1956 *Present :* K. D. de Silva, J.

C. SELLAHEWA, Appellant, *and* D. J. RANAWEERA, Respondent

S. C. 217—C. R. Hambantota, 6,552

Landlord and tenant—Conditional notice to quit—Validity—Increase of rent by landlord—Liability of tenant to pay it—Overholding tenant—Damages.

A notice to quit given by a landlord to his tenant is not invalid if it is to take effect only if the tenant is unwilling to pay certain increased rent in the future. If, in such a case, the tenant decides not to pay the enhanced rent, he is not entitled to complain that the notice to quit was bad in that it was not an unqualified notice.

A tenant is not liable to pay enhanced rent unless he agrees to pay such rent. The landlord cannot increase the rent without the consent of the tenant.

A landlord cannot claim from an overholding tenant damages on the basis of a fair value of the use and occupation of the premises in question unless there is evidence as to what is the fair value of the use and occupation.

APPEAL from a judgment of the Court of Requests, Hambantota.

A. F. Wijemanne, for the defendant appellant.

E. B. Wikramanayake, Q.C., with *S. W. Walpita*, for the plaintiff respondent.

Cur. adv. vult.

December 20, 1956. de SILVA, J.—

In this action the plaintiff successfully sued his monthly tenant the defendant appellant to eject him from the premises described in the plaint and to recover arrears of rent. Admittedly the building in question which is a boutique situate at Ambalantota is not governed by the provisions of the Rent Restriction Act. The defendant became the tenant of the boutique under the plaintiff about 14 years ago at a monthly rental of Rs. 6 which was later increased to Rs. 10 and thereafter to Rs. 20. He has paid rent up to the end of February, 1954. On January 30, 1954, the plaintiff through his Proctor sent to the defendant the notice P1 which reads :—

To :

C. Sellahewa of Ambalantota

"I am instructed by Mr. D. J. Ranaweera of Yatiyana to request you to pay a sum of Rupees forty per month as rent from 1st March 1954 in respect of premises bearing Assessment No. 34 situated at Ambalantota rented out to you.

In failure thereof I am further instructed to inform you to vacate the said premises on 1st March 1954."

Sgd. A. E. BULTJENS,
Proctor.

The defendant declined to pay the enhanced rent and also failed to vacate the premises. The plaintiff then instituted this action on July 22, 1954, claiming a sum of Rs. 200 as arrears of rent up to end of June, 1954, and praying for an order of ejectment. It was contended on behalf of the defendant that the notice to quit was bad in that it was not an unqualified notice. The claim for enhanced rent was resisted on the ground that there was no agreement by the defendant to pay such rent.

I am not prepared to hold that the notice to quit is invalid for the reason that it was to take effect only if the defendant was unwilling to pay the enhanced rent. This notice made it quite clear to the defendant that he was to vacate the premises on March 1, 1954, if he was not, prepared to comply with the demand for increased rent. The defendant having decided not to pay the enhanced rent is not entitled to complain that the notice is defective. No prejudice was caused to him because the notice to quit was to take effect only if he was unwilling to pay the rent demanded.

The next question to be considered is what amount is the plaintiff entitled to recover as arrears of rent. It is clear from the plaint that the plaintiff claimed rent and not damages as from March 1, 1954. The issues too were formulated on the same basis. As from March 1, 1954, the plaintiff claimed rent at the rate of Rs. 40 a month. Rent is payable in terms of the contract of tenancy entered into between the parties. The landlord cannot increase the rent without the consent of the tenant just as the latter cannot reduce it without the consent of the former—Wille's Landlord & Tenant (1910 Edition, Page 55) and *de Silva et al. v. Perera* [1]. Mr. Wikramanayake, Q.C., who appeared for the plaintiff-respondent while conceding that he was not strictly entitled to claim rent as from March 1, 1954, submitted that he had the right to recover from that date rent for use and occupation. But in this action no attempt was made to recover any sum for use and occupation. In the Court below it appears to have been contended by the Proctor for the plaintiff that according to the informal agreement between the parties the plaintiff was entitled to raise the rent. The learned Commissioner has shared that view. He after referring to the increase of rent on two previous occasions proceeds to say :—

> "Therefore his plea that there was no original agreement to pay the enhanced rent cannot stand because the defendant had consented to pay the increased rent of Rs. 10 and Rs. 20 earlier ".

I find it difficult to appreciate this reasoning. Because on two previous occasions the tenant agreed to pay the increased rent it does not follow that the landlord is entitled to recover from the tenant, on subsequent occasions too, enhanced rent even though the latter is unwilling to pay such rent. Of course if the parties had earlier entered into an agreement whereby the plaintiff was given the right to increase the rent without the concurrence of the tenant the position would be different. No such agreement has been proved although the learned Commissioner has referred to an " original agreement ".

[1] *(1928) 29 N. L. R. 506.*

A landlord is entitled to recover damages from an overholding tenant at a higher rate than the rent but such damages have to be assessed on the basis of a fair value of the use and occupation of the premises—*Jacobs v. Ebert* [1]. In this case there is no evidence as to what is the fair value of the use and occupation of the premises in question.

I would therefore enter judgment for plaintiff in ejectment and damages at the rate of Rs. 20 per month as from March 1, 1954, till the restoration of possession with costs. The defendant will be entitled to the costs of this appeal.

Decree varied.