1948 *Present :* **Basnayake J.**

ALLES, Appellant, *and* MUTHUSAMY, Respondent

S. C. 112—C. R. Colombo, 6,647

Landlord and tenant—Action for ejectment—Settlement—Acceptance thereafter by landlord of rent in excess of what was due—Failure by defendant to keep terms of settlement—Right of landlord to execute decree—New tenancy—Rent Restriction Ordinance, section 9.

The mere acceptance of a payment in excess of what is due to the landlord during the current period of tenancy does not create a new tenancy at the expiration of that period. A tenant who has paid more than the authorized rent has his statutory remedy in section 9 of the Rent Restriction Ordinance.

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

S. Subramaniam, for the plaintiff, appellant.

H. W. Tambiah, for the defendant, respondent.

Cur. adv. vult.

December 20, 1948. BASNAYAKE J.—

The plaintiff-appellant (hereinafter referred to as the plaintiff) and the defendant-respondent (hereinafter referred to as the defendant) are landlord and tenant. The plaintiff instituted this action in order to recover arrears of rent and to have the defendant ejected from the premises of which he was tenant. The defendant did not file answer and the learned Commissioner entered judgment by default against him. The defendant appeared later and moved under section 823 (3) of the Civil Procedure Code to have the judgment set aside. On July 8, 1947, the date fixed for inquiry into the defendant's motion, both parties were

represented by counsel who informed the court that the parties had arrived at a settlement. The learned Commissioner's record of the settlement reads :

> " It is agreed that all rents and damages to December, 1946, have been paid and settled. Of consent judgment for plaintiff for Rs. 462 being rent and damages up to the end of June, 1947. Ejectment and further damages at Rs. 77 per month from 1.7.47. If defendant pays each month's damages together with Rs. 77 out of arrears by the 25th of each month as from 25.7.47 writ of ejectment not to be executed till 31.12.47. Defendant undertakes to give vacant possession on 31.12.47. Defendant says he is living in the premises with boarders but when he leaves he will give vacant possession."

On July 8, 1947, decree was entered in terms of the agreement. The defendant failed to keep his undertaking to vacate the premises on December 31, 1947, and on February 27, 1948, the plaintiff applied for execution of his decree under section 224 of the Civil Procedure Code stating the particulars required therein. That application was allowed on the same day. It must be assumed that it was allowed after the court had satisfied itself as required by section 225 of the Civil Procedure Code that the application was substantially in conformity with the directions in section 224 and that the applicant was entitled to obtain execution.

On March 1, 1948, the defendant's proctor moved to recall the writ and stay execution, but not in accordance with section 343 (2) of the Civil Procedure Code, for no petition as required therein was filed.

The main ground of objection was that the plaintiff had demanded and received a sum of Rs. 6 in excess of the amount due to him for the months of October, November, and December, 1947, and that a new tenancy had been created thereby.

On April 22, 1948, the learned Commissioner heard the parties in regard to the defendant's motion and dismissed the plaintiff's application for writ which he had allowed on February 27, 1948. The defendant stated in his evidence that after the decree was entered the plaintiff demanded a sum of Rs. 6 in excess of the amount of Rs. 77 per mensem awarded as damages for the period July, 1947, to December, 1947, during which the defendant was permitted to remain in occupation of the premises, and that he paid each month by cheque Rs. 160 being Rs. 77 out of arrears and Rs. 83 by way of damages. Under cross-examination he states that the plaintiff asked for a higher amount by way of monthly damages in October, 1947, after he had paid for three months at the rate of Rs. 154 per mensem. The plaintiff denies that he asked for Rs. 6 more than the amount of monthly damages awarded. He says that after making three payments of Rs. 154 each in cash the defendant began in October to send through his proctor to the plaintiff's proctor cheques of Rs. 160 each month for October, November and December, 1947, although the amount payable was Rs. 154. Three such payments had been made by December, 1947. He denies that there was a fresh contract of tenancy and that he asked for higher damages.

I am unable to agree with the learned Commissioner that the acceptance by the plaintiff of a few rupees in excess of the minimum amount the defendant was obliged to pay under the decree constitutes a new tenancy. Although out of the arrears of Rs. 462 due to the plaintiff the defendant was bound under the decree to pay only Rs. 77 each month, there was nothing to prevent his paying more each month if he was so minded, as he would be entitled to credit in respect of whatever amount he paid in reduction of arrears. There is no evidence that each remittance was accompanied by a note stating how it was made up. Even if there had been such a note, the plaintiff was entitled to appropriate any extra sum that was remitted to him each month against the arrears due to him.

Sub-section (1A) of section 3 of the Rent Restriction Ordinance, No. 60 of 1942, declares that it is unlawful for a tenant to pay or offer to pay a rent of an amount in excess of the authorised rent, while section 7 of that Ordinance forbids a tenant to pay or offer to pay as a condition of the continuance of the tenancy of any premises, in addition to the rent of such premises, any premium, commission, gratuity or other like payment or pecuniary consideration whatsoever. If the defendant's story is true, he has himself on his own showing acted contrary to the provisions of the Ordinance. He cannot be allowed to claim the benefit of his own wrong. If he has paid more than the authorised rent, he has his statutory remedy in section 9 of the Ordinance whereby he is entitled to recover the excess paid by him from the rent payable by him to the landlord without prejudice to any other method of recovery.

I find myself unable to agree with the learned Commissioner that the overpayment of Rs. 6 for each of the months October, November, and December, 1947, creates a new tenancy. When a valid notice has been given, a new tenancy can be created only by an express or implied agreement. In the instant case there is no convincing evidence of such an agreement. The mere acceptance of a payment in excess of what is due to the landlord during the current period of tenancy does not create a new tenancy at the expiration thereof. It has been held in *Bowden v. Rallison* [1] that since the Rent Restriction Acts the mere acceptance of rent by the landlord and the payment of rent by the tenant is no evidence of a new tenancy between them. The reason for this view is thus stated by Goddard C.J. : " The position is that when a notice to quit expires, the house being protected by the Rent Restriction Acts, the landlord may not be able to get possession unless he can show certain things. He may not, therefore, attempt to get possession, and the mere fact that he accepts the rent does not show that there is a new contractual tenancy. It is equally consistent with what is known as a statutory tenancy. As the justices have not found here anything except that the tenant remained in possession after the notice to quit had expired in 1939, and had paid his rent, the inference must be that he remained there as a statutory tenant."

Section 8A of our Rent Restriction Ordinance, No. 6 of 1942, as amended by Ordinance No. 20 of 1946, appears to be designed to

[1] *(1948) 1 All E. R. 841 at 843.*

create a statutory tenancy in respect of tenants who are protected by the provisions of the Rent Restriction Ordinance from ejectment from the premises they occupy.

I am unable to uphold the learned Commissioner's order dismissing the application of the plaintiff which he had already allowed.

I therefore set aside the order appealed from, with costs, and direct a writ of execution to issue to the Fiscal.

Appeal allowed.