

Greig  
v.  
De Lima.

The plaint in the Magistrate's Court merely stated that the note had been made by Theron and endorsed by the defendant, without stating that the maker had failed to pay the same on demand.

Musgrave, for the defendant, produced an affidavit, setting forth that in the Court of the Resident Magistrate the defendant had pleaded, as a defence, want of due negotiation, no notice having been given him by the holder of the non-payment by the maker of the note when due, which he considered was a sufficient defence, and ought to have been sustained by the Resident Magistrate; and contended that when a claim was made in this Court in virtue of the sentence of an inferior Court, that sentence, although final in the inferior Court, afforded only *prima facie* evidence of the debt when the judgment of this Court was sought,—which, although sufficient to warrant provisional sentence when no objection was made, might, like any other apparently liquid ground for a provisional sentence, be rebutted by a defence, which, like the present one, was or could be instantly instructed.

The Court would have refused the provisional sentence, if the facts had been as stated by the defendant.

*Sed postea* (30th November, 1840,) the plaintiff produced the record of the proceedings in the Resident Magistrate's Court, showing that evidence had been given to the Resident Magistrate that due notice of the non-payment had been given to the defendant,—and besides, that subsequently the defendant had repeatedly acknowledged his liability, and promised payment.

The Court gave provisional sentence, as prayed.

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1. LEASE.—NOTARIAL.

2. — UNDERHAND.

3. — ALLEGATION OF UNLIQUIDATED DAMAGES NO  
DEFENCE AGAINST PROVISIONAL CLAIM FOR  
RENT ON

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1. NEETHLING *v.* TAYLOR.

[23rd December, 1834.]

*Production of Lease sufficient to entitle the Lessor to claim Provisional Sentence for Rent.—Procurator "in rem suam" entitled to sue.*

Neethling  
v.  
Taylor.

The plaintiff claimed provisional sentence in the following summons:—

"Command A. Taylor, &c., that, &c., he render to J. H. Neethling, &c., acting in his capacity of testamentary executor

of the late A. Munnik and his predeceased wife, and administrator of their minor heirs, and on an authorization of J. G. Munnik, the proprietor of a certain water mill, tenanted by the said A. Taylor,—first, the sum of Rds. 207, which he owes to the said J. H. Neethling upon and by virtue of a certain promissory note, passed by the said A. Taylor in favour of the said J. H. Neethling, bearing date, &c. 2nd,—The sum of Rds. 110, &c., which he owes to the said J. H. Neethling upon and by virtue of the said promissory note, &c., and upon and by virtue of a certain notarial contract passed, &c.,—the said sum of Rds. 110, being the rent of the said mill, for the month of November, 1834, which became due on the 1st December, 1834, and payable to the plaintiff, by virtue of an authorization of the said J. G. Munnik,” &c.

Neethling  
v.  
Taylor.

The defendant did not appear.

The plaintiff produced, 1st, a notarial contract for the lease of the mill, mentioned in the summons, dated 9th July, 1833, executed by J. G. Munnik and the defendant, whereby the former let to the latter the mill, and in which it was stipulated that “this lease is to be for five successive years, commencing with the 1st July, 1833, and expiring on the 30th June, 1838, &c. The tenant shall pay unto the landlord a rent of Rds. 110 per month, payable monthly.”

2nd, the following document:—

“I, J. G. Munnik, hereby authorize J. H. Neethling, irrevocably and as *in rem suam*, in his capacity as testamentary executor of the late A. Munnik and predeceased wife, to receive and recover from Mr. A. Taylor, the tenant of my mill, all rents due for the said mill, at Rds. 110, since the month of September due thereon, and that will hereafter become due.

“Witness my hand,

“J. G. MUNNIK.

“Rondebosch, 16th September, 1834.”

And 3rd, the following promissory note:—

“Rondebosch, November 20, 1834.

“Fourteen days after date, I promise to pay to J. H. Neethling, Esq., Rds. 207, for rent due to Mr. J. G. Munnik, for part of the month of September and for the month of October,—and I hereby further engage to pay to the said J. H. Neethling, Esq., the rent of mill, &c., as it becomes due, until properly authorized to the contrary by Mr. Munnik.

“A. TAYLOR.”

The Court were of opinion that the plaintiff was, in respect of the promissory note, entitled to provisional sentence for the Rds. 207, and that the deed of authorization in favour of plaintiff, even without, but *à fortiori* with, the undertaking at

Neethling  
v.  
Taylor.

the end of the promissory note, had the effect of placing the plaintiff in the same situation and vesting him with the same title to sue for the rent that Munnik himself would have had.

But the Chief Justice held that the contract of lease was not sufficient to have entitled the landlord to provisional sentence for rents alleged by him to be due; and that the contract, even in conjunction with the note and undertaking at the end of it, was not evidence sufficient to entitle the plaintiff to provisional sentence for the rent claimed for the month of November.

Menzies, J., and Kekewich, J., were of opinion that the production of a contract of lease, signed by a defendant, by which he stipulates to pay rent to the plaintiff, is of itself sufficient to entitle the plaintiff to provisional sentence for any rent alleged by him to be due for any part of the period of the term during which, by the contract, the lease is to subsist; and therefore that, independently of the note signed by the defendant in favour of the plaintiff, the latter, in virtue of the contract of lease and the authorization of the landlord, would have been entitled to provisional sentence for both the sums claimed in the summons; and therefore gave provisional sentence, as prayed.

## 2. TRUTER v. EVEREST.

[17th February, 1842.]

### *Provisional Sentence on an Underhand Contract of Lease.*

Truter  
v.  
Everest.

In this case, the plaintiff claimed provisional sentence for £60, for four months' rent of a certain house, &c., from 1st October, 1841 to 31st January, 1842, by virtue of an underhand contract or agreement, dated 12th August, 1840, containing the following stipulation:—"Mr. E. (the defendant) takes and hires of Mr. Truter (the plaintiff,) his house, &c., on a lease for five years, to be reckoned and computed from the 12th August instant. The conditions of the lease are as follows: Mr. Everest engages to pay, by way of hire or rent for said house, the sum of £15 per month," &c.

Cloete, for the plaintiff, put in this contract, and claimed provisional sentence, maintaining that it was not necessary for him to prove that the defendant had had possession of the premises, and that the rent for the past period must, in law, be presumed to be due, in the same way that interest for a past period is presumed to be due, unless the defendant shall prove it to have been paid, or show cause why he shall not be liable for such rent.

The Court granted provisional sentence, as prayed.