1969 *Present :* Weeramantry, J.

E. N. FERNANDO, Appellant, *and* G. WIJESEKERA, Respondent

S. C. 73/67—C. R. Colombo, 92762/R. E.

Landlord and tenant—Attornment of tenant to a new landlord—Precise meaning of "attornment"—Whether it carries the implication of a continuation of the prior contract of tenancy—Landlordship by title paramount or by assignment and novation—Effect—Rent Restriction Act.

The term "attornment" in relation to the acknowledgment by a tenant of a new landlord connotes a constructive method of delivery to the new landlord through an alteration in the tenant's mental state by which he acknowledges the landlordship of a person other than his original landlord. "The notion of attornment contains no element which points to the continued existence of the prior contract—a meaning which is often mistakenly supposed to be inherent in the term."

A tenant (the defendant), to whom his landlord had let a block of baro land, constructed a house subsequently on the land and occupied it. Some time later the block of land was amicably divided between the landlord and his brother (the plaintiff), who were the co-owners and a new landlord (the plaintiff) became the owner of that part of the land which contained the dwelling-house constructed by the tenant. Thereupon the tenant attorned to the new landlord on the basis of a contract of tenancy the terms and conditions of which provided for an increased rental and were not identical with those which had prevailed earlier.

***Held*, that the legal background existing at the time when the second contract of tenancy was formed was fundamentally different from that existing at the time of the first contract. The subject matter of the contract between the plaintiff and the defendant at the time of the attornment was not the bare land but the land and the structure standing thereon. Accordingly, the Rent Restriction Act applied to the premises and the defendant was entitled to its protection.**

Observations on landlordship by title paramount and by assignment and novation.

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

W. D. Gunasekera, for the plaintiff-appellant.

Nimal Senanayake, with *Prins Rajasooriya*, for the defendant-respondent.

Cur. adv. vult.

November 20, 1969. WEERAMANTRY, J.—

The question involved in this case is the right of a subsequent landlord to eject a tenant to whom the previous landlord had let a block of bare land on which the tenant constructed a building subsequent to such letting but prior to his attornment to the new landlord.

It would appear that the original contract of tenancy in regard to this bare block was between the defendant and the plaintiff's brother who at that time was in possession of the land. The plaintiff's position as stated by him in evidence was that though his brother was in possession of the land, the entire front portion of the land in fact belonged to the plaintiff by right of inheritance from his father, and that he (the plaintiff) had been unable to look after the property himself because his duties as a public servant required him to be away from Colombo. Thereafter he sent a notice to the defendant and other tenants stating that he was in fact the owner of the land. The defendant was agreeable to becoming his tenant, and accordingly was accepted as such. The building in question had been constructed on the land prior to the time when the defendant became his tenant, but the plaintiff's position was that what he let to the defendant was no more than what his brother had let, namely the bare land.

It would appear, although the plaintiff denied that there had been a dispute between himself and his brother, that the plaintiff had given notice to his brother through a proctor asking him to occupy the rear portion, and that it was only thereafter that the plaintiff took over the front portion which included the portion let to the defendant.

The plaintiff's admission that it was only after giving notice to his brother through a proctor that he recovered possession of this land, renders it uncertain whether the plaintiff took over the land upon an amicable division, involving an assignment to him by his brother of the latter's rights as landlord, or upon an independent assertion of title. I shall therefore examine the legal position upon both these hypotheses.

The main contention of the defendant is that the plaintiff is not entitled to institute this action for the ejectment of the defendant inasmuch as the subject matter of the contract of tenancy between the plaintiff and the defendant was not the bare land, but the building so constructed together with the appurtenant land. It was common ground that if it was a building which was let, the tenant was entitled to protection under the Rent Restriction Act and that this action would fail, whereas if the subject of the contract was only the bare land the Rent Act would not apply and the plaintiff would be entitled to ejectment.

The submission was made on the plaintiff's behalf that the defendant's attornment to him meant in law that the prior contract continued, with the plaintiff standing in the shoes of his brother the former landlord ; and that the land let by the brother being a bare land, the subject matter of

the contract between the plaintiff and the defendant was also this bare land, despite the fact that prior to the attornment to the plaintiff, the defendant had erected a structure thereon.

The contention of the defendant on the other hand is that there was no continuity of contract in the sense contended for by the plaintiff but that upon the attornment by the defendant to the plaintiff a fresh contract came into being. The subject of this fresh contract was the land and premises in existence at the time of its formation and therefore included the building constructed by the defendant. Upon this basis it is contended that the premises are subject to the provisions of the Rent Restriction Act and that the plaintiff cannot have and maintain this action.

Since the original hearing of this appeal counsel have at my instance given me the benefit of a fuller argument on the question of attornment and I am thankful to them for their assistance in clarifying its true import in this case.

In view of the importance attaching to attornment in the context of the arguments referred to, it becomes necessary to examine the precise meaning of attornment when used in our law in relation to the acknowledgment by a tenant of a new landlord. For this purpose the term will require examination with reference both to the English law where it had its origin and to the Roman-Dutch law, with a view to determining whether it carries the implication of a continuation of the prior contract.

One significant feature which emerges from this examination is that though the word attornment is frequently used in Ceylon in relation to the law of landlord and tenant, its use in the modern Roman-Dutch law of South Africa seems to concentrate largely on its meaning as a method of symbolic delivery, to which I shall presently refer. Thus while the word finds a place as such a mode of delivery in Wille's work on the Principles of South African law it does not find a place in the work of the same learned author on the Law of Landlord and Tenant; and indeed the words "attornment" and "attorn" find no place whatever in Sisson's or Bell's South African Legal Dictionary. Against this background we must determine its precise implications in our legal system.

Turning first to the English law, we see that the word apparently derived from the French term *a tourner* meaning to turn. It later became "a(t) torner", whence "attorn" passed into the English law books. According to the Oxford Dictionary it means to turn over to another, to assign or transfer goods, tenant's service, allegiance etc., and meant in feudal law to transfer one's homage and allegiance from one lord to another. It has been judicially defined as "the act of the tenant's putting one person in the place of another as his landlord." [1]

[1] *Per* Holroyd, *Cornish v. Searell* (1828), 8 B. & C. 471, cited by Foa, General Law of Landlord and Tenant, 8th ed., s. 732 and by Lord Devlin in *Meeruppe Sumanatissa Terunnanse v. Warakapitiya Pangnananda Terunnanse* (1968), 70 N.L.R. 313 at 317. P. C.

Attornment was in its origin a technical concept tied up with the complexities of the English land law resulting from such measures as the Statute Quia Emptores which prohibited sub-infeudation,[1] and its later history was affected by such other statutes as the Statute of Uses, the Statute of Wills and the Law of Property Act 1925. It should be stressed that we in this jurisdiction are in no way concerned with these intricacies or with the implications resulting therefrom.

It is necessary to observe also that apart from its use in the English land law, the word attornment with its basic underlying meaning already referred to, of a turning over to or acknowledgment, is used also in English law in relation to the sale of goods. Thus where goods are in the possession of a bailee or agent and after they are sold the bailee or agent acknowledges the buyer's title and continues to hold under him as his bailee or agent, there is said to be attornment.[2] So also a carrier of goods may attorn to the buyer after arrival at his destination by acknowledging that he holds the goods on his behalf and continuing in possession of them as bailee for the buyer.[3]

One final observation on the use of the term in English law before we pass on to an examination of its use in the Roman-Dutch law, is that the English use of the term in land law is not necessarily restricted to the case of a landlord who succeeds to the rights of the previous landlord, for we find it used even in the case of a landlord who acquires his status independently by title paramount;[4] and indeed this Court has upon occasion used this term in reference to a landlord claiming upon an independent title.[5] The mere circumstance therefore that an attornment had taken place does not necessarily imply in English law a continuity of existence of the pre-existing contract.

Turning now to the modern Roman-Dutch law we see that the notion of a turning over to or acknowledgment which is its underlying meaning in the English law has brought about its use in the modern Roman-Dutch law to signify a symbolic delivery to a new owner, that is, a means of effecting delivery without any change in the actual possession of the property.[6] The term is thus a convenient description of the process of change of custody which occurs when an agent who holds goods for A, receives directions to hold them for B.[7] In such a case the agent is said in the modern Roman-Dutch law, as in the English law relating to the sale of goods, to attorn to the third party,[8] but what is thus referred to

[1] See Woodfall on Landlord and Tenant, 26th ed., s. 1909.

[2] *Dublin City Distillery Co. v. Doherty* (1914) A.C. 823.

[3] Halsbury 3rd ed., vol. 34, p. 131.

[4] *Doe d. Chawner v. Boulter*, (1836), 6 Ad. and El. 675.

[5] *Alles v. Krishnan*, (1952) 54 N.L.R. 154; *Tillekeratne v. Coomarasingham* (1926), 28 N.L.R. at 186 at 188 per Jayewardono, A.J. at 189.

[6] See *Standard Bank v. Conner*, 6 S.C. 44 where apparently this phraseology of English law was first adopted. See also Mackeurton, Sale of Goods in South Africa, 3rd ed, p. 160.

[7] Lee, Roman-Dutch Law, 5th ed., p. 136.

[8] ibid.

is none other than a form of *traditio* or delivery of a corporeal thing, for it achieves a constructive or fictitious delivery by an alteration of the mental element in possession without the necessity for the thing being moved at all.[1] It would appear to be in this sense that the term is used in the law of South Africa.

This idea of constructive or fictitious delivery is perhaps even more clearly illustrated in the converse notion of *constitutum possessorium* with which such attornment is often compared, and to which learned counsel for the respondent referred me in this connection. In *constitutum possessorium*, A, who holds an article as owner, agrees to hold it thereafter in another character, as by way of borrower from B. This involves in effect a transfer of possession from A to B and a transfer back from B to A though in a different capacity. The two transfers cancel out each other[2] as though by a process of legal algebra,[3] and without the necessity for the physical processes being gone through, the same result is achieved by A remaining in physical possession.

The position is no different in the case of attornment, for here too the agent notionally surrenders the property to A, who delivers possession to B who in turn delivers physical possession to the samo agent. A change of mental attitude on the part of the agent effects the result that would otherwise require a set of physical transfers. This aspect of attornment received recognition in *Alles v. Krishnan*[4] where it was observed that attornment constituted a notional vacation of the premises under the former landlord, and in *Tillekeratne v. Coomarasingham*[5] where actual physical dispossession was held to be unnecessary, the tenant's eviction in such cases being constructive or symbolic.

In short, whatever technicalities may have attached to the term in the legal system of its origin, the strict meaning of attornment in the Roman-Dutch law is a variety of *brevi manu traditio*, for which the Roman-Dutch law had no specific name, which occurs when there is an agreement between the owner, the intended transferee, and an agent who has *detentio* on behalf of the owner, to the effect that the agent is from then on to hold the thing for the transferee.[6] It is, in other words, one of the several forms of constructive delivery known to the Roman-Dutch law.[7]

Despite the fact that the term as borrowed by the Roman-Dutch law thus concerns itself with a method of constructive delivery of movables, in Ceylon it has since 1895[8] at least been used frequently in relation to the law of landlord and tenant. Since associations of the term with the complexities of English land law are irrelevant in our jurisdiction, its

[1] Wille, Principles, 5th ed., p. 176.
[2] Lee, ibid, p. 137.
[3] See Paton, Jurisprudence, 2nd ed., p. 43—"The fiction is the algebra of law and a picturesque form of algebra besides".
[4] (1952) 54 N.L.R. 154.
[5] (1926) 28 N.L.R. 186 at 189.
[6] Wille, Principles, 4th ed., p. 176. See also *Hearn & Co. (Pty.) Ltd. v. Bleiman* (1950) 3 S.A.L.R. 617 at 625.
[7] *Hearn & Co. (Pty.) Ltd. v. Bleiman* (1950) 3 S.A.L.R. 617 at 625.
[8] See *Wijeratne v. Hendrick* (1895) 3 N. L. R. 158.

proper meaning, if we are to take its use in South Africa as a guide, would appear to be a constructive method of delivery to the new landlord through an alteration in the tenant's mental state, by which he acknowledges the landlordship of a person other than his original landlord.

We thus see that the notion of attornment contains no element which points to the continued existence of the prior contract—a meaning which is often mistakenly supposed to be inherent in the term.

I shall now proceed to examine the question whether there can be said to be a continuance of the old contract on either of the hypotheses earlier indicated.

If this is a case of landlordship by title paramount, it is clear that there is no continuity whatever between the present contract and that between the tenant and the previous landlord, and there will be little difficulty in deciding that the matter must be treated on the basis of an altogether fresh contract entered into between the plaintiff and the defendant.

If on the other hand there had been an assignment of his rights by the plaintiff's brother to the plaintiff, there would appear again to be no continuation of the old contract when we have regard to the true meaning of assignment, for assignment of contractual rights and obligations is but a variety of novation.[1] While substitution of a new debtor for an old is termed delegation and substitution of a new creditor for an old constitutes cession, substitution of a new party for the old both as creditor and debtor, that is where he assumes both rights and obligations, is the species of novation which is known as assignment.

One of the characteristics of all species of novation is the extinction of the pre-existing contract[2] and the substitution of a new contract in its place. Ordinarily therefore, when there is an assignment of contractual rights and obligations there is a complete extinction of the rights and obligations which had subsisted under the prior contract. In the special case however of the assignment of a landlord's rights and obligations to another there may be a survival of the tenant's rights in the limited sense that his rights under the lease are preserved. This is in consequence of the modification by the Roman-Dutch law of the principle of the Civil law that there is no legal bond whatever between the purchaser of land and a prior lessee,[3] and the adoption by the Roman-Dutch law of the principle that hire goes before sale. The purchaser by virtue of this principle becomes the landlord of the tenant under the same conditions as under his lease with the seller.[4] This rule adopted in South Africa[5] has been received in Ceylon as well[6] though with some reservations[7] which may need further examination in an appropriate case.

[1] Wille, Principles, 5th ed., p. 357.
[2] D. 46.2.1 pr. Canay, Novation, p. 2.
[3] D. 19.2.25. 1 ; C. 46.5.9.
[4] Gr. 3. 19.16.
[5] See *De Jager v. Sisana*, (1929), A.D. 71 at 82 ; Wille, Principles, 5th ed., p. 393 ; Landlord and Tenant, 4th ed., p. 86.
[6] *Silva v. Silva* (1913) 16 N.L.R. 315.
[7] *Wijesinghe v. Charles* (1915) 18 N L. R 168.

In the present case however there is in any event no need to consider whether the plaintiff became the defendant's landlord under the same conditions by operation of this principle, for the reason that the conduct of parties clearly points to the plaintiff and the defendant having acted on the footing of a new contract whose terms were not the same as those of the prior contract.

We have it in evidence that although the rental charged by the previous landlord was a sum of Rs. 20 per month, the plaintiff charged rent initially at the rate of Rs. 30 per month, thereby showing a clear intention to enter into a contract on terms and conditions not identical with those which had prevailed earlier. It is no doubt possible, as learned counsel for the appellant strenuously contended, to relate an increased rental purely to an increased use of the ground, where additional structures are built thereon, but there has been no increased use of the ground at the moment of commencement of the plaintiff's landlordship, for it commenced the very instant his brother ceased to be landlord. The enhanced rental is clear evidence that the plaintiff and the defendant were not even in their own minds looking upon their relationship as a continuance of the prior contract and were not merely taking the terms of their contract from that which had existed before. The circumstances point far more probably in the direction of an enhanced rental being agreed upon in consideration of the letting of the building than in the direction of an increase in pure ground rent, and as between the possibilities I would agree with the learned trial Judge's view that the existence of the building was the reason for this increase in rent.

These factors viewed against the background of an option available to the tenant at the termination of his original contract of tenancy to dismantle the building and claim his materials or alternatively to let the materials enure to the owner of the soil subject to his rights to compensation,[1] leave little doubt also that in the present instance the defendant has by his conduct permitted the materials to pass to the soil.

It follows from what has been stated that the legal background existing at the time the second contract was formed was fundamentally different from that existing at the time of the first contract and that what was within the power of the plaintiff to let (namely a building with appurtenant land) was entirely different from what was within his brother's power to let at any time (namely a block of bare land).

In all these circumstances I consider that a tenancy only in respect of bare land seems both unlikely in fact and indeed impossible in law after the accession of the building to the soil.

All these factors point to the formation of a new contract whose subject matter was a building with the appurtenant land as opposed to one in respect of bare land only.

[1] *Jafferjee v. de Zoysa*, (1953) 55 N.L.R. 124.

I reach the conclusion therefore that the subject matter of the contract between the plaintiff and the defendant was not the bare land but the land and the structure standing thereon. In this view of the matter the Rent Act applies to the premises and the plaintiff would not be entitled to maintain this action. The plaintiff's action must accordingly fail, and it is dismissed with costs both here and in the court below.

Appeal dismissed.