Special Appeal No. 635 of 1868.

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March 2.

Nanabhai Rustamji.....*Appellant.*

Pestanji Jamsetji.....*Respondent.*

Tenant from year to year—Notice to quit—Six month's notice.

When there is no custom of the country to the contrary six months, notice to quit is proper notice. This period must have elapsed before the plaint is filed, and the time occupied in the suit before decree cannot be counted.

This was a Special Appeal from the decision of N. M. W. Daniell, Acting Judge of the District of Surat, in Appeal suit No. 120 of 1868, confirming the decree of the Munsif of Balsar.

The plaintiff brought this suit to recover from the defendant possession of certain land. He also claimed to recover rent for the same for two years and ten months. The following is a translation of the agreement under which the defendant held the land from the plaintiff:—

"I will pay you every year the amount of the said rent as it falls due. If I do not pay the rent and you ask (me) to vacate your land, I will then (immediately) duly vacate and make over the land to you. If you call upon me to vacate the land and if I do not vacate it, or even pay the amount of the rent, you are at liberty to compel me by a suit to vacate the land.

The defendant replied that only eight yards of the land belonged to the plaintiff; that the land on the north side did not belong to the plaintiff alone; but that a portion belonged to Kolobhai, and that rent was due only for the current year.

The Munsif held that the plaintiff was entitled to recover possession of the land, and that the claim for rent was proved to the extent of Rs. 24-2-8.

In appeal the Acting Judge delivered the following judgment:—

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"The appellant argued that, according to the terms of the lease, the respondent can only recover possession if the appellant fail to pay the rent. I do not see that this point was distinctly raised in the lower Court, but it is one which may be considered now, as the appellant's arguments are confined to the virtue of the bond. I do not read the bond to mean that the owner is barred from recovering so long as the rent is paid. The clause says, that if the rent be not paid, the owners may at once resume the land. The lease is for no definite period; and to construe the lease is an interminable instrument at the option of the appellant, would, in my opinion, be a misinterpretation of the agreement and would be inequitable. The clause seems to me to mean that the appellant, so long as he pays rent, can prevent the respondent recovering immediate possession, if cause be shown for delaying recovery.

"It is argued that in the bond it is agreed that the rent shall be paid annually. The present award has been for ten months rent. The cause of action could not arise until the expiry of a year.

"On the first issue, I rule that the respondent can recover possession of the land; on the second issue, although the terms of tha bond are for the payment of an *annual* rent I consider in Equity that the respondent is entitled to the rent for the portion of the year preceding recovery, and that the right of recovery arose when he took action to recover possession of the land.

"I rule that the claim to rent is proved to the extent award in the lower Court. The decree of the lower Court is confirmed with costs."

The case was heard this day before Couch, C. J., and Gibbs, J.

Nanabhai Haridas for the appellant:—The Judge has held that rent was not due at the time when possession was demanded and we had no notice of the tenancy being determined.

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Shantaram Narayan for the Respondent:—The lease is not terminable only by default of payment. Whether we have put an end to the lease has not been determined. Here the period occupied by this suit was a sufficient notice of the determination of the tenancy as ruled by this Court. *Nasarvanji Hormasji v. Narayan Trimbak* (*a*).

COUCH, C. J.—The lease (No. 2,) cannot be construed as creating more than a yearly tenancy, as we find no words in it indicating that the tenancy was to be for a longer period, or of a permanent nature. It was by its terms determinable by failure to pay the rent annually, or by a reasonable notice. A Court of Equity will relieve upon payment of the rent when possession is demanded on the ground that the rent due had not been paid. Now, what is a reasonable notice depends upon the custom of the country ; and in the absence of any custom, six months' notice would, I think, be a fair one. (*b*) In order to enable the plaintiff to recover in this case, he should show a failure of payment and a demand of possession, or that he had determined the tenancy by a notice. The plaintiff sued for rent for two years and ten months, but, on the defendant's alleging that he had paid the rent for two years, the plaintiff gave up his claim for that (*vide* Exhibit No. 9). The motive under which the plaintiff did this does not appear, but the claim was withdrawn, and the rent found due was only for ten months; consequently, we cannot hold that there was a failure to pay the rent. We must therefore consider whether there was a notice to quit. The plaint was brought soon after the demand for possession was made; so there was no notice, and I cannot assent to the doctrine that the defendant can avail himself of the time occupied by this suit. We must, therefore, reverse the decrees of both the lower Courts on the ground that the tenancy had not been determined when this suit was instituted. The plaintiff will be at liberty to bring a fresh suit upon a determination of the tenancy since the institution of the present suit, either by a proper notice, or by a failure to pay rent.

(*a*) 4 Bom. H. C. Rep. A. C. J. 125.
(*b*) *Vide* Sec. 43 of Bombay Act I. of 1865.

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GIBBS, J.—I concur. With regard to the case of *Nasserwanji v. Narayan (supra)* in which we held that the institution of the suit, which had lasted for more than two years, might be held to be a sufficient notice to quit, the facts were very peculiar. There, the agent of an *inamdar* gave lands *on suti* tenure without the consent of the *inamdar*, and it was found by us that the agent was guilty of fraud. It was urged there also that there was no notice to quit, but the tenants were considered *participles criminis*, I think, and therefore, we thought they might be turned out without any notice.

Couch, C. J.—If so, the tenants were not entitled to any notice to quit, seeing that they had got the land from an unauthorized person.

Decrees reversed.

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Special Appeal No. 629 of 1867.

Narotamdas Bhagtandas, ... *Appellant.*

Dayabhai Ichhachand. ... *Respondent.*

Insurance Policy—Notice of loss—Limitation—Act XIV. of 1859, sec. 1 cl. 10—Mercantile usage.

A suit for the recovery of the amount due on a Policy of Marine Insurance falls under cl. 10 of sec. 1 of the Limitation Act.

In such cases the limitation (in the absence of a custom allowing a certain time of grace) begins to run from the date when the defendant has notice of the loss and refuses, or neglects, to pay.

This was a Special Appeal from the decision of C. G. Kemball, Judge of the District of Surat, in appeal suit No. 118 of 1866, confirming the decree of Lallubhai Gopaldas, Munsif of Surat.

The Special Appeal was argued on the 28th January 1868 before Tucker and Warden, J.J.

The facts appear from the judgment of the Court.

Shantaram Narayan for the Appellant.

Dhirajlal Mathuradas for the Respondent.

Cur. adv. vult.