consider the third question which has been propounded, the question of the measure of damages, and here it seems to me that the Magistrate overlooked an essential element in the assessment. He apparently held (and if so it was correctly held) that the proper measure of damages was the injury done to the value of the reversion but in assessing that injury he has overlooked the consideration that the term of the lease had still nine out of ten years to run. Had the term been about to expire it is quite clear that the value of the reversion would be diminished by the amount that it would cost a purchaser to restore that land to the state of cleanliness as to noxious weeds which it enjoyed in June, 1945, and that is the sum which the Magistrate has been at pains to calculate. But it by no means follows that the value would be diminished by the same amount when it is borne in mind that a purchaser of the reversion now would have to wait nine years to come into possession and during that period would enjoy the benefits *tanta et talia* of the covenant to clear. Had the Magistrate attempted an assessment of the damages on this basis (a task of which the difficulty is only too clear) this Court would have been reluctant to interfere with the result. But he has not attempted to do so and accordingly the assessment at which he in fact arrived cannot stand. In view of the small value of the subject matter I am reluctant to increase the burden of costs to the parties by taking any steps to have the damages assessed according to the true manner other than by assessing them myself on the evidence on record at the sum of £1.

There remains the question of the order for costs made by the Magistrate and, in particular, of whether or not he properly allowed the respondent the sum of £2 2s. 6d. in respect of the stamp duty and penalty paid by him on the duplicate agreement which was put in evidence. Here, I think, the facts are not in dispute. The agreement was executed in duplicate but neither copy was stamped at the time of execution. When the proceedings were commenced respondent served a notice to produce the original (which was in appellant's possession) on appellant's solicitor who intimated that he would decline to comply with the notice on the ground that the original was not stamped. Respondent thereupon paid 2s. 6d. stamp duty and £2 penalty on the duplicate and produced it in evidence at the trial.

Under the Stamp Duties Ordinance (Cap. 150) the stamp duty on an agreement for a lease such as that with which this case is concerned is 2s. 6d. and a similar duty is payable on the duplicate. The Ordinance does not anywhere say in terms by whom that duty is to be paid but by s. 4 the Crown can recover the amount of the duty, if it be not paid, from the person described in the schedule as the "person primarily liable" who, in respect of both leases and duplicates of leases, is the lessee. It is not, of course, open to anyone but the Crown to proceed under s. 4 and the only other sanction to enforce payment is that contained in ss. 38 and 40 which provide in effect that an unstamped instrument cannot be given in evidence until appropriate stamp duty and penalty, if any, have been paid. That sanction, it will be observed, operates not only against the person described as "primary liable" but against anyone who wishes to make use in evidence of a document which attracts stamp duty.

In this particular case, then, the lessor, having failed to make any binding agreement for the stamping of the documents by the lessee, had two courses open to him. On the one hand he could, as a prudent man would, have stamped forthwith the duplicate which remained in his possession. Or on the other hand he could do nothing in the hope that if any dispute should arise regarding the document it would arise in such a way as to force the lessee and not himself to put the document in evidence. He chose to take the latter course but unfortunately for him the dispute has arisen in such a way as to force him to put the document in evidence and I fail to see why he should recover from the lessee an expense which arose from his own lack of ordinary prudence dating from long before the commencement of the dispute between the parties. The amount of costs allowed by the Magistrate will consequently be reduced to £4 16s. od.

As regards the costs of this appeal, the appellant has in effect failed on two issues and succeeded on two others. It is accordingly a case where the costs should be apportioned which I do by ordering that each side pay its own costs.

POLICE *ats.* PRASAD.

[Appellate Jurisdiction (Seton, C.J.) September 19, 1946.]

Penal Code Cap. 4—s. 193 (c)—loitering near premises for a disorderly purpose—whether immoral purpose disorderly—whether section applies if disorderly purpose actually carried into effect.

Prasad was noticed by a constable standing in the gateway of a private residence committing an act of masturbation. He was facing the house and what he was doing was not visible from the road.

HELD.—(1) Proof that a person is found near premises committing masturbation is proof that he was there for a disorderly purpose within the meaning of s. 193 (c) of the Penal Code.

(2) The offence defined by s. 193 (c) of the Penal Code may include cases where the purpose alleged has in fact been carried into effect.

Cases referred to :—

(1) *R. v. Berg and ors.* [1927] 20 Cr. Ap. 38.

(2) *Hayes v. Stevenson* [1860] 3 L.T. 296 ; 25 J.P. 39 ; 37 Dig. 364.

APPEAL by the police against dismissal of a charge by a Magistrate.

E. M. Prichard, for the appellant : In dismissing this charge the learned Magistrate observed " So far as the evidence goes it is clear that the act of masturbation was being committed and therefore it was not 193 (c) but 193 (d) which applied, but the prosecution say that the act was not visible from a public place so that there was no offence against (d)". There is a certain difficulty about the logic of that observation but whatever it means it scarcely suggests that the Magistrate applied himself to the real question—whether the facts proved