APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

KIKABHAI GANDABHAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* KALU GHELA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896. *June* 16.

Landlord and tenant—Yearly tenancy—Notice to quit—Notice to make a fresh agreement with the landlord or to quit at the end of the year—Sufficient notice.

On the 28th September, 1891, the plaintiff gave defendants, who held his land as annual tenants, a notice in the following terms:—

"Therefore, within two days from the receipt of this notice, meet us, increase the rent and give us a legal writing, or in default, on the 31st March, 1892, we shall keep present two good men and take full possession of the said land with all trees, &c., on that day, and no contention of yours in that matter will avail; and if you raise a contention we shall have recourse to a regular suit to obtain possession, and you will be responsible, &c."

Held that the notice was a good and valid notice to terminate the tenancy.

SECOND appeal from the decision of T. Hamilton, District Judge of Surat, reversing the decree of Khán Sáheb Jahangir E. Modi, Subordinate Judge of Olpád.

The plaintiff sued to recover possession of certain lands, alleging that the defendants were yearly tenants; that he served them with a notice on the 28th September, 1891, to pay enhanced rent or to give up possession on the 31st March, 1892, and that they refused either to pay the enhanced rent or to vacate the lands.

The following is the material portion of the notice referred to in the plaint:—

"We have very often told you and sent you word that you are not giving us a rent-note and you are putting us off from time to time. Besides, people are ready to give us more rent; therefore, we are now not willing to keep you for good. Therefore within two days of the receipt of this notice meet us, increase the rent and give us a legal writing, or in default on the 31st March, 1892, we shall keep present two good men and take full possession of the said land with all trees, well, &c., on that day, and no contention of yours in that matter will avail, and if you raise a contention, we shall have recourse to a regular suit to obtain possession, and you will be responsible for the expenses."

The defendants pleaded (*inter alia*) that the notice given by the plaintiff was not a good legal notice.

* Second Appeal, No. 709 of 1895.

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The Subordinate Judge found that the notice served by the plaintiff on the defendants was sufficient. He, therefore, allowed the claim.

On appeal by the defendants the Judge held that the notice given to the defendants was not sufficient, and he reversed the decree.

The plaintiff preferred a second appeal.

Govardhanram M. Tripathi appeared for the appellant (plaintiff) :—The notice was good. It was given more than six months before 31st March, 1892. Sections 83 and 84 of the Land Revenue Code (Bombay Act V of 1879) were complied with. The notice is clear and unambiguous and sufficient in law to entitle the plaintiff to maintain an action in ejectment. The Judge has relied on *Mohamaya* v. *Nilmadhab*[1] and *Bradley* v. *Atkinson*[2]. In the former case there was no question as to the sufficiency of notice, and the latter case is not applicable, because the notice in that case expired in the middle of the month of tenancy. In support of our contention we rely on *Hem Chunder* v. *Radha Pershad*[3], *Ahearn* v. *Bellman*[4], *Bury* v. *Thompson*[5] and Woodfall on Landlord and Tenant, page 316 (14th edition).

Motilal M. Munshi appeared for the respondents (defendants) :—The decision in *Hem Chunder* v. *Radha Pershad*[3] is based on the decisions in *Janoo Mundur* v. *Brijo Singh*[6], which is dissented from in *Mohamaya* v. *Nilmadhab*[1]. The notice in dispute being a notice in the alternative is not sufficient—*Bradley* v. *Atkinson*[7]. The test is what was the intention of the landlord. In the present case the intention of the landlord was to continue the tenancy in case we paid the enhanced rent.

FARRAN, C. J. :—The District Judge in this case has dismissed the plaintiff's suit on the ground that the notice which the plaintiff gave to the defendants, his alleged tenants, was not in law a notice which could determine the tenancy. The Subordinate Judge on that point had come to a different conclusion.

(1) I. L. R., 11 Cal., 533.
(2) I. L. R., 7 All., 899.
(3) 23 Cal. W. R., 440.
(4) 4 Ex. D., 201.
(5) (1895) 1 Q. B., 231.
(6) 22 Cal. W. R., 518.
(7) I. L. R., 7 All., 899.

Apart from authority, and reading the notice as a person not a lawyer would understand it, we agree with the Subordinate Judge that it expresses the intention of the plaintiff to enter upon and take possession of the land on the 31st March, 1892, and requires the defendants to deliver up possession on that day. "Therefore," the notice states, "within two days from the receipt of this notice meet us, increase the rent, and give us a legal writing, or in default on the 31st March, 1892, we shall keep present two good men and take full possession of the said land with all trees, &c., on that day, and no contention of yours in that matter will avail, and if you raise a contention we shall have recourse to a regular suit to obtain possession and you will be responsible, &c." The defendants were by that notice allowed two days to make a fresh agreement with their landlord, failing which the notice to them to quit at the end of the year became an absolute notice. Two days after the defendants received that notice, when they knew that they had not made an agreement with the plaintiff, they had before them a written notice which had then become unconditional that they must give up possession on the 31st March, 1892. The terms of the notice could not possibly, we think, have left them in doubt as to what was required of them. That to an ordinary mind would appear to be sufficient to terminate the defendants' existing tenancy on the day specified, assuming it to have been a tenancy which the plaintiff had the right to terminate by notice.

Is there, then, anything in the authorities which prevents us from holding such a notice to be a good and valid notice to terminate the tenancy? We think that there is not. In *Bradley* v. *Atkinson* relied on by the District Judge the notice dated 11th December was "If the rooms you occupy are not vacated within a month from this date I will file a suit against you for ejectment as well as for recovery of rent due at the enhanced rate." The notice in the judgment of the Court delivered by Petheram, C. J., was held insufficient, as it was not an intimation to terminate the tenancy *on the 31st December*, the date on which the tenancy could be legally determined. The essential condition that there must be no uncertainty as to the date upon which the tenancy is to terminate, and that such date must be a

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date on which the tenancy can legally be determined, was wanting and, therefore, the notice was held bad. The judgment of Straight, J., makes the reason of the decision very plain. The case is totally unlike the present, where the legal date on which the tenancy is to terminate is stated with particularity. In *Mohamaya* v. *Nilmadhab*[1] all that was decided was that a notice to quit or pay an enhanced rent did not entitle the landlord to a decree for both rent and in ejectment—rent for the first quarter after the notice and ejectment thereafter.

The judgment of Garth, C. J., in the last mentioned case raises a doubt whether a notice to quit upon a certain date or pay an enhanced rate from that date is valid. Such a notice was treated as a good notice in *Janoo Mundur* v. *Brijo Singh*[2], followed in *Hem Chunder* v. *Radha Pershad*[3]. And a majority of the Judges in *Ahearn* v. *Bellman*[4] held that a notice to quit was not invalidated by the addition of the further clause "and I hereby further give you notice that, should you retain possession of the premises after the day before-mentioned, the annual rental of the premises now held by you from me will be £160 payable quarterly in advance." We do not think it necessary in this case to decide whether the doubt expressed in *Mohamaya* v. *Nilmadhab* (*supra*) is well-founded or not. There the alternative presented to the tenant continued to be presented to him until the date specified in the notice. Here the alternative ceased to be an alternative two days after the service of the notice where after the notice to quit left the tenant no other option than to deliver up possession on the day named. In *Bury* v. *Thompson*[5] a notice by a tenant that he would leave the leasehold premises on a certain day unless the landlord agreed in the meantime to a reduction of rent, was held to be a good notice. It bears a close resemblance to the notice in the present case.

We do not think, therefore, that the authorities prevent us from acting upon our own view as to the validity of the notice before us and, therefore, hold that the notice is a good and effectual notice, and reverse the decree of the District Judge and

(1) I. L. R., 11 Cal., 533.
(2) 22 Cal. W. R., 548.
(3) 23 Cal. W. R., 440.
(4) 4 Ex. D., 201.
(5) [1895] 1 Q. B., 231, confirmed in appeal at 696.

remand the appeal for trial of the remaining issues. Costs of the appeal will be costs in the cause.

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Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

BAPU (ORIGINAL DEFENDANT No. 5), APPELLANT, *v.* BHAVANI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 AND 2).*

1896. *June* 16.

Mortgage—Mortgage or sale—Test of mortgage—Practice—Procedure—Finding on unnecessary issue between co-defendants—Res judicata.

In an instrument dated the 30th June, 1886, styled a sale-deed, it was recited that in consideration of Rs. 2,500 certain specified properties (already mortgaged to the so-called vendees and in their possession) were "given in sale" to them and were to be enjoyed by them for ten years in any manner they liked. At the expiration of that time the vendors were to pay the Rs. 2,500 and take back the property. In 1893 the plaintiff (a son of the so-called vendor) brought this suit treating the above instrument as a mortgage and praying for redemption. The main question in the suit was whether the instrument sued on was a mortgage or a deed of sale with the option of repurchase after ten years.

Held, that the instrument was a mortgage. The test was whether after the execution of the deed there continued to be a debt from the so-called vendors to the vendee, or whether the pre-existing debt became extinguished on the execution of the deed.

A finding between co-defendants unnecessary for the determination of the suit, or the rights of the parties involved in the suit, is not *res judicata*.

SECOND appeal from the decree of G. Jacob, District Judge of Sholápur-Bijápur, reversing the decree of the Subordinate Judge of Bársi.

Suit for redemption. The land in question was the property of one Gunaji and his two sons, *viz.*, the plaintiff Bhavani and Raoji (defendant No. 4). This land had been mortgaged to members of the Mundhe family, and the mortgagee's interest had become vested in one Nani, who was in possession.

On the 21st October, 1885, Gunaji mortgaged this same land to Pandurang and Nana (defendants Nos. 1 and 2) for Rs. 2,000,

* Second Appeal, No. 646 of 1895.