1936 *Present :* **Abrahams C.J. and Soertsz A.J.**

UKKUWA *v.* FERNANDO.

158—D. C. Kandy, 45,334.

Lessor and lessee—Tenant under informal lease—Subsequent lease by notarial instrument—Right of latter to give notice to former—Position of original lessee—Monthly tenancy—Action in ejectment.

Where the lessee of a land on an informal document was sued in ejectment by a subsequent lessee of the land on a notarial instrument, who gave him notice to quit within thirty days,—

Held, that the original lessee was in the position of a monthly tenant who was entitled to a calendar month's notice ; and that the plaintiff could not sue him in ejectment until the monthly tenancy had been determined by due notice given him by his lessor.

In the absence of an attornment of the original lessee to the plaintiff or an assignment after notice of the lessor's rights to him the plaintiff is not entitled to give the defendant notice to quit.

THE plaintiff sued the defendant to eject him from a land which he had obtained on an indenture of lease from the owner, Ukku Amma, who leased the land to him for a period of two years commencing on August 11, 1933. He alleged that the defendant was a tenant-at-will from his lessor and that he requested him to leave the premises within thirty days from August 24, 1934, but that the defendant denied plaintiff's right to give him notice and was in wrongful possession of the land.

The defendant filed answer stating that he held the land from Ukku Amma on an informal lease dated November 26, 1932. He denied plaintiff's right to give him notice to quit and prayed that plaintiff's action be dismissed.

C. V. Ranawake (with him *Dodwell Goonewardene*), for defendant, appellant.—The defendant is not in the position of a tenant-at-will, his informal document creates a monthly tenancy. (*Bandara v. Appuhamy* [1], *Wambeek v. Le Mesurier* [2].) If the document operated so as to create a monthly tenancy, this contract of tenancy was with the owner of the premises, not with the plaintiff, who is a lessee of the owner. There has been no assignment to the plaintiff of the owner's rights as landlord nor has the defendant attorned to the plaintiff; in other words there is no privity of contract between the plaintiff and the defendant. See *Wijeratne v. Hendrick* [3], *Arnolis v. Mohideen Pitche* [4], *Rajapakse v. Cooray* [5].

If then the contract is with the owner the question of a due and proper notice, on which the learned District Judge has gone, does not arise; even if it does arise the notice is bad inasmuch as the notice should be a calendar month's notice.

H. V. Perera (with him *S. W. Jayasuriya*), for plaintiff, respondent.—On the authority of *de Silva v. Goonewardene* [6] and *The Secretary of State for the War Department v. Ward* [7] the defendant must be held to be a tenant-at-will, and accordingly he is not entitled to any formal notice. The plaintiff's lease is an alienation *pro tanto*, and the plaintiff was entitled to do whatever the owner, his lessor, could do; his lease created proprietary rights which the plaintiff can make good against the whole world. (*Goonewardane v. Rajapakse* [8], *Carron v. Fernando* [9].) As a tenant-at-will the defendant was not entitled to any formal notice; the position is the same even if he was not such a tenant, his document of title being the informal lease. (*Auneris v. Aralis* [10], *Cornelius v. Dionis.*[11] "

Goonewardene, in reply.—The cases in *2 Browne* do not help to determine the question of a tenancy-at-will; there no reliance was placed on any special agreement; here there is an agreement, however informal, with distinct stipulations as to payment of rent, &c. (D 1). No doubt the plaintiff's lease created proprietary rights in his favour; but his right to sue the defendant in ejectment arises only after his tenancy has been determined by a notice from the proper source.

Cur. adv. vult.

October 6, 1936. SOERTSZ A.J.—

The plaintiff-respondent instituted this action on June 19, 1934, praying that he be declared entitled to the possession of the land Jambugahamankada described in the schedule to the plaint, that the defendant be ejected therefrom and be ordered to pay on account of damages consequent on his wrongful occupation of the land, a sum of Rs. 100 a month from August 11, 1933, till the plaintiff is restored to possession. His case was that one Ukku Amma, the acknowledged owner of the land, had by the indenture of lease marked A which is an exhibit in the case, leased this land to him for a period of two years

[1] *25 N. L. R. 176.*
[2] *3 N. L. R. 105.*
[3] *3 N. L. R. 158.*
[4] *3 Bal. 159.*
[5] *2 Times of Cey. L. R. 209.*
[6] *2 Browne 202.*
[7] *2 Browne 256.*
[8] *1 N. L. R. 217.*
[9] *35 N. L. R. 352.*
[10] *30 N. L. R. 363.*
[11] *13 C. L. Rec. 254.*

commencing on August 11, 1933. He averred that he "learnt that the defendant claims as *tenant-at-will*" of his lessor Ukku Amma and that he "requested the defendant to leave the said premises within thirty days from August 24, 1933, but that the defendant has denied plaintiff's right to give him notice and is in wrongful occupation of the said land".

The defendant filed answer denying that he was a tenant-at-will of Ukku Amma and stating that by a non-notarial writing dated November 26, 1932, Ukku Amma put him in possession of this land. He said he had improved it at a cost of Rs. 500, that he was in lawful occupation of it, that he was not aware of the lease set up by the plaintiff till that fact was disclosed in the plaint and that, as a matter of law, the notice the plaintiff alleged he had given him to vacate the land 'is bad and of no force or effect'. He prayed that plaintiff's action be dismissed.

The case went to trial on the following issues :—

(1) Has the defendant been given due notice to quit ?
(2) Is plaintiff entitled to mesne profits from October 1, 1933 ?
(3) If so, to what amount ?
(4) Has defendant made any improvements on this land ?
(5) If so, what is their value?
(6) Can defendant claim the *jus retentionis* in respect of anything more than he has improved ?
(7) Is the notice good in law ?
(8) If not, is paintiff entitled to maintain this action ?

Evidence was led for the plaintiff. The defendant appears to have relied on his plea that the plaintiff's action failed because the notice he alleged he gave was bad in law. The District Judge held against the defendant on this point and entered judgment "for the plaintiff as prayed for with damages at the rate of Rs. 787.50 per annum from *October 1, 1933,* till possession is yielded, and costs".

On appeal, Counsel for the appellant contended that the findings of the trial Judge on issues (1), (7), and (8) are wrong. He maintained that the defendant was not a tenant-at-will, but that his position was that of a monthly tenant of Ukku Amma and that, therefore, notice *the plaintiff* alleged he gave on *August 24, 1933,* calling upon the defendant to quit the land *within thirty days* was not sufficient in law : firstly, because there was no privity of contract between the plaintiff and the defendant, the defendant not having attorned tenant to the plaintiff, and secondly, because the notice relied on was not a proper month's notice. The question discussed before us was whether the defendant occupies the position of a tenant-at-will or of a monthly tenant. Document D1 shows that the intention of the parties to it was to create a lease for a period of five years, the lessee to have possession for the first *two months* free of rent and thereafter to pay rent *at the commencement of each and every month at the rate of Rs. 20* per month, Rs. 50 per month, and Rs. 100 per month according to the fluctuations of the market for green leaf. But this document failed of its purpose to create a lease of the land for five years because it was obnoxious to section 2 of Ordinance No. 7 of 1840, which requires a lease of land, other than a lease at will or for a period not exceeding one month, to be notarially attested. It was,

however, admissible in evidence for the purpose of ascertaining the legal position of the parties to it. In *Bandara v. Appuhamy* [1] Schneider J., after a careful review of the English and local authorities, held that the provision in section 2 of Ordinance No. 7 of 1840, was intended to shut out evidence, other than that of a notarially attested instrument, to prove a lease for any period exceeding one month. It was not intended to shut out oral or 'documentary evidence contained in an informal document' of a tenancy for a period not exceeding one month. The Ordinance is careful to exclude tenancies of such a nature from its provisions". The informal document in the case considered by Schneider J. appears to have been very similar to the document D1 in this case, and I would therefore adopt his words and say that "It seems . . . . equitable and consistent with the spirit of the Ordinance and the intention of the parties, to hold that the defendant is entitled to say 'if I am not a tenant for a term of years contemplated by me and my lessor, there is no provision of law which prevents me from being regarded as, at least, holding the land upon the footing of a monthly tenant'". In *Wambeek v. Le Mesurier* [2], Laurie J. said that he was "of the opinion that a tenant entering into possession under a lease void in law, thereupon becomes tenant from month to month upon the terms of the writing *as far as they are applicable to and not inconsistent with a monthly tenancy*".

Schneider J. and Loos A.J. took the same view in *Buultjens v. Carolis Appu* [3].

Counsel for the respondent relied upon *de Silva v. Goonewardene* [4] and *The Secretary of State for the War Department v. Ward* [5] for his submissions that the defendant in this case was no more than a tenant-at-will. In the latter case Moncrieff A.C.J. and Brown J. held that a tenant in possession under an agreement invalid under Ordinance No. 7 of 1840, is merely a tenant-at-will, and not a monthly tenant "because the occupant cannot show that by any stipulation as to occupancy, notice, or amount to be paid for the occupancy, there was aught of a monthly character impressed upon the agreement".

That case is clearly distinguishable from this on the ground that in this case there are stipulations as to occupancy and payment of rent by the month which "impress upon the agreement a monthly character", and on the grounds stated by Schneider J. in *Bandara v. Appuhamy* (*supra*). I am unable to see that the earlier case referred to by respondent's Counsel has any direct bearing on the point under consideration.

I would therefore hold that the defendant's position was that of a monthly tenant. Upon that finding, two questions arise: whether the plaintiff was entitled to terminate that tenancy by giving the defendant notice to quit; and, whether the notice the plaintiff says he gave was a sufficient notice.

In *Wijeratne v. Hendrick* [6] Withers J. held that the defendant a monthly tenant under R was not liable for rent except by attornment to R's lessee, or by express assignment by R to his lessee of the benefit of his contract with the defendant, with due notice given to the defendant

[1] *25 N. L. R. 176.*
[2] *3 N. L. R. 105.*
[3] *21 N. L. R. 156.*
[4] *2 Browne 202*
[5] *2 Browne 256.*
[6] *3 N. L. R. 158.*

of that assignment. This ruling was followed by Middleton J. in *Arnolis v. Mohideen Pitche* [1]. In a more recent case (*Rajapakse v. Cooray* [2]) where the material facts were that the plaintiff took a lease of a land from one A and found the defendant in possession, the defendant said that he held the land on an earlier lease from A and that on the termination of that lease he continued on the land because he was due compensation by A for improvements effected by him by agreement with A and that he was therefore, a tenant from month to month. The plaintiff, thereupon, requested the defendant to be his tenant, but at a higher rental than that paid by him to A. The defendant refused. The plaintiff gave defendant notice to quit, and, on his failure to do so, sued him to recover possession of the land and damages for the loss of use and occupation. Ennis J. held that "as the defendant never attorned tenant to the plaintiff, the notice from plaintiff is bad". There was no privity of contract between the plaintiff and the defendant. He added that "if authority be needed for this proposition, the case of *Wijeratne v. Hendrick* (*supra*) may be cited".

In the present case, the plaintiff relied in his plaint on the notice given by *him* to the defendant on August 24, 1933, requesting him to quit the land within thirty days. The cases I have referred to rule that the *plaintiff* was not entitled to give the defendant that notice. Moreover, in this case, assuming that plaintiff was entitled to give the defendant notice to quit, he is faced with the difficulty that the notice relied upon in the plaint is not a valid notice. It was given on August 24 and it called upon the defendant to leave the land within thirty days. The defendant was in the position of a monthly tenant and was, therefore, entitled to a calendar month's notice. According to D1, he was liable to pay rent at the *commencement* of every month. We have been referred to two cases in support of the proposition that "an informal lessee of land" is not entitled to "formal notice in the same way as a monthly tenant". The two cases are *Auneris v. Aralis* [3] and *Cornelis v. Dionis* [4]. In the former case, Drieberg J. said "For my part I doubt whether a lessee on an informal lease who is not a monthly tenant by contract, but by implication or by an equitable view taken of his position to relieve him of the loss he sustains by the invalidity of a transaction to which his lessor is a party, is entitled to such notice as is required in a monthly tenancy by contract with all the requirements of law regarding such notice". In the latter case, Garvin J. said that he was inclined to agree with that view. With great respect, I am unable to appreciate the distinction that is sought to be made between "a monthly tenant by contract" and "a monthly tenant by implication or by an equitable view taken of his position". To treat "a monthly tenant by implication or by an equitable view taken of his position" in this way is but to give him an empty title. But surely, by whatever process a monthly tenant is evolved he comes into being a monthly tenant. No more, no less. He must be invested with all the rights and liabilities of that legal entity. There does not appear to be any justification for allowing him full status in the one case and only a curtailed status in the other cases.

[1] *3 Bal. 159.*
[2] *2 Times of Cey. L. R. 209.*
[3] *30 N. L. R. 363.*
[4] *3 N. L. R. 158.*

I would therefore hold that the defendant was entitled to a calendar month's notice from Ukku Amma before his tenancy could have been determined. The notice relied upon by the plaintiff was not a sufficient notice. But there is evidence to show that before the plaintiff instituted this action, Ukku Amma had given defendant notice to quit. By document P4 of October 12, 1933, she called upon him to quit and deliver possession of the land on November 30, 1933. The effect of that notice was to determine the defendant's tenancy on November 30, 1933, and to make his occupation of the land from December 1, 1933, an unlawful occupation, and to render him liable to be ejected. Counsel for the respondent relied on the ruling in *Goonewardene v. Rajapakse* [1] and in *Carron v. Fernando* [2] for his contention that the plaintiff in this case who is a lessee was entitled to do what his lessor could have done, namely, to give notice to the defendant requiring him to quit the land, because a lease of land "creates not only contractual rights between the parties, but also proprietary rights which the lessee can make good against all the world". In the one case, it was said that a lease was 'a *pro tanto* alienation'. In the other that it was held that within certain limits the lessee can make good his proprietary rights against the world.

I do not think the rules laid down in those cases apply to the facts of this case beyond enabling the plaintiff as lessee to sue the defendant in ejactment once the lawful holding by the defendant as monthly tenant had been determined by due notice given him by his landlord and his occupation had become unlawful.

In this view of the matter, the plaintiff's claim in the prayer of his plaint for damages as from August 11, 1933, cannot be sustained, nor can that part of the order of the District Judge be supported which directs the defendant to pay damages as from October 1, 1933, on the footing that the notice given on August 24, 1933, was a good notice.

The valid notice was that given on October 12, terminating the tenancy on November 30, 1933. I would, therefore, vary the decree entered in this case by directing the defendant to pay damages at Rs. 787.50 per annum as from December 1, 1933. In all the circumstances of this case, I am of opinion that the plaintiff should get half the taxed costs in the Court below and pay half the taxed costs of this appeal.

ABRAHAMS C.J.—I agree.

Judgment varied.