1968 *Present* : Wijayatilake, J.

K. P. PUNCHINONA, Appellant, *and* T. HENDRICK PERERA, Respondent

S. C. 119/67—C. R. Colombo, 88705/R.E.

Landlord and tenant—Suit for rent and ejectment on ground of attornment by defendant as tenant of plaintiff—Burden of proof.

Where a lessee of a dwelling-house sues the occupant for arrears of rent and ejectment on the ground that the latter had attorned to him as tenant upon the execution of the deed of lease, the burden is on the plaintiff to establish that there had been a contract of tenancy between the defendant and the plaintiff's lessor and that the defendant attorned to the plaintiff as tenant.

Obiter : It is now a well established principle that a tenant who remains in occupation with notice of the purchaser's election to recognise him as a tenant may legitimately be regarded as having attorned to the purchaser so as to establish privity of contract between them.

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

J. W. Subasinghe, with *T. H. N. Richards*, for the defendant-appellant.

S. C. E. Rodrigo, for the plaintiff-respondent.

Cur. adv. vult.

October 10, 1968. WIJAYATILAKE, J.—

In this case the plaintiff sued the defendant for ejectment from premises No. 567, Madiwela Road, and for the recovery of arrears of rent. After trial the learned Commissioner held that the plaintiff is not entitled to a decree of ejectment. However, he held that the plaintiff is entitled to rent at Rs. 15 from February 1963 till the end of January 1965.

The principal question in this case is whether there was a contract of tenancy between the defendant and the plaintiff's lessor and if so whether the defendant has attorned to the plaintiff. Admittedly, one K. Dharmadasa Fernando is the owner of the premises in question. According to the plaintiff the defendant was in occupation of these premises as a tenant of the said Fernando on the basis of a monthly tenancy and the plaintiff by deed No. 306 of 8th February 1963 (P 1) had taken a lease of those premises from Fernando for a period of two years. Thereafter on 4th March 1963 his proctor by letter (P 2) had informed the defendant of the lease and requested her to remit to the plaintiff the lessee on (P 1) all rents from February 1963 at Rs. 15 per month. Despite this letter no rent whatever had been paid by the defendant and on 8th February 1964 nearly an year later, by letter (P 3) the plaintiff's proctor had given her notice to quit and deliver possession on 31st May, 1964. In her answer

the defendant admitted the receipt of notice (P 3) and at the commencement of the trial her counsel had referred to (P 2) and the plaintiff had been allowed to amend the plaint. The proctor who wrote these two letters has also given evidence.

The position of the defendant is that she is the mistress of the said Fernando who is the owner of these premises and he had put her in possession of the premises sometime in October, 1960, undertaking to execute a deed of transfer in her favour and since then she has been in possession of these premises *ut dominus*. She denies that there was any contract of tenancy with the said Fernando.

The plaintiff in his evidence has stated that after the deed of lease was attested he had gone along with the lessor and told the defendant to pay the rent to him and she had agreed to do so. However, it is noteworthy that the plaintiff has failed to call his lessor in support. Apart from the plaintiff's proctor the only witness called by the plaintiff was one Dayananda who has spoken to his paying rent in respect of another house in this same garden to the plaintiff. However, he has failed to produce any receipts in support. Furthermore he has spoken to a period after the expiry of the lease (P 1).

Learned counsel for the plaintiff relies strongly on the letter (P 2) as the defendant had failed to send any communication to the contrary. It is evident that the defendant had ignored the letter (P 2) of 4th March, 1963 and the plaintiff appears to have slept over his rights if any for nearly one year till he thought of sending the quit notice on 8th February, 1964. I should think that his conduct in this situation points to the truth of the defendant's version. It is also significant that the original plaint in this case was on the basis that the plaintiff let out the premises in question to the defendant direct and there was no reference to the lease. The plaint was amended only after this came up for trial on the production of (P 2) by counsel for the defendant.

Mr. Subasinghe, learned counsel for the appellant, has submitted that even if it is assumed that the defendant was a tenant of the plaintiff's lessor the plaintiff has failed to prove an attornment. He relies on the following cases:—*Wijayaratne v. Hendrick* [1], *Arnolis v. Mohideen Pitchai* [2], *Ukkuwa v. Fernando* [3], *Rajapakse v. Cooray* [4].

On the other hand Mr. Rodrigo, learned counsel for the respondent, relies on the principle that when leased premises have been sold by the landlord, the tenant who receives notice of the purchaser's election to recognise him as tenant is not entitled to deny his attornment to the purchaser if he continues to be in occupation without informing the purchaser that he does not elect to attorn to him. He relies on the

[1] (1895) 3 N. L. R. 158.
[2] 3 Bal N. C. 159.
[3] (1936) 38 N. L. R. 125.
[4] (1924) 2 Times of Ceylon 209.

following cases :—*Sabapathipillai v. Ramupillai* [1], *Charles Perera v. de Costa* [2], *de Alwis v. Perera* [3], *Silva v. Silva* [4]. See also the case of *Zackarya v. Benedict* [5].

Thus it would seem that it is now a well established principle that a tenant who remains in occupation *with notice* of the purchaser's election to recognise him as a tenant may legitimately be regarded as having attorned to the purchaser so as to establish *privity of contract* between them.

In the instant case silence on the part of the defendant on the receipt of letter (P 2) may be recognised as an attornment although she in fact did not pay any rent at all. Be that as it may, in my opinion, the plaintiff has failed in the present case to prove that the defendant was a tenant of the plaintiff's lessor at any stage. The best evidence would have been that of the lessor himself who had been summoned as a witness but the plaintiff failed to call him. I do not think there was a burden on the defendant.

On a scrutiny of the facts in this case it is evident that the story as related by the defendant is the more likely, although she was not truthful when she was questioned about the receipt of (P 2). The defendant has very boldly pleaded in her answer that the owner of these premises was keeping her as his mistress. Despite this allegation the owner has failed to controvert it by supporting the plaintiff's case. The conclusion is irresistible that he has sought to get rid of an amatorial problem he has created for himself by executing the lease (P2) in favour of the plaintiff, and thereby adopted this circuitous method of ousting this woman.

In my opinion this action on the basis of an attornment in respect of a monthly tenancy is clearly misconceived. I would accordingly allow the appeal. I vacate the order of the learned Commissioner and dismiss the plaintiff's action with costs. The defendant shall be entitled to the costs of appeal.

Appeal allowed.

[1] *(1956) 58 N. L. R. 367.*
[2] *(1955) 57 N. L. R. 283.*
[3] *(1951) 52 N. L. R. 433 at 445*
[4] *(1913) 16 N. L. R. 315.*
[5] *(1950) 53 N. L. R. 311.*