1948 *Present :* **Windham J.**

ISMAIL, Appellant, *and* HERFT, Respondent

S. C. 40—C. R. Colombo, 6,939

Rent Restriction Ordinance—Premises required for use of plaintiff—Decree for ejectment of defendant—Appeal—Death of plaintiff pending appeal—Duty of Appellate Court—Requirement of Ordinance must be satisfied—Ordinance 60 of 1942—Section 8 (c).

Where, under section 8 (c) of the Rent Restriction Ordinance, the plaintiff has obtained a decree for ejectment against the defendant on the ground that the premises are reasonably required as a residence for himself and his family and the plaintiff dies pending an appeal from such order and before writ of ejectment has issued, it is the duty of the Court of Appeal to satisfy itself that the premises are still reasonably required for the purposes set out in the plaint.

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

H. W. Tambiah, with *R. Manikavasagar*, for defendant, appellant.

A. M. Charavanamuttu, for substituted plaintiff, respondent.

Cur. adv. vult.

December 21, 1948. WINDHAM J.—

This is an appeal by the tenant of a dwelling house against a judgment of the learned Commissioner ordering his eviction on the ground that the premises were reasonably required for the use and occupation as a residence for the plaintiff-respondent and his family. In his judgment, which was delivered on November 17, 1947, the learned Commissioner ordered that writ of ejectment should not issue until May 31, 1948, provided that damages in Rs. 65 per month should be regularly paid, that being the amount of the monthly rent payable under the tenancy. They were so paid. Meanwhile, this appeal was lodged on November 21, 1947. On March 9, 1948, before writ of ejectment was due to be issued, the plaintiff died, leaving a widow and four children. One of his sons, as sole executor of his will, was substituted as respondent. Under his will, which was proved on September 27, 1948, the plaintiff left all his property to his three sons (including the above executor) and his daughter in equal shares absolutely.

Three grounds of appeal have been urged. First, it is said that the plaintiff failed to give to the defendant a valid notice to quit. On March 31, 1947, the plaintiff purchased the premises in question from another. He forthwith on the same day gave notice to quit to the defendant, who had been the vendor's tenant. The notice reached the defendant on the same day, March 31, and required him to vacate by the end of April, failing which he would be sued for ejectment and damages as from May 1. The tenancy being a monthly one which ran from the first of each month, having begun on the first of a month, this was to my mind a perfectly good notice to quit, in accordance with the requirements of the law, as recently clarified in *Thassim v. Cabeen* [1]. But it is argued for the defendant that since the notice to quit contained a direction to the defendant (as it did) that he should pay the plaintiff " all rent accruing as and from April 1, that is to say, it did not require him to pay the plaintiff as and from March 31,—and since the plaintiff in his evidence stated that " up to the 31st March the defendant was liable to pay rents to the previous landlord, and from the 1st April the defendant was my tenant ",—therefore the plaintiff cannot be heard to say that he became the defendant's landlord before the 1st April, with the result that when he served the notice to quit, on 31st March, he was not his landlord and the notice was accordingly bad and of no effect. I do not think this contention can be acceded to. As the learned Commissioner rightly held, the plaintiff became the defendant's landlord at the moment he purchased the premises on 31st March, before he served the notice to quit, if only a few hours before. The plaintiff could not modify this legal result by merely stating that he became landlord as from 1st April and by requiring the defendant to pay him rent only as from that day. Clearly the plaintiff's not requiring him to pay rent in respect of the last day of March, or in respect of a proportionate fraction of that day, was a mere arrangement of convenience, which could be adjusted if necessary (though there was no evidence that it was adjusted) between the plaintiff and his vendor. This ground of appeal accordingly fails.

[1] *(1946) 47 N. L. R. 440.*

The second ground of appeal is that the learned Commissioner erred, in the light of the evidence, in finding that the premises were reasonably required for the use and occupation as a residence for the plaintiff and his family. The defendant bases this contention mainly on the plaintiff's answers to two questions put to him in cross-examination. These questions were the following :—(1) " The real reason why you want these premises is to get your second son, Shelton, to run a dairy in these premises ?" (2) " You require these premises for the business of your second son ?" To each of these questions the plaintiff answered " Yes ". It is accordingly contended that by his answers the plaintiff was admitting that the enabling of his son to run a dairy there was the only genuine reason why the plaintiff wanted the premises, and that he did not in truth want them as a residence for himself and the other members of his family at all. But the learned Commissioner went into this point very carefully, and he considered these particular answers of the plaintiff along with his definite statements, both in examination in chief and in re-examination, that he did want to live in the house himself, which statements were corroborated by other evidence that was accepted. I see no cause to interfere on this ground with the reasonable conclusion of the learned Commissioner that, in the light of *all* the plaintiff's evidence, the latter did not intend to convey the idea that he wanted the premises for his son's business only. He never said that this was his *only* reason. It may well be that this was the real reason, in the sense of the primary reason, and that but for the fact that these particular premises could be used as a dairy the plaintiff might have sought other premises for his own residence. But that is quite compatible with his having at the same time a genuine desire to reside in the premises himself also, and thereby to " kill two birds with one stone ". The learned Commissioner was accordingly justified in holding on all the evidence that the premises were reasonably required for the use and occupation as a residence for the plaintiff and his family.

In support of this same ground of appeal a further argument has been advanced. From the terms of his judgment it is clear that the learned Commissioner considered that the hardship which would result to the defendant if the action were to succeed, and the hardship which would result to the plaintiff if it were to be dismissed, were about evenly balanced, and in deciding in favour of the plaintiff he followed the principle laid down in *Raman v. Perera* [1], that where the hardships are equal the landlord should succeed by reason of his ownership. It is argued that this decision must be taken to have been impliedly overruled in *Mahroof v. Isadeen* [2], where it was held that where neither the plaintiff nor the defendant proved their respective allegations the plaintiff must fail since he has not discharged the burden cast upon him as plaintiff. But I do not consider that *Mahroof v. Isadeen* (*supra*) affects the principle laid down in *Raman v. Perera* (*supra*). For although by a rigid application of the axiom that " if equals be added to equals the wholes are equal ", it might be contended that the position where neither side has proved its allegations must be the same as where each side has adduced equally cogent

[1] *(1944) 46 N. L. R. 133.* [2] *(1946) 48 N .L. R. 14.*

evidence in support of its allegations, and that the landlord must accordingly fail in the latter case as in the former, nevertheless the legal position is not truly the same in the two cases. For in the latter case the landlord has made out a case to answer, and it is for the Court, in the light of the tenant's evidence, to decide whether the landlord's requirement is a reasonable one; whereas in the former case the landlord has adduced no evidence on which it could be held, even in the absence of any evidence on the tenant's behalf, that his requirement was a reasonable one. Furthermore, I find that the principle laid down in *Raman v. Perera* (*supra*) has been very recently approved and applied by my brother Gratiaen in *Piyatissa v. De Mel.* I respectfully agree with my brother that the principle should be followed by reason both of its intrinsic merits and of the undesirability of fluctuating judicial interpretations with their resulting uncertainty.

The second ground of appeal accordingly fails, and one ground remains, based on the admitted fact that the plaintiff died on a date after the judgment of the learned Commissioner and the filing of the appeal, but before the date fixed for the issue of the writ of ejectment and before the hearing of this appeal. Although this ground could not of course have been included in the grounds of appeal, I consider that the plaintiff's death is a fact which can properly be taken into account by this Court in considering whether the defendant ought to be ejected. For the right of the plaintiff to occupy the premises by virtue of section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942, is a personal right, conferred on him only on the ground that the premises are reasonably required, in the words of his plaint, " as a residence for the plaintiff and his family ". Until he had actually entered into occupation of the premises, which he never did, this was not a right which would be transmissible to his heirs or successors, being personal to himself and founded upon his personal requirements. It is certainly not a right which enures for his executor, for his executor's requirements as to residence are not the plaintiff's. Nor can the learned Commissioner's judgment be construed as holding that the premises were proved to be reasonably required as a residence for the plaintiff's family, apart from the plaintiff himself. The plaint did not allege this (the words are "for the plaintiff *and* his family "), and the Commissioner's judgment made two things quite clear. First, as I have already said, the respective needs of the plaintiff and of the defendant for the premises were considered to be about equally balanced, so that the fact of the plaintiff's being the landlord had to be brought in to tip the scale in his favour. It may be noted here that the plaintiff was a married man with a wife and four children, of whom one was under age, and that at the time of the hearing his two elder sons were living away from him at the house of one of them, while the remainder of his family were temporarily also living elsewhere, he himself residing alone in a friend's house until he should be able to move into the house in dispute and be rejoined by them. The defendant, on his part, was a married man with a wife and two children, and also two nephews and two nieces, all living with him in the premises in dispute, and no alternative accommodation for him was offered or available. Secondly, the conclusion reached by the learned Commissioner, upon adequate evidence,

was that " the premises are reasonably required by the plaintiff for his own use as a residence". In arriving at this conclusion he found that—" the fact that the plaintiff is obliged to rely on the charity of a friend for his own accommodation, and has to live separate from the other members of his family for want of proper accommodation, would indicate that the plaintiff does require the premises for use as a residence ".

In view of these observations and findings it seems to me that the ground was entirely cut from beneath the feet of the plaintiff's case by his untimely death before the writ of ejectment issued and before he could occupy the premises. The time at which the conditions set out in section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942, must be shown to exist by a landlord is, I conceive, the time when the court is required to make the ejectment order. But in a case where there is an appeal from such an order, and the landlord who brought the action has died before writ of ejectment has issued and before he has entered into possession of the premises, then I think that the appeal court should likewise satisfy itself that the premises are still reasonably required for the purpose set out in the plaint, that is to say, in the present case, as a residence for the landlord and his family. This has now become impossible, and in any case his death must obviously have tipped in favour of the defendant the scales which even while the plaintiff lived were so evenly balanced. This appeal must therefore be allowed, and the judgment of the learned Commissioner set aside. Nothing in this judgment, of course, will operate to preclude whatever person may have succeeded, or may succeed, the deceased plaintiff as landlord of the premises, from suing the defendant for eviction on the ground that the premises are reasonably required as a residence for him or her, the new landlord. In view of the learned Commissioner's judgment for eviction having been good when it was made, I order that the substituted plaintiff-respondent shall have the plaintiff's costs of the trial, while the defendant shall have his costs of this appeal.

Appeal allowed.