1933 *Present :* **Dalton S.P.J. and Drieberg J.**

GOONESEKERE *v.* RAMAPILLAI.

138—D. C. Kandy, 41,475.

Lease—Assignment with written consent—Liability of lessee for rent.

A lessee, who has assigned his lease with the written consent of his lessor is not liable for the rent.

APPEAL from a judgment of the District Judge of Kandy.

H. V. Perera (with him *E. B. Wikramanayake*), for first defendant, appellant.

N. Gratiaen, for plaintiff, respondent.

Cur. adv. vult.

May 22, 1933. DALTON S.P.J.—

The plaintiff sues in her personal capacity and as executrix of her late husband. Together they granted to the first defendant, who is the present appellant, a lease, No. 435, of a rubber land some 8 acres in extent with the buildings and plantations thereon for a period of five years from November 30, 1927. The lease provided that the lessee, the first defendant, should not assign or underlet the premises leased without the consent in writing of the lessors. On July 20, 1929, plaintiff gave a written consent (exhibit P 1) to the assignment of the lease

so granted to the second and the third defendants, and on August 3, 1929, a notarial assignment was executed by the first defendant in favour of the second and third defendants (exhibit P 2). It sets out that, in consideration for a certain sum, the first defendant "doth hereby sell, assign, and set over" to the second and third defendants "all that indenture of lease No. 435 and all benefit and advantage thereof, and all the estate, right . . . ." of the first defendant over the land and premises to hold the land and premises during the residue of the unexpired term "subject to the rent reserved by the said indenture of lease and the covenants therein contained . . . ."; the second and third defendants then covenant to pay the rents reserved and to perform the covenants contained in the lease.

At the date of the assignment it is conceded that no rent was due by the first defendant, but subsequent rent became due and was unpaid. Plaintiff thereupon instituted this action to recover rent from the three defendants jointly and severally, that is, the original lessee and his assignees. Subsequently the claim against the third defendant was waived, but plaintiff obtained judgment for the amount he claimed against the first and second defendants.

The first defendant pleaded that the assignment being with the written consent of the lessor, as provided in the lease, he was freed thereby from any liability for rent after the completion of the assignment. The learned District Judge, however, held, on the authority of Walter Pereira in his *Laws of Ceylon,* that the original lessee remains liable in spite of the assignment given with the written consent of the lessor. From that conclusion the first defendant appeals.

The case is governed by the common law, although the term "assignment" in Ceylon is taken over from English law, just as it has been taken over in South Africa (see Lee's *Roman-Dutch Law (3rd ed.), p. 310*). The effect of an assignment, as opposed to a sublease, is there set out by the learned author. It substitutes the assignee in place of the original lessee "who thereupon ceases to be bound or entitled under the contract".

Wille in *Landlord and Tenant in South Africa* sets out the effect of an assignment or cession of a lease in the same way. It is "a transference by the tenant of all his existing rights and all his existing obligations under his lease to another person so that the assignee is substituted for the tenant". The tenant loses all rights and is relieved of all obligations, the assignee becoming the tenant under the terms and conditions of the original lease. The assignment before us has in express terms provided for this, and is entered into by the parties with the written consent of the lessor. Wille also points out, to answer another argument raised by Mr. Gratiaen, that a stipulation that a lease may be ceded implies that not only may rights under it be ceded, but also obligations, as being a stipulation referring to the lease as a whole without making any distinction between rights and obligations.

No question arises here (although it has incidentally been touched upon in the argument before us) as to whether consent of the lessor is necessary to effect a discharge of the original lessee of his liabilities under the lease. Consent of the lessor to an assignment is provided for in the lease and has been given. I might point out, however, that the decision (*Goonesekere v. John Sinno*[1]) on this particular point, that where the question of consent is not referred to in the original contract a lease can be assigned without the consent of the lessor, the lessee thereby freeing himself from his liabilities under the lease, does not appear to follow the common law as it is applied to-day in South Africa, and would also appear in Professor Lee's view to be contrary to principle. The practical result of following such a conclusion as was come to in the local decision I cite is a matter which seems to have given the learned District Judge some difficulty. I can find nothing in *Pless Pol v. Lady de Soysa*[2] contrary to the view of the law now taken in South Africa. There is of course nothing to prevent a lessor covenanting not to withhold his consent except for strong and good reason.

The authority upon which the learned District Judge relied for his conclusion that the original lessee was still liable for rent in spite of an assignment by him of the lease with the consent of the lessor is a statement in the *Laws of Ceylon,* to which I have referred, at page 665. The learned author is there discussing the law on the subject in South Africa. On an assignment by the lessee, where the lessor has recognized the assignee, or where the lessor's assent to the assignment was not necessary, he states the lessor and assignee stand to each other as did the lessor and original lessee as far as regards rights and obligations affecting the premises leased. Then he adds the following words "Naturally however the original lessee would remain liable", and cites Morice's *English and Roman-Dutch Law, p. 159,* as authority for that latter statement. Counsel have not been able to refer us to anything in *Morice* which supports that statement, nor have I been able to find anything myself. The subject of assignments is not dealt with at page 159 of the second edition of *Morice* published in 1905. Mr. Walter Pereira's *Laws of Ceylon* which is cited is dated 1913. At page 173 of *Morice* it is certainly stated that when the assignment is of the *rights* of the lessee, it has been held that such an assignment by the lessee does not free him from liability for rent. The learned District Judge appears to have read this as referring to an assignment of both rights and liabilities, but that is not correct. I can find nothing in the authority quoted to show that in the circumstances I have set out from the passage in the *Laws of Ceylon* relied on the original lessee would also remain liable for rent. It is possible of course, and other footnotes lead me to think it must be so, that Mr. Walter Pereira was quoting from the first edition of Morice, but I have not been able to obtain a copy to ascertain if that was so. If that is so, it would seem that the statement relied on was omitted or corrected in the second edition. On the other authorities I have cited it is not a correct statement of the law.

[1] *4 C. L. Rec. 133.* [2] *15 N. L. R. 57.*

In the case before us, in my opinion, the assignees stepped into the place of the original lessee, the present appellant, and the learned Judge was wrong in his interpretation of the law. The first defendant (appellant) was not liable for the amount claimed, and the action as against him must be dismissed. The appeal must be allowed with costs to the appellant in both Courts.

DRIEBERG J.—I agree.

Appeal allowed.