1951 *Present:* **Basnayake J.**

FERNANDO, Appellant, *and* SAMARAWEERA, Respondent

S. C. 206—C. R. Colombo, 26,034

Landlord and tenant—Termination of tenancy by notice to quit—Cheques sent thereafter but returned after institution of action for ejectment—Is new tenancy created ?—"Waiver of notice to quit"—Effect of deposit left by tenant with landlord—Rent Restriction Act, No. 29 of 1948, section 13.

Plaintiff was the owner of certain premises and defendant was his tenant. As the plaintiff required the premises for the purpose of his own business, in May, 1949, he gave notice of termination of the defendant's tenancy at the end of June, 1949. Defendant did not vacate the premises, and notwithstanding the termination of his tenancy continued to send by post each month a cheque for the amount of the rent and also to pay the rates in accordance with previous practice. The plaintiff retained the cheques but did not cash them. Proceedings in ejectment were, however, not instituted till March, 1950. A day after the institution of the action under the Rent Restriction Act the cheques were returned to the defendant by the plaintiff's proctor with the intimation that an action had been filed and that as the defendant's deposit of six months' rent with the plaintiff had been appropriated as damages for the period July to December, 1949, the cheques were being returned.

Held, that the retention by the landlord of the cheques sent by post by the tenant in payment of rent for a period subsequent to the determination of the tenancy could not give rise to the inference that the landlord by so doing intended to create a new tenancy. Nor did the appropriation of the deposit affect the position in a case where the tenant after the termination of his contractual tenancy retained his possession of the premises by virtue of the Rent Restriction Act.

Sending of cheques by a tenant does not amount to payment of rent when no receipts are given by the landlord and the cheques are not cashed.

In a case governed by the Rent Restriction Act, once the contractual tenancy is ended by notice, the landlord loses no rights by accepting rent from the statutory tenant whom he may evict by judicial process without any further notice the moment he fails to carry out his statutory obligations or he is able to satisfy the Court that the premises are reasonably required by him. Even in a contractual tenancy a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended and agreed that there should be a new tenancy.

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

C. Thiagalingam, K.C., with *S. Canagarayar*, for the plaintiff appellant.

N. E. Weerasooria, K.C., with *M. I. M. Haniffa* and *B. S. C. Ratwatte*, for the defendant respondent.

Cur. adv. vult.

March 6, 1951. BASNAYAKE J.—

This is an appeal by the plaintiff-landlord in an action in ejectment. The question that arises for decision is whether the retention by the landlord of cheques sent by post by the tenant in payment of rent for a period subsequent to the determination of the tenancy, can give rise to the inference that the landlord by so doing intended to create a new tenancy. The learned Commissioner of Requests has held that such an inference can be drawn.

Shortly the facts are as follows: The plaintiff is the owner of premises Nos. 236 (hereinafter referred to as No. 236) and 238, Gas Works Street, and No. 4. Dam Street, and the defendant is his tenant. As the plaintiff required No. 236 for the purposes of his own business, in 1945, he terminated the defendant's tenancy after due notice. The defendant failed to quit the premises on the termination of the tenancy. The plaintiff therefore instituted proceedings in ejectment. In March, 1947, that action was dismissed. Thereafter the defendant continued to remain in the premises and pay rent. In May, 1949, the plaintiff again gave notice of termination of the defendant's tenancy of No. 236 at the end of June, 1949. This time too the defendant did not vacate the premises, and notwithstanding the termination of his tenancy continued to send by post each month a cheque for the amount of the rent and also to pay the rates in accordance with previous practice. The plaintiff retained the cheques but did not cash them. Proceedings in ejectment were, however, not instituted till March, 1950. A day after the institution of the action, the cheques were returned to the defendant by the plaintiff's proctor with the intimation that an action had been filed and that as the defendant's deposit of six months' rent with the plaintiff had been appropriated as damages for the period July to December, 1949, the cheques were being returned.

It is admitted that the defendant had deposited with the plaintiff six months' rent in advance. The terms of the deposit are not precisely indicated either in the pleadings or in the evidence. No issue has been raised as to the legality or the consequences of the plaintiff's action in appropriating the deposit. But as the legal effect of the appropriation by a landlord of a deposit towards rent is mixed with the other questions that arise in this case, I shall briefly refer to the legal aspects of a deposit in the case of landlord and tenant.

A deposit of rent in advance is, in reality, a loan by the lessee to the lessor to be returned to the former, either by applying the amount so deposited on the rent or particular instalments of the rent, or by applying it in satisfaction of claims for damages for breaches of other covenants,

if it is agreed that it may be so applied, or by repaying, at the end of the term, the amount deposited, if all claims of the lessor which it was intended to secure are otherwise satisfied. The tenant is entitled to recover from the landlord the excess of the amount of the deposit above the rent due or the damage suffered by reason of the tenant's default, when the landlord has recovered possession by reason of such default.

In a contractual tenancy the appropriation of the deposit towards rent falling due after the termination of the tenancy under the name of damages [1] or any other may give rise to the inference that by so doing the landlord intended to create a new tenancy. But in a case where the tenant after the termination of his contractual tenancy retains his possession of the premises by virtue of the Rent Restriction Act, different considerations arise. These considerations will be discussed later.

I shall now proceed to consider whether the sending of cheques by the defendant amounted to payment of rent and if so whether the payment of rent after the determination of his tenancy gave rise to a new tenancy.

The giving of a cheque does not operate as an assignment *pro tanto* of the maker's funds or credit at the bank upon which it is drawn. The maker can stop payment, or, in the event of his death, the authority of the bank to make payment is revoked [2]. The law on the point is thus stated by Sir Ernest Pollock, M. R., in *Re Swinburne* [3]:—

> " Now a cheque is clearly not an assignment of money in the hands of a banker. A cheque, as explained by Lord Romilly, M. R., in *Hewitt v. Kaye* ((1868) L. R. 6 Eq. 198), is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is with the bankers or elsewhere. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. Let me assume, therefore, that there was money in the current account ready to meet this cheque as and when it was accepted for payment by the banker, but it is clear law that the fact that this cheque was outstanding did not indicate that there had been any assignment of the money on current account to meet the cheque. It is merely a mandate or authority in the hands of the holder of the cheque to go to the bank and get the money from it."

A practice of " certifying " or " marking " cheques for payment has grown up among bankers. In the United States " certified " cheques have received statutory recognition but in our country the practice has not been recognised by law. " Certification " is taken in practice as a representation that the bank, at the time of certifying, has funds of the drawer to carry out the order of the drawer. A certified cheque remains a cheque and the giving of such a cheque does not amount to payment in cash nor does it operate as an assignment of funds.[4]

[1] *Gerber v. Van Eyssen, (1947) 1 S. A. L. R. 705 at 709.*
Park v. Shell Oil Co. of Canada Ltd. (1950) 4 D. L. R. 283.
[2] *Johnson v. Johnson (1948) 3 D. L. R. 590 at 595.*
[3] *(1926) L. R. Ch. 41.*
[4] *Chalmers, Bills of Exchange, 11th Edn. p. 245.*
Byles on Bills, 20th Edn. pp. 22–23.

The tenant pays by cheque at his risk. The loss of or delay of the cheque in transit or the negligence of the bank may not excuse his default. The fact that the cheque is as a matter of practice sent by post will not change the character of the payment made by cheque.[1] But where the tenant pays his rent by cheque and the landlord accepts it as payment and gives a receipt therefor without waiting till the cheque is realised, then if the cheque is dishonoured he cannot sue for the rent if he has by his receipt acknowledged satisfaction of his debt. The position is different if he merely acknowledges the receipt of the cheque without treating it as a discharge of the debt. Where a complete discharge of the debt is given the remedy is an action on the cheque and not an action for rent. In the instant case no receipts were given and the cheques were not cashed.

I shall now turn to the next question whether the retention by the plaintiff of the cheques sent by the defendant gave rise to a new tenancy. Under our common law of letting and hiring the landlord may in terms of the contract terminate a contract of tenancy by notice.[2] Upon the expiration of the notice the tenant is bound to quit. If he does not he is liable to be ejected by process of law.[3] But since the enactment of legislation relating to rent restriction the position is different. The Rent Restriction Act does not fetter the landlord's right to terminate the contract of tenancy by adequate notice, but it prohibits the landlord from instituting an action for ejecment of a tenant without the written authority of the Rent Control Board except where—

(*a*) rent has been in arrear for one month after it has become due; or

(*b*) the tenant has given notice to quit; or

(*c*) the premises are, in the opinion of the Court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord, or for the purposes of the trade, business, profession, vocation or employment of the landlord; or

(*d*) the tenant or any person residing or lodging with him or being his sub-tenant has, in the opinion of the Court, been guilty of conduct which is a nuisance to adjoining occupiers, or has been convicted of using the premises for an immoral or illegal purpose, or the condition of the premises has, in the opinion of the Court, deteriorated owing to acts committed by or to the neglect or default of the tenant or any such person.

It appears from the foregoing that a landlord who has terminated the contract of tenancy through a desire to get back his premises but is unable to satisfy the above requirements has to submit to the continued occupation of his premises by a person whom he does not want there but whom the statute will not permit him to eject therefrom by process of law. Such a person cannot be described as a trespasser for his occupation of the premises is not unlawful. He is, since the termination of the tenancy, under no contractual relationship with the landlord.

[1] *Die Afrikaanse Pers Bpk v Perestrello and another, 1949 (2) S. A. L. R. 346 at 349.*
[2] *Voet, Book XIX, Title 11, Section 18.*
[3] *Ibid.*

This creature of the statute whose counterpart is to be found in England has been called the " statutory tenant " by Lord Justice Schrutton [1] who also describes him as that anomalous legal entity who would not ordinarily be described as a tenant. Lord Coleridge [2] describes the resulting legal relationship as a " statutory tenancy ". What are the rights and obligations of this " anomalous legal entity "? For the answer we have to turn to the Rent Restriction Act. Under that Act he—

(*a*) must pay the authorised rent within one month after it has become due,
(*b*) may by notice to the landlord terminate his " statutory tenancy ",
(*c*) or any person residing or lodging with him or being his sub-tenant may not be guilty of conduct which is a nuisance to adjoining owners,
(*d*) may not be convicted of using the premises for an immoral or illegal purpose.
(*e*) may not allow the condition of the premises to deteriorate owing to acts committed by him or by his sub-tenant or by any person residing or lodging with him or owing to his neglect or default or of any person residing or lodging with him,
(*f*) may not without the prior consent in writing of the landlord sublet the premises or any part thereof,
(*g*) may not except with the prior consent of the landlord use or permit any other person to use any residential premises for any purpose other than that of residence.

The landlord on his part—

(*a*) may not demand or receive more than the authorised rent,
(*b*) must receive the authorised rent if it is tendered within one month after it has become due or earlier,
(*c*) must issue a receipt for every payment made to him by way of rent or advance,
(*d*) may not receive an amount exceeding three months' authorised rent in advance,
(*e*) may not receive any premium, commission, gratuity or other like payment or pecuniary consideration,
(*f*) may not without reasonable cause discontinue to withhold any amenities previously provided for the benefit of the tenant,
(*g*) must carry out all repairs or re-decoration necessary to maintain the premises in proper condition,
(*h*) may not institute proceedings in ejectment—

(i) unless the premises are reasonably required for occupation as a residence for himself or any member of his family or for the purpose of his trade, business, profession or employment, or
(ii) unless the " statutory tenant " commits a breach of his statutory obligations enumerated above.

[1] *Shuter v. Hersh (1922) 1 K. B. D. 438 at 448–449.*
[2] *Hunt v. Bliss (1919) W. N. 331.*

Once the tenant commits a breach of any one of his statutory obligations the bar against the institution of proceedings in ejectment imposed by section 13 of the Act is removed and there is nothing the " statutory tenant" can do to regain his immunity from eviction. His rights and obligations are governed by the statute and immediately he violates its provisions the consequences of such violation begin to flow. For instance if he is in arrears of rent for one month after it has become due the landlord becomes free to institute proceedings in ejectment. He cannot prevent his eviction by process of law by tendering the rent out of time either before or after the institution of legal proceedings. The consequences of the failure to observe the obligations imposed by the statute cannot be avoided by doing late what should have been done in time. This view finds support in the case of *Meenatchee v. Anthony* [1] where it was held that when a tenant has already lost his statutory right to continue in occupation, he cannot revive that right by the simple expedient of paying rent long after it fell due. Even in a contractual tenancy the tenant cannot by tendering the rent after forfeiture deprive the landlord of his right.[2]

I shall now proceed to consider the consequences of the acceptance of rent by the landlord from a statutory tenant. Under the Act as shown above the statutory tenant is bound at the risk of eviction to pay rent within a month of its becoming due. That obligation carries with it an implied obligation on the part of the landlord to receive the rent so tendered. For if such an obligation were not implied the tenant would for no fault of his lose the immunity provided by the statute. A statute should not be read as compelling the impossible—*Lex non cogit ad impossibilia*. If therefore acceptance of rent from a " statutory tenant " is one of the statutory obligations of the landlord no new contract of tenancy can arise when he does what the statute compels him to do. A contract of letting and hiring cannot arise except by agreement of parties. A tenancy by contract can only arise where the parties are *ad idem* as to its essential particulars.

The resulting position is that by accepting rent from a statutory tenant for however long a period a landlord does not create a contractual tenancy. Similarly the defendant acquired no right to a contractual tenancy by continuing to pay rates in accordance with the arrangement that subsisted between the plaintiff and himself. That was only the payment of rent by deduction, for, the rates paid were deducted from the rent. Once the contractual tenancy is ended by notice the landlord loses no rights by accepting rent from the statutory tenant whom he may evict by judicial process without any further notice the moment he fails to carry out his statutory obligations or he is able to satisfy the Court that the premises are reasonably required by him. This is what the statute says and it is right that the statute should be strictly construed, for, legislation which interferes with freedom of contract must be construed strictly and not carried further than the

[1] *(1930) Natal Law Reports, 204.*
[2] *Barret v. New Oceana Transvaal Coal Co. Ltd. (1903) svaal Supreme Court, p. 431 at 442.*

words and necessary implications demand.[1] In the English case of *Morrison v. Jacobs* [2] Lord Justice Scott observes in commenting on similar legislation:

> " The contractual tenancy having expired, it was not necessary for the landlord to serve the tenant with any notice to quit: all that was necessary was that he should come to court and satisfy the Judge that he reasonably required possession of the dwelling-house for his own occupation as a residence."

In the instance case the learned Commissioner of Requests says:

> " His (landlord's) conduct in this case in accepting those cheques as payment of rent month after month after the termination of this notice and returning them only after he filed this action clearly gives rise to the inference that he had waived his notice and had allowed the tenancy to continue. On the facts of this case, a new tenancy by implied agreement can be presumed and the notice must be deemed to have been waived."

It is clear that the learned Commissioner has fallen into the error of treating the tenancy as a contractual tenancy and also assuming that there is a presumption in favour of the waiver of rights. I have demonstrated above that the appellant's tenancy was not, after its termination by notice, a contractual tenancy. But even in a contractual tenancy the mere acceptance of rent is insufficient to create a new tenancy.[1] The agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to the terms (*Attorney-General v. Ediriwickramasuriya,* (1940) 41 N.L.R. 499; *Virasinghe v. Peiris,* (1943) 46 N.L.R. 139). Some of the earlier English decisions on this point are quoted in the decisions of this Court cited above. It will be sufficient therefore to refer to the recent case of *Clarke v. Grant and another* [3] from which I propose to quote at length as the legal position in England is clearly set out in the judgment of Goddard C.J. who says:

> " If a landlord seeks to recover possession of property on the ground that breach of covenant has entitled him to a forfeiture, it has always been held that acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of covenant as a forfeiture. The lease is voidable, not void, and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby acknowledges or recognises that the lease is continuing. With regard to the payment of rent after a notice to quit, however, that result has never followed. If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there

[1] *(1930) Natal Law Reports, 204.* [2] *(1945) 1, K. B. D. 577 at 581.*
[3] *(1949) 1 All E. R. 768.*

should be a new tenancy. That has been the law ever since it was laid down by the Court of King's Bench in *Doe d. Cheny v. Batten* where Lord Mansfield said (1 Cowp. 245): 'The question therefore is *quo animo* the rent was received, and what the real intention of both parties was ?

"It is impossible to say that the parties in this case intended that there should be a new tenancy. The landlord always desired to get possession of the premises. That is why he gave his notice to quit. The mere mistake of his agent in accepting the money as rent which had accrued is no evidence that the landlord was agreeing to a new tenancy. The importance of the present case is that it gives this Court an opportunity of overruling once and for all the decision of the Divisional Court in *Hartell v. Blackler* (1920) 2 K. B. 161)."

I shall now pass on to discuss the matter raised in issue No. 10 in these words "there has been a waiver of the notice by subsequent acceptance of rent". Waiver is the voluntary relinquishment of a right. The expression waiver of notice is used in the context not for the purpose of conveying the idea that the landlord waived any right he had to receive a notice but to indicate that by accepting the rent the landlord created a new tenancy. It is a wrong use of the expression. Once a notice of termination of a tenancy is given and the term of the notice expires without the notice being withdrawn no question of the waiver of the notice can rise. This expression is of English origin and it is therefore pertinent to refer to English cases in this connexion. Lush J. says [1]:

"The expression 'waiver of a notice to quit' though convenient as a description of the position where both landlord and tenant agree that a notice which has expired shall be treated as inoperative, is an inaccurate expression, and if one attempts to found a proposition of law upon it is likely to lead one astray."

In the case of *Davies v. Bristow* [1], Shearman J. observes: "After the time has expired the lease is at an end and a landlord can no more waive his notice to quit than he can waive the effluxion of time." The same Judge calls it a "loose and unscientific expression in that connection."

Before I conclude I should like to refer to the erroneous view of the law relating to waiver taken by the learned Commissioner. He appears to think that waiver is presumed. An intention to waive a right or benefit to which a person is entitled is never presumed.[2] The presumption is against waiver [3], for though everyone is under our law at liberty to renounce any benefit to which he is entitled the intention to waive a right or benefit to which a person is entitled cannot be lightly inferred, but must clearly appear from his words or conduct [4]. The onus of proof of waiver is on the person who asserts it. Where the tenant alleges that the landlord waived his rights he must prove that the

[1] *Davies v. Bristow (1920) 3 K. B. D. 428 at 437.*
[2] *Van Niekerk and Union Govt. (Minister of Lands) v. Carter (1917) A. D. 359.*
[3] *Nolte v. Kotze (1938) S. W. A. 25.*
Van Heerden v. Pretorius (1914) A. D. 69.

landlord with full knowledge of his rights decided tto abandom them either expressly or by unambiguous conduct inconsistent with an intention to enforce them.[1]

Lastly, I wish to deal with the question of delay in instituting this action. It was instituted eight months after the second notice of termination of the tenancy. The plaintiff's explanation is that he was endeavouring to recover the premises by negotiation without recourse to law. One can believe him especially in view of his previous unsuccessful attempt to obtain possession by process of law. His explanation has not been seriously challenged. Apart from that the conduct of the plaintiff in relation to these premises since about the middle of 1945 left none of the persons concerned in doubt as to his true intentions. Mere delay in enforcing a legal right does not cause the loss of that right [2].

For the above reasons the plaintiff is entitled to judgment as prayed for, as the learned Commissioner has held that the premises are reasonably required for the purposes of the plaintiff's trade or business.

The appeal is allowed with costs both here and below.

Appeal allowed.