1933 *Present:* **Garvin A.C.J. and Maartensz A.J.**

CARRON *v.* FERNANDO *et al.*

*360—D. C. Negombo, 6,637.*

*Lease—Mortgage of leasehold interest—Nature of notarial lease—Jus in re—Effective charge against third party—Rate of interest—Proof that it is not unreasonable—Ordinance No. 2 of 1918, s. 4.*

**A notarially executed lease of land creates a real right in the land and a duly registered mortgage of the leasehold interest is an effective and an enforceable charge into whosoever's possession that interest may pass.**

**A person is not entitled to recover interest at a higher rate than 15 per cent. upon a loan exceeding Rs. 2,500 in the absence of proof of special circumstances showing that the rate is not unreasonable.**

THE plaintiff, as the executrix of the estate of the late T. K. Carron, instituted this action to recover moneys alleged to be due to the estate upon a bond No. 450 of January 9, 1929, whereby the first and second defendants hypothecated to and with the said T. K. Carron all their interests in a lease of the premises described in schedule A and, in addition, the lands and premises described in schedule B. The leasehold interests hypothecated were created by a deed No. 35 of June 28, 1927, whereby the fourth defendant granted the premises to the first and second defendants for a term of 12 years from April 4, 1927. The plaintiff further pleaded an assignment to Carron by the first and second defendants of a mortgage of the premises referred to in schedule C to secure the repayment to them of a sum of Rs. 40,000 advanced to the fourth defendant at the time of the lease. It was pleaded that this assignment had been granted by way of further security for the sum advanced on the principal bond. The plaintiff prayed for judgment for the sum claimed and a decree declaring that the leasehold interests referred to in schedule A and the premises described in schedules B and C be specially bound and executable for the amount of her claim. The first and second defendants admitted the debt but pleaded that the rate of interest, *i.e.*, 18 per cent., was excessive and should be reduced. They further pleaded that Carron had not paid them the consideration for the assignment and asked that this sum Rs. 40,000 be set off against the money due on the bond. The third defendant who claimed to be vested with certain interests in the leasehold premises objected to a hypothecary decree being entered in respect of them. The learned District Judge entered judgment in favour of the plaintiff for the sum claimed and granted her a hypothecary decree in respect of the leasehold premises and the premises described in schedule C.

*H. V. Perera* (with him *D. W. Fernando*), for defendants, appellants.—The assignment to Carron by the first and second defendants of the mortgage created in their favour by the fourth defendant is an assignment for a money consideration of Rs. 40,000 and not an assignment by way of security for the moneys advanced upon the bond sued on. The consideration has not been paid and the first and second defendants claim this amount in reconvention. The plaintiff's answers to the interrogatories served on her amount to an admission of this claim. She is

further not entitled in law in view of the provisions of section 92 of the Evidence Ordinance to seek to contradict the terms of the assignment by parol evidence.

The rate of 18 per cent. interest prescribed in the bond sued upon is excessive and by reason of the provisions of the Money Lending Ordinance the Court has jurisdiction where interest is excessive to entertain any application to reduce the rate of interest.

The terms of the lease prohibit subletting except with the consent of the lessor; this would necessarily also include assignment either simply or by way of mortgage by the lessee except with the consent of the lessor —Wille on *Landlord and Tenant, p. 173; Demas v. Saris and Chronis* [1]. The mortgage of their leasehold interest by the first and second defendants to Carron without the written consent of the lessor is not binding on the lessor or on the third defendant who is the purchaser from the lessor of the premises leased.

A lease in Ceylon does not create a *jus in re*. Under the Roman-Dutch law a tenant only received a personal right or *jus in personam—Wille p. 204*. According to Sande (*De Prohib. Alienat. Rerum, Pt. 1., ch. 1, s. 46*) never in law does any real right arise from a simple lease for whatever term nor is a *quasi dominium* transferred.

The law in South Africa as regards a tenant's rights is different—*Wille pp. 208 and 209*. This is so by virtue of the law relating to registration of leases.

*Hayley, K.C.* (with *Soertsz, K.C.*), for plaintiff, respondent.—With regard to the argument that the claim in reconvention should succeed as the plaintiff is debarred by section 92 of the Evidence Act from saying that the assignment was not for a money consideration, as the deed of assignment is for such a consideration, it is submitted that, as the defendants deny receipt of the consideration, although in the deed of assignment consideration is recited as having been given, it is open to the plaintiff to prove the real nature of the transaction. See *Nadaraja v. Ramalingam Mudaliar* [2]; also *Kiri Banda v. Saly Marikar* [3].

The rate of interest is not excessive in the circumstances of the case. The burden of proving that it is excessive is on the party alleging it. With regard to the contention that the mortgage by the first and second defendants of the leasehold interests was bad and cannot give the mortgagee any preferential rights as subletting was prohibited without the written consent of the lessors, it is submitted—(*a*) that the evidence of the lessor shows that she consented to the mortgage, she was the only person concerned to consent or withhold her consent at the time of the mortgage and the third defendant's attitude in that matter is of no consequence. (*b*) Such prohibitions, as the one relied on, are to be strictly construed. A prohibition against subletting must be construed as prohibiting that kind of dealing alone and no other. The lessor could have prohibited a mortgage of the leasehold interests as well, and as she did not do so, a mortgage was good and once the mortgage was good, all the practical consequences of a mortgage must be allowed to result, although the ultimate effect may be to substitute another lessee for the original lessee.

[1] (1909) *T. H. 112.* [2] *5 C. W. R. 304.* [3] *4 C. W. R. 206.*

(c) The ultimate result of a mortgage followed by a sale amounts to an assignment rather than to a subletting, and in the original deed of lease an assignment must be assumed to have been envisaged as permissible, for assigns are specially mentioned.

A lease does create a *jus in re*. It gives possession to the lessee. A lease has been held to amount to a *pro tanto* alienation and on that footing it creates a right in a thing, the right to possess. See *Goonewardana v. Rajapakse.*[1]

In Roman-Dutch law a lease creates not only conractual rights between the parties, but also proprietary rights which the lessee can make good against all the world. It is upon that fact that the maxim "hire goes before sale" is based. The Roman-Dutch law thus differs from the Roman law.

In Ceylon the view that a lease creates ownership in land has always been followed. See *Abdul Azeez v. Abdul Rahiman*[2]; *Isaac Perera v. Baba Appu.*[3] It is now too late to disturb that view.

It results, therefore, that the secondary mortgage by the lessees must be subject to the rights of the plaintiff who is the primary mortgagee. The lessees having mortgaged the leasehold interests with plaintiff's intestate cannot by a subsequent act derogate from the earlier rights created by them in favour of the earlier mortgagee.

*Cur. adv. vult.*

December 1, 1933. GARVIN, A.C.J.—

The facts material to this appeal are fully set out in the judgment of Maartensz J. which I have had the advantage of reading and with which I agree. The plaintiff is the executrix of the estate of the late T. K. Carron. She instituted this action to recover moneys alleged to be due upon a bond No. 45 of January 9, 1929, whereby the first and second defendants hypothecated to and with the said T. K. Carron all their interests in a lease of the premises described in schedule A to the plaint and in addition the lands and premises enumerated in schedule B thereto. The leasehold interests hypothecated were created by a deed No. 35 of June 28, 1927, whereby the fourth defendant granted the premises to the first and second defendants for a term of 12 years from April 4, 1927. The plaintiff further pleaded an assignment to Carron by the first and second defendants of a mortgage of the premises referred to in schedule C to secure the repayment to them of a sum of Rs. 40,000 paid and advanced to the fourth defendant at the time of the execution of the lease by her in their favour. She pleaded that this assignment had been granted by way of further security for the sum advanced on the principal bond and prayed for judgment for the sums claimed and a decree declaring the leasehold interests referred to in schedule A and the premises described in schedules B and C specially bound and executable for the amount of her claim. The first and second defendants admitted the debt and their only plea in respect thereto was that the rate of interest, *i.e.*, 18 per cent. was excessive and should be reduced. They pleaded further that Caroon had not paid them the consideration for the assignment which was Rs. 40,000, which they pleaded was due, and asked that this amount be

[1] (1895) *1 N. L. R. 217.* [2] *1 Current Law Reports 275.* [3] (1897) *3 N. L. R. 48.*

set off against the moneys due from them on the bond in Carron's favour. The third defendant who claims now to be vested with certain interests in the leasehold premises described in schedule A raised various pleas and objections to a hypothecary decree being entered in respect of the leasehold interests in and over the premises discribed in schedule A and the premises described in schedule C. The learned District Judge entered judgment for the plaintiff for the amount claimed by her and granted her a hypothecary decree in respect of the leasehold interests referred to and the premises described in schedule B.

In the course of the trial objection was successfully taken to any parol evidence being offered by the plaintiff to show that the assignment to Carron by the first and second defendants of the mortgage created in their favour by the fourth defendant was not, as it appears upon the face of the documents to be, an assignment for a money consideration of Rs. 40,000 but was merely an assignment by way of security for the moneys advanced upon the bond No. 45 of January 9, 1929. From this order the plaintiff has not appealed, but the appellants have raised an objection to the reservation by the learned District Judge to the plaintiff of a right to institute further proceedings if so advised upon that assignment. It is a question whether the reservation made by the learned District Judge is of any legal force at all, but the objection is, I think, well founded. If any rights of action survive to the plaintiff in respect of that assignment she must be left to take such action as she may be advised without any reservation to her of a special right to do so.

Now the only portion of the judgment of which the first and second defendants appear to complain relates to the dismissal of their counterclaim for the sum of Rs. 40,000. No evidence was led in support of this claim except the answers to certain interrogatories which had been served upon the plaintiff. In the replication filed by the plaintiff there is an express denial that anything is due from her to the first and second defendants upon the assignment. Nor is there anything in her answers made to the interrogatories which amounts to an admission of the claim.

On the contrary, it is clear both from this document and from what happened in the course of these proceedings that she maintains that the transaction was intended to be additional security for the repayment of the money lent on the bond No. 45. There is therefore no admission of the claim and no evidence led in support of it. The learned District Judge was therefore right in my opinion in dismissing it. It is urged, however, that the plaintiff's answer to the claim could only be substantiated by parol evidence which was not admissible in law in view of the provisions of section 92 of the Evidence Act. That is an objection that might possibly have been urged if evidence had been led in support of the claim, and it is also possible that since the first and second defendants were themselves seeking to contradict the statement in the bond that Rs. 40,000 had actually been paid and received by them that it might have been held that in such circumstances it would have been competent for the plaintiff to establish by parol evidence her defence that no money was due. Moreover, the evidence in this case proves conclusively that the first and second defendants have by the various complicated transactions subsequent to the lease and the assignment in their favour to

which they were parties obtained the full benefit of the mortgage granted in their favour by the fourth defendant. There is nothing due from the fourth defendant to the first and second defendants and there is nothing therefore upon which the assignment of the mortgage can operate. They are in effect seeking to recover Rs. 40,000 when they have themselves obtained the full benefit of the mortgage in their favour and have been repaid all moneys due to them on that mortgage. In such circumstances it is quite understandable why these defendants refrained from entering the witness box to give evidence in support of their claim.

There is more substance in their prayer for relief from what they plead is the excessive rate of interest. Te rate of interest prescribed in the bond is 18 per cent. though provision is made for the acceptance of interest at the lesser rate of 15 per cent. where in strict compliance with the provisions of the bond the interest is paid on the due date. It is urged that, despite the terminology used, the additional 3 per cent. is in effect a penalty. It was further pleaded that by reason of the provisions of the Money Lending Ordinance the Court has jurisdiction where interest is excessive to entertain any application to reduce the rate of interest. Section 4 of that Ordinance declares what rates of interest shall be deemed to be unreasonable. In the case of loans of over Rs. 2,500 anything in excess of 15 per cent. is to be deemed to be unreasonable "unless the creditor or any person claiming through the creditor shall satisfy the Court that in all the circumstances of the case the rate charged would in fact be reasonable". There is no evidence in this case of any special circumstances which leads to the inference that in this case the rate of 18 per cent. is not unreasonable. I agree therefore that the plaintiff should not be allowed to compute the interest at anything in excess of 15 per cent.

This brings me to the main appeal which is the appeal of the third defendant. What he seeks relief from is the decree in so far as it declares that the interest created in the premises described in schedule A by the indenture of lease No. 35 of June 27, 1927, are saleable. The main grounds upon which it was sought to impeach the judgment on this point were (1) that the mortgage decree would be ineffective inasmuch as the lessor had the right to refuse to recognize any assignee of the lease, (2) that the lease had been terminated by the surrender of the unexpired term thereof, (3) that no valid mortgage such as would bind subsequent mortgagees or assignees of the lessee's interest had been created. In support of the first of these contentions we were invited to look at the terms of the lease whereby subletting was prohibited except with the consent in writing of the lessor. This it was urged would necessarily also exclude assignment by the lessee except with the consent of the lessor. But in this case there is evidence given by the lessor herself. She states, "Mr. Carron informed me that he was taking a mortgage of the leasehold interests. I agree". Since the interest of a mortgagee consists of the right to bring the property mortgaged to sale for the recovery of his claim, it is manifest that in consenting to the mortgage the lessor must be taken to have consented to accept any purchaser at such a sale as her tenant in place of the original lessee. There is therefore clear evidence that in this instance the lessor has consented to this transaction.

Moreover, she has not appealed from the decree which is clearly binding upon her. It was then said that subsequent to the institution of these proceedings and during their pendency the third defendant had become the purchaser of the premises leased. If he did purchase these premises he did so with the full knowledge of the mortgage in favour of Carron and presumably also with full knowledge of the circumstance that the fourth defendant had consented to the mortgage in his favour. Whatever interests he may have acquired were acquired subsequent to this mortgage made with the consent of the then owner and he cannot be now heard to object to the decree on the ground now under consideration.

The plea that the lease had been terminated was first raised on what was thought by Counsel to be a surrender by the first and second defendants to the lessor by the document P 10 of September 1, 1931, to which all the present defendants were parties. But this was shown to be a misapprehension. The document had been drawn up for quite a different purpose. Not only was there no surrender but the continuance of the lease was expressly contemplated. The ground was then shifted and was based upon documents P 6, P 7, P 8, P 9, P 11 and P 12. It was urged that the combined effect of these documents was to vest in the third defendant all the rights of the lessor in the unexpired term of the lease, that by the document P 11 one Sockalingam Chettiar became the purchaser of these leasehold interests at a sale in execution of a subsequent mortgage created in respect thereof by the first and second defendants and that he had by the document P 12 surrendered to the third defendant. Here again there was a misapprehension as to the actual facts. It is true that by the document P 6 the lessor, that is to say the fourth defendant, had assigned all her interests in the lease and the benefit and advantage thereof to one Anamalai Chettiar and that Anamalai Chettiar had by the document P 9 of September 1, 1931, assigned these interests to the third defendant. But the interests created by the document P 6 were expressly declared to remain operative "only so long as mortgage bond No. 1,013, dated April 4, 1929, remained uncancelled and undischarged". It was admitted that that mortgage had been cancelled and discharged at the date of the alleged surrended by Sockalingam. There was therefore no surrender by Sockalingam, if indeed he was vested with legal rights in this leasehold, to the lessors or to any person authorized by them to accept the surrender. Finally it was urged that by the document P 8 by which the fourth and fifth defendants mortgaged these premises in favour of the Bank they had also assigned to the Bank the right to possess and take the rents, profits, issues and income of the said land during the continuance of the mortgage and that by reason of this right to possess and enjoy the premises the third defendant became entitled to accept a surrender of the term from the persons entitled thereto. Apart from the words referred to, there is nothing in the deed which justifies the contention that it was the intention of the fourth and fifth defendants to constitute the third defendant their agent for the purpose of obtaining a cancellation of this lease by surrender or otherwise. On the contrary one of the obligations which was specially imposed upon the fourth and fifth defendants was the obligation to "accept from the said J. X. Fernando and M. T. Mathes (the first and second defendants)

a surrender of the unexpired term of the lease created by the aforesaid Indenture No. 35 and place the Obligee Bank (the third defendant) in vacant possession of the said land and premises referred to". Assuming therefore that the rights of the lessees had passed to Sockalingam Chettiar there is no evidence here that this lease had been terminated by the lessor or by any persons specially authorized by him to do so. There is, of course, the further objection that the interests, if any, of Sockalingam in the lease were subject to the mortgage in favour of Carron. If as has been urged by the respondent this mortgage was validly executed and was effective to charge the interests mortgaged in the hands of any person to whom they may have passed subsequent to this mortgage, then clearly the surrender by Sockalingam even if it were in other respects unexceptionable may not be permitted to prejudice the mortgagee's rights.

The last and the main contention urged on behalf of the third defendant was that the mortgage in favour of Carron, though it may have been effective as between the immediate parties, was ineffective to charge these leasehold interests in the hands of any person to whom they may have passed from the lessees. It was urged that the interests of a lessee did not amount to a real right in the land but were purely in the nature of personal rights and that the hypothecation of such personal rights unless accompanied by an assignment of the lease did not create a charge effective against persons to whom the rights of the lessee may have passed.

The question whether the rights which a lessee obtains is a real right (*jus in rem*) or a purely personal right (*jus in personam*) is one in regard to which there appears to have been a considerable difference of opinion. There can be no question that in its inception a lessee's interests were not considered to amount to anything more than purely personal rights enforceable against the lessor. But under the Roman-Dutch law the maxim "Hire goes before sale" has been called in aid to give some relief to the lessee and gradually the lessee was further permitted to bring actions to protect him in his possession and enjoyment of his leasehold rights not only against the lessor but as against all others who endeavoured to interfere with him in the exercise of his rights. His position has thus gradually grown stronger and more secure and at the present time he enjoys for the term of his lease such security as the owner of any other real right. In South Africa as a result of this development of the law a duly registered lease for over 10 years is now given the same status as an interest in the land and is definitely regarded as a *jus in re*. The lessee under such a lease "obtains a real right to the property as against all persons other than a creditor under a mortgage bond which has been duly registered against the same property before the lease was registered". See Wille on *Landlord and Tenant, p. 210.* On the other hand the interests of tenants under short term leases are still treated as purely in the nature of *jura in personam.*—Wille on *Landlord and Tenant, p. 209.*

A similar development in regard to the position of a lessee of land has taken place in Ceylon. In *Goonewardana v. Rajapakse*[1], when the right of a lessee to maintain an action against his lessor and others to be restored to the possession of the premises and for damages was considered, Bonser C.J., after referring to the various actions given to a lessee under

[1] *(1895) 1 N. L. R. 217.*

the Roman-Dutch law to secure him in the enjoyment of his leasehold rights and after referring to the provisions of Ordinance No. 7 of 1840, allowed the action and expressed himself in the following terms:—"In my opinion we ought to regard a notarial lease as a *pro tanto* alienation and we ought to give the lessee under such a lease during his term the legal remedies of an owner and possessor". In *Isaac Perera v. Baba Appu* the law as stated by Bonser C.J. was affirmed and a lease under a notarial contract though he had not been put in possession by his lessor was permitted to establish his lessor's title and vindicate his right to the possession of the land leased. And later in 1909 in *Abdul Azeez v. Abdul Rahiman*[1], Hutchinson C.J. in the course of his judgment observes "A lessee under a valid lease from the owner is dominus or owner for the term of his lease. He is owner during that term as against all the world, including his lessor".

Now the provisions of Ordinance No. 7 of 1840 require every lease other than a lease at will or for a period not exceeding one month to be in writing and executed in the presence of a licensed notary public and two witnesses. This is a requirement which must be complied with if any "sale, purchase, transfer, assignment or mortgage of land or other immovable property", and any "promise, bargain, contract or agreement for effecting any such object, or for establishing any security, interest or encumbrance affecting land or other immovable property", is to be of any force or avail in law. So also, by reason of the provisions of Ordinance No. 14 of 1891 "every deed or other instrument of sale, purchase, transfer, assignment of mortgage of land or other immovable property, or of a "promise, bargain, contract or agreement for effecting any such object or for establishing or transferring any security, interest or encumbrance affecting such land or property other than a lease at will or for any period not exceeding one month" is required to be registered and in the event of failure to register such a "deed shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration". In the result, in Ceylon every lease for any period exceeding a month must be evidenced by an instrument duly executed before a notary and two witnesses like every other instrument affecting land and must also as in the case of all instruments affecting land be duly registered. In Ceylon the position is not quite the same as in South Africa. Every lease which is executed before a notary and duly registered is placed upon the same footing as the law in South Africa places a duly registered lease for more than 10 years, and every notarially attested lease is regarded as an alienation for the term of the lease and as creating a real right as distinct from a purely personal right. It has to be admitted that there are some respects in which the position of a lessee does differ from that of persons who are entitled to real rights. His title is a defeasible one and dependent upon the observance of the conditions and covenants of the lease. Further, his possession is not in the fullest sense and cannot for all purposes be regarded as a possession *ut dominus*. It differs from other *jura in re alieno* in that the owner of the land has certain duties imposed upon him by the terms of the lease which is not the case with other rights *in re alieno*. In this and possibly in other respects a lessee's position differs

[1] (1897) 3 *N. L. R.* 48. [2] (1909) 1 *Current Law Reports*, 271.

from that of persons entitled to real rights in the land. On the other hand the strength of his position has developed so considerably since the early days in which he was not permitted any rights other than purely personal rights as against the lessor that it approximates closely to that of a person entitled to a real right in the land. "The peculiarity of a real right or *jus in rem*, as distinguished from a personal right or *jus in personam* is that it adheres or is attached to the thing, which is its object, so closely that it may be enforced by the person, who is entitled to it, against any person whomsoever who interferes with it, and not merely against a particular person who is under special obligations with regard to it".—Maasdorp's *Institutes of Cape Law, p. 12.* Such is the position of a lessee under our law that his rights may be enforced by him "against any person whomsoever who interferes with it", and not merely against the lessor. Thus it would seem that that feature which Maasdorp regards as the peculiarity of a real right is a feature of the right of a lessee in Ceylon. It seems to me to be too late now to urge that a notarially executed lease of land in Ceylon does not create a real right in the land.

A duly registered mortgage of immovable property is a charge upon the land and adheres to it notwithstanding that it may have passed into the hands of others, unless of course adverse interests thereto have been created by duly registered instruments which by reason of registration take priority. Similarly as the interest of a lessee in land is a real right a duly registered mortgage of those interests will remain an effective and an enforceable charge into whosoever's possession those interests may pass. The law in Ceylon is exactly the same as the law in South Africa relating to registered long leases where "such a lease can be effectually mortgaged or pledged by an instrument registered in the Deeds Office". —Wille on *Mortgage and Pledge, p. 132.*

In my judgment the plaintiff is entitled to the decree she claims in respect of the rights in the lease hypothecated by the first and second defendants.

I agree therefore to the order proposed by Maartensz A.J.

MAARTENSZ A.J.—

This was an action by the administratrix of the estate of the late Mr. T. K. Carron to recover from the first and second defendants a sum of Rs. 31,250 alleged to be due as principal and interest upon bond No. 45 dated January 29, 1929, and for a hypothecary decree against them and the third, fourth, and fifth defendants in respect of the properties hypothecated by the bond described in schedules A and B of the plaint, and the property described in the schedule to deed of assignment No. 44 dated January 9, 1929, and in schedule C of the plaint.

The plaintiff averred that the payment of the amount due on the said bond No. 45 was further secured to the mortgagee by the said deed of assignment.

The first and second defendants admitted the execution of the bond, but alleged that the rate of interest 18 per cent. stipulated in the bond was excessive.

They denied that the deed of assignment No. 44 was given as security for the payment of the amount due on the bond No. 45, and claimed from plaintiff a sum of Rs. 40,000 with legal interest, being the amount of the consideration for the assignment of the bond referred to in deed No. 44.

They prayed for a dismissal of plaintiff's action and for judgment against the plaintiff for a sum of Rs. 26,845, the difference between the amount due to plaintiff on the bond sued on and the amount due to first and second defendants on the deed of assignment No. 44.

The third defendant pleaded that even if the plaintiff was entitled to judgment against the first and second defendants for the amount sued for, she was not entitled to a hypothecary decree in respect of the properties described in schedules A and C of the plaint for the reasons set out in paragraphs 9 and 10 of the third defendant's answer, which I shall set out later.

The learned District Judge entered judgment for plaintiff for the sum sued for and granted her a hypothecary decree in respect of the properties described in schedules A and B of the plaint.

The first, second, and third defendants appeal from this decree in one petition of appeal—but the grounds of appeal are entirely different and they must be dealt with separately.

I shall first deal with the third defendant's pleas to the plaintiff's claim to a hypothecary decree over the property described in schedule A of the plaint. For this purpose it will be necessary to refer to the exhibits in the case.

By deed No. 35 (P 1) dated June 28, 1917, the fourth defendant leased to the first and second defendants an estate called Kahatawila estate *alias* Crooswatta for a period of 12 years commencing from April 4, 1927, for a sum of Rs. 114,000. Rs. 40,000 was to be paid in advance and the balance in quarterly instalments which varied from year to year, provision being made for the reduction by instalments of the sum of Rs. 40,000.

The indenture provided that "the lessees shall not have the right to sublease the said premises without the written consent of the lessor."

The lessor inherited the premises under the will of one John de Croos subject to an entail for the benefit of the fifth defendant.

By bond No. 36 (P 2) of the same date the fourth and fifth defendants mortgaged the estate to the first and second defendants to secure the repayment of the sum of Rs. 40,000 advanced by them.

By bond No. 45 (P 4) dated January 9 the first and second defendants to secure repayment of a sum of Rs. 20,000 mortgaged and hypothecated to T. K. Carron the property described in schedules A and B of the plaint.

The property described in schedule A is the interest of the first and second defendants in the unexpired term of the lease of Kahatawila estate *alias* Crooswatta set out as follows:—

> "All that the right, title and interest of the obligors and over the indenture of lease bearing No. 35, dated June 28, 1927, and attested by L. S. Kirthisinghe, Notary Public of Negombo, together with the residue and unexpired term of lease thereby granted and the money paid in advance in respect of the lease created by the said indenture No. 35 and affecting—
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> All that land and premises called and known as Kahatawila estate *alias* Crooswatta . . . ".

The bond carried interest payable at the rate of 18 per cent. payable quarterly in advance subject to the proviso that if the interest was paid on the due date or within one week of the date "the obligors will have the privilege to pay the aforesaid interest calculated only at and after the rate of 15 per cent. per annum anything to the contrary notwithstanding".

By deed No. 44 (P 3) of the same date the first and second defendants assigned to T. K. Carron the mortgage bond No. 36 as well as the sum due on the bond for a sum of Rs. 40,000 the receipt of which the first and second defendants expressly admitted and acknowledged. Kahatawila *alias* Crooswatta hypothecated by bond No. 36 is described in schedule C of the plaint. It was plaintiff's case that this bond No. 36 was assigned to T. K. Carron as additional security for the sum of Rs. 20,000 secured by bond No. 45. The learned District Judge has rejected this claim and the plaintiff has not appealed from his order.

I shall have to refer to this deed of assignment again in connection with the claim of the first and second defendants that Rs. 40,000 is due to them from Carron's estate.

By bond No. 1,013 (P 5) dated April 4, 1929, the fourth and fifth defendants mortgaged Kahatawila estate to Annamalai Chettiar to secure repayment of a sum of Rs. 100,000.

The attestation clause recites that Rs. 60,000 was paid to the obligors by cheques drawn in their favour by the obligee and the balance Rs. 40,000 retained by the obligee to be paid in satisfaction of bond No. 36 (P 2).

By deed No. 1,015 (P 6) of the same date (April 4, 1929) the fourth defendant assigned the lease No. 35 and the full benefit and advantage thereof and all the estate, right, title, interest, claim, and demand whatsoever of the fourth defendant into and out of the same thereof to Annamalai Chettiar for a sum of Rs. 10 subject to the proviso that the assignment shall remain operative only so long as the bond No. 1,013 remains uncancelled and undischarged, and that on the cancellation and discharge of the said mortgage bond the assignment shall cease and determine.

By bond No. 2,001 (P 7) dated October 16, 1929, the first and second defendants to secure the repayment of a sum of Rs. 25,000 mortgaged and hypothecated with Suppramaniam Chettiar and Ramanathan Chettiar the unexpired term of the lease of Kahatawila estate secured to them by indenture of lease No. 35 (P 1) and all their right, title, and interest in the sum of Rs. 40,000 paid by them to the lessor (fourth defendant) and secured to them by bond No. 36 (P 2).

The attestation clause recites that Rs. 2,254.17 was paid to the obligors and Rs. 21,850 "set aside" to be paid in settlement of the existing mortgage.

That mortgage was Carron's mortgage.

The mortgagees put bond No. 2,001 in suit in case No. 41,647 of the District Court of Colombo, for the recovery of the sum of Rs. 2,254.17. The leasehold interest was sold in execution of the decree and purchased by Sockalingam Chettiar.

By deed No. 860 dated February 3, 1932 (P 11) their interests were conveyed to Sockalingam Chettiar by the Secretary of the District Court of Colombo.

By deed No. 833 (P 8) dated August 2, 1931, the fourth and fifth defendants to secure repayment of a sum of Rs. 100,000 mortgaged and hypothecated Kahatawila estate to and with the third defendant.

The bond recites (1) that a sum of Rs. 70,494 was due from the obligors to Annamalai Chettiar on bond No. 1,013 and that he had not paid and discharged the bond No. 36, (2) that there was due and owing on bond No. 36 the balance sum of Rs. 26,050, (3) that the obligors had by deed No. 1,015 assigned to Annamalai Chettiar the benefit of lease No. 35, (4) that the obligors had arranged with the lessees under indenture of lease No. 35 for the surrender of the unexpired term of the lease on payment of the sum of Rs. 26,050, (5) that the sum of Rs. 100,000 was borrowed to pay the sums of Rs. 70,494 and Rs. 26,050.

The bond provided "that the obligors shall and will immediately on the execution of these presents accept from the said John Xavier Fervando and Mary Thecla Mathes Fernando (first and second defendants) a surrender of the unexpired term of the lease created by the aforesaid indenture No. 35 and place the Obligee Bank in vacant possession of the said land and premises", subject to the proviso that on repayment of the principal and interest the obligor shall be entitled to a cancellation and discharge of the bond and to possession of the land and premises mortgaged.

By deed No. 840 (P 9) dated September 1, 1931, Annamalai Chettiar assigned to the third defendant the benefit of the lease assigned to him by the lessor, the fourth defendant by deed No. 1,015.

By deed No. 841 (P 10) dated June 8, 1931, the first, second, third, fourth, and fifth defendants and Sockalingam Chettiar entered into an agreement by which it was agreed (1) that the balance due to the first and second defendants upon bond No. 36 was Rs. 26,050 and that this sum should be paid from and out of the rents payable by the first and second defendants, (2) that Sockalingam Chettiar shall be placed in possession of Kahatawila estate and that he should manage it and pay the income left after expenditure in payment of the rent due to fourth and fifth defendants and the balance, if any, in reduction of the debt of Rs. 26,050, (3) that nothing in the agreement shall be deemed to cancel or determine or vary the conditions of the indenture of lease No. 35 and the bond No. 36.

By deed No. 1,051 dated April 28, 1932 (P 12) Sockalingam Chettiar, who had acquired by deed No. 860 the unexpired term of the lease, purported to surrender to the third defendant "the estate, plantations, and premises comprised in and expressed to be demised by the said indenture of lease No. 35".

It was at one stage urged in support of third defendant's appeal that the indenture of lease No. 35 (P 1) had been cancelled and discharged by the execution of deed No. 1,051.

This contention was based on a misapprehension as to the effect of deeds P 6, P 8, and P 12. The assignment of the lessor's interest in deed P 6 was subject to the proviso that it should be operative only as long as the mortgage bond No. 1,013 remained uncancelled and undischarged. By the bond No. 833 (P 8) the third defendant retained the amount due on bond No. 1,013 for the purpose of discharging it. The assignment P 9

was superseded by the agreement P 10. The contention was accordingly abandoned that the third defendant stood in the place of the lessor and was therfore entitled to agree to a surrender of the lessees' interests which may have passed to Sockalingam Chettiar. The argument that the third defendant was entitled to agree to a cancellation of the lease because the Bank was given a right of possession by the bond P 8 was an untenable one. The Bank had no authority under that clause to cancel the lease.

I am of opinion that the indenture of lease No. 35 was not cancelled or discharged when this action was instituted.

The main contention of the third defendant was that a lease in Ceylon did not create a *jus in re* and that the mortgage to Carron was invalid as the first and second defendants had not assigned their interests in the lease to him.

Wille in his work on *Landlord and Tenant* at page 204 says that—

"Under the Roman-Dutch law, according to the majority of the Roman-Dutch Jurists, a tenant also only received a personal right, or *jus in personam*. Thus Sande (*De Prohib. Alienat. Rerum, Pt. 1., ch. 1, s. 46*) says: 'Never in law does any real right arise from a simple lease for whatever term, nor is a *quasi dominium* transferred'." (He also cites *Voet.*)

On the other hand Grotius says that hiring does not merely give the tenant a personal claim against the landlord but a distinct and independent right of his own. Merula lays down that "though a tenant is not in possession, he nevertheless has a writ of *maintenue* for such right as he had, even against the owner".

In South Africa, according to Wille, pages 208 and 209, the juridical nature of a tenant's rights under a lease is as follows:—

"(1) *Under a short lease.*

The tenant obtains a personal right against the landlord to enforce his right to the use of the property leased. As against a particular successor of the landlord, the tenant obtains a right to the extent of being able to enforce his right to the use for the period of the lease: this right, when viewed from the fact that it lies against a certain class, is clearly only a personal right. As against a creditor of the landlord, other than a creditor under a mortgage bond duly registered before the lease was entered into, the tenant obtains the right to enforce his right to the use, this right, again, is only a personal right . . . . .

(2) *Under a long lease.*

(*a*) *If duly registered.*—The tenant obtains a real right to the property as against all persons other than a creditor under a mortgage bond which has been duly registered against the same property before the lease was registered.

(*b*) *If not duly registered.*—The tenant obtains a personal right against the landlord for the use for the period of the lease, if, though not registered, the lease has otherwise been validly executed as between the landlord and the tenant, as *e.g.*, if notarially drawn in the Transvaal.

As against creditors or subsequent purchasers the tenant's right to the use is of no effect, at any rate in so far as the lease exceeds ten years, unless such purchaser had actual notice of the lease".

Lee in his *Introduction to Roman-Dutch Law* after referring to the opinions of the Roman-Dutch Jurists and South African decisions, states the law thus:—

"From what has been said, it is plain, that in modern times, as in the later stages of the Roman-Dutch law of Holland, a lease creates not only contractual rights as between the parties but also proprietary rights, which the lessee can within the limits above stated make good against all the world. We are fully justified therefore in regarding a lease as a species of ownership of land".

He adds a note (page 144) "So in Ceylon, a lessee under a valid lease from the owner is dominus or owner for the term of the lease. He is owner during that time against all the world". Hutchinson C.J. in *Abdul Azeez v. Abdul Rahiman*[1]; and again "in my opinion we ought to regard a notarial lease as a *pro tanto* alienation", Bonser C.J. in *Goonewardana v. Rajapakse*[2]; approved in *Isaac Perera v. Baba Appu*[3]".

The law, as it has developed in Ceylon, is in accordance with the opinion expressed by Lee. The authorities cited by him have been accepted and acted upon, and I see no reason to dissent from them.

There is no distinction between long leases, *i.e.*, for ten years and upwards and short leases for under ten years. All leases except leases at will or for a period not exceeding one month must by section 2 of Ordinance No. 7 of 1840 be executed by the lessor before a notary and two witnesses and duly attested.

The section is as follows:—

"No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses".

Registration is not necessary for the validity of the lease. But by section 7 of the Registration of Documents Ordinance, 1927, a lease, unless it is duly registered, will become void as against all parties claiming an adverse interest thereto on valuable consideration which is duly registered, unless there has been fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof.

[1] *(1909) Current Law Reports, Vol. I., 275.* [2] *(1895) 2 N. L. R. 219.*
[3] *(1897) 3 N. L. R. 48.*

It was submitted that a long registered lease in South Africa created a corporeal right by virtue of some legislation on the subject of registration. I am of opinion that the nature of the right created by a lease does not depend on registration but on the effect of the lease, that is, on whether it is binding only inter parties or binding against the world.

I accordingly hold that the lease to the first and second defendants created a corporeal right, and there was no necessity to assign the lease to Carron to create a valid mortgage over the lessees' interest in the unexpired term of the lease.

It was also contended that the mortgage was only effectual against the particular successors and creditors of the landlord and not effectual against the creditors of the lessee.

Wille at page 181 says with regard to the rights of a pledgee—

> " In each case the pledgee obtains a preference over only the rights validly pledged to him. If the pledge of a duly registered long lease is itself duly registered, the pledgee is preferent over the proceeds of the lease to other creditors of the tenant as well as to creditors of the landlord and subsequent purchasers of the property leased ".

This statement of the law, if it is right, disposes of the contention that the mortgage to Carron did not affect the lessees' creditors. With due deference it is, in my opinion, correct. If the mortgage to Carron is effectual against the landlord, *a fortiori* it is effectual against the tenant, who created the right, and his creditors.

I shall now deal with the subsidiary objection raised by the third defendant to the mortgage, namely, that the mortgage was executed by the lessees without the consent of the lessor—which amounted to a breach of the provisions in the indenture No. 35 that the " lessees shall not have the right to sublease the said premises without the written consent of the lessor ".

It has been held in South Africa that if there has been an express agreement that the tenant may not sublet, he is not entitled to assign or cede his obligations (*Demas v. Saris & Chronis*[1]). Wille, p. 3. At page 178 he lays down that a tenant can only validly pledge his lease without the consent of the landlord where he has the right of ceding or assigning both his rights and obligations without the consent of the landlord.

The first and second defendants, to effect a valid pledge, had therefore to get the consent of the fourth defendant the lessor—they did not get that consent.

The objection however cannot prevail for two reasons: (1) The fourth defendant in her evidence stated " Mr. Carron informed me that he was taking a mortgage of the leasehold interests—I agreed ". She had therefore consented to the mortgage, and it is not open to her to say that she would not accept the execution purchaser of the lessees' interest as lessee.

(2) I have held that the fourth defendant has not divested herself of her interests in the indenture of lease No. 35, and it is only she who can take

[1] *(1909) T. H. 112.*

exception to a breach of the provision against subleasing—she has not taken the objection at the trial nor appealed against the Judge's order in which he answered the relevant issue (10) in the negative.

Third defendant's Counsel stated at the hearing of the appeal that the third defendant had acquired Kahatawila estate after the trial and contended that the third defendant was therefore entitled to raise the objection. I am of opinion that that is a question which cannot be investigated in this appeal. Even if the question can be raised, I am of opinion that the third defendant is bound by the valid pledge created with the consent of the fourth defendant.

The first and second defendant appellants' objections to the decree were, shortly stated: (1) that the rate of interest sued for on bond No. 45 was excessive, (2) that they were entitled to credit for a sum of Rs. 40,000 due on deed of assignment No. 44, and (3) that the District Judge was wrong in reserving to the plaintiff the right to bring and maintain another action in respect of the deed of assignment No. 44.

The first objection must, in my judgment, succeed. The rate of interest provided for by the bond is 18 per cent. per annum, subject to the proviso that 15 per cent. will be accepted if the interest is paid punctually. The interest sued for is calculated at the rate of 18 per cent. per annum.

Section 4 of the Money Lending Ordinance, No. 2 of 1918, enacts that—

> " (1) in considering whether in any case the return to be received by the creditor is excessive, the Court shall have regard (amongst other things) to the reasonableness of the rate of interest charged.
>
> (2) Any rate of interest charged above the rates following, that is to say (c) in the case of loans of over two thousand five hundred rupees, fifteen per centum per annum shall be deemed to be unreasonable, unless the creditor, or any person claiming through the creditor, shall satisfy the Court that in all the circumstances of the case the rate charged was in fact reasonable ".

The plaintiff has made no attempt to satisfy the Court that the rate charged was in fact reasonable. The District Judge has held it was reasonable on some arithmetical calculations of his own, which are not based on any facts or figures put before him. They cannot therefore be given effect to.

The respondent contended that the extra 3 per cent. was in the nature of a penalty the mortgagors agreed to for default of payment. However one may look at it, the return the creditor is now seeking is 18 per cent. per annum, a rate obnoxious to the Ordinance and not proved to be reasonable.

I accordingly hold that the interest recoverable should be calculated at the rate of 15 per cent. per annum.

The second objection arises in this way. By deed No. 44 (P 3) the first and second defendants assigned to Carron the bond No. 36 executed in their favour for a sum of Rs. 40,000. The consideration for the assignment was Rs. 40,000, the receipt of which the first and second defendants expressly admitted and acknowledged. In their answer they alleged

that they did not in fact receive this consideration, the receipt of which they had acknowledged. They then administered the following interrogatories:—

(1) Was the sum of Rs. 40,000 stated in the deed of assignment No. 44 dated January 9, 1929, attested by T. P. C. Carron of Negombo, Notary Public, as the consideration therefore paid by the late T. K. Carron to the first and second defendants.

(2) If so, state how and in what manner the said sum of Rs. 40,000 was paid.

The answers to the questions were as follows:—

(1) The sum of Rs. 40,000 was not paid in cash, but there was good consideration for the deed No. 44 which as already stated was given as further security for the payment of bond No. 45.

(2) The reply to the first interrogatory answers this.

The first and second defendants in proof of the averment that they did not receive the sum of Rs. 40,000 only read the answer to the interrogatories in evidence.

The plaintiff averred in her plaint that the bond No. 35 was assigned as further security for the repayment of the amount lent on bond No. 45. She was not allowed to prove this fact. It does not follow that she would not be entitled to prove the real nature of the transaction to repel the claim made by the first and second defendants that the sum of Rs. 40,000 is due to them. There was no investigation of this claim, because, I take it, the first and second defendants did not attempt to prove that Rs. 40,000 was due to them.

I agree with the learned District Judge that the first and second defendants have not established their claim to this sum.

The objection to the reservation of the right of the plaintiff to sue on the assignment No. 44 in another action should, in my opinion, be allowed. There is no necessity for such a reservation; if the plaintiff is entitled to bring another action her right to do so need not be reserved; if another action is barred by any rule of law she cannot avail herself of the right reserved to avoid the bar, except on the ground that the appellants acquiesced in the order reserving the right and are bound by it.

So that the defendants may not be hampered in their defence to any other action on the deed No. 44. I direct that the words " and it is further ordered and decreed that the plaintiff be at liberty to proceed on with a proper action in respect of the deed of assignment No. 44 dated January 9, 1929, and attested by the aforesaid notary public, affecting the premises described in schedule C annexed hereto " be deleted. This direction does not in any way determine that such an action is not available to the plaintiff.

Subject to this variation of the decree and the order as regards the rate of interest, the appeal is dismissed. As the third defendant has failed entirely and the first and second defendants only to a small extent, they should pay three-fourth the costs of appeal.

*Judgment varied.*