1952 *Present :* **Swan J.**

P. J. CHACKO, Appellant, *and* D. K. MODY, Respondent

S. C. 56— C. R. Colombo, 30,846

Landlord and tenant—Notice to quit—Subsequent extension of time—Tenant's liability to pay rent—Rent Restriction Act, No. 29 of 1948, s. 13 (1) (a).

When a tenant who has been given due notice to quit asks for and obtains an extension of time, he must continue to pay rent during the extended period. Failure to do so renders him liable to be sued in ejectment under section 13 (1)(*a*) of the Rent Restriction Act.

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

H. W. Jayewardene, for the defendant appellant.

H. W. Tambiah, with *N. C. J. Rustomjee*, for the plaintiff respondent.

Cur. adv. vult.

November 14, 1952. SWAN J.—

In this case the plaintiff-respondent sued the defendant-appellant to have him ejected from premises No. 354, Skinners Road North, and for the recovery of Rs. 70/98 as arrears of rent up to 30.11.50 and damages at Rs. 23/66 a month from 1.12.50.

The plaintiff claimed the right to eject the defendant without the authorization of the Board upon two grounds—

(*a*) that rent had been in arrear for one month after it had become due, and

(*b*) that the defendant had given notice to quit.

The notice relied upon was an undertaking in writing (marked P2 at the trial) dated 12.8.50 whereby the defendant agreed to vacate and give peaceful possession of the premises No. 354, Skinners Road North, on 30th November, 1950.

In his answer the defendant whilst admitting the writing referred to above stated that it was given by him on condition that the plaintiff would pay him Rs. 1,000 before he left and would also provide him with alternative accommodation. He further stated that he had been paying rent regularly up to the end of August, 1950, that on 18.9.50 the plaintiff unlawfully stopped the water supply to the premises thereby causing him loss and damage to the extent of Rs. 40 per day. He claimed in reconvention a sum of Rs. 5,360 as damages from 18.9.50 to 31.1.51.

The plaintiff filed a replication in which he stated that he did not agree to provide the defendant with alternative accommodation and that the sum of Rs. 1,000 was to be an *ex gratia* payment, provided the defendant gave vacant possession on 30.11.50. With regard to the claim in reconvention the plaintiff stated that there was no water service to the premises in question, that the plaintiff gave the defendant a kitchen to use free of rent on the express condition that the defendant would give it up when required to do so ; that the defendant surrendered possession of the kitchen and was thereafter permitted to draw water through a rubber tube for a few days, and that the plaintiff, as he lawfully might, prevented the defendant from so drawing water thereafter.

The parties went to trial on the following issues :—

(1) Did the defendant on or about 12.8.50 give the plaintiff notice that he will vacate the premises in suit on or before 30.11.50 ?
(2) Was the contract of tenancy determined by the said notice ?
(3) Has rent been in arrears for a month after it became due ?
(4) If issue No. 1 is or if issues 2 and 3 are answered in the affirmative, is the plaintiff entitled to a writ of ejectment ?
(5) What amount is due to the plaintiff on account of arrears of rent and damages ?
(6) Was the notice referred to in paragraph 4 of the plaint given in the circumstances set out in paragraph 4 of the answer ?
(7) Is such a notice a notice that is contemplated by section 13 (1) (*b*) of the Act ?
(8) Did the plaintiff on or about 18.9.50 cut off the water supply to the defendant's premises ?
(9) What damages did the defendant suffer thereby ?

During the course of the trial it was revealed that the plaintiff had on 26. 7. 50 given the defendant notice terminating the tenancy at the end of August, 1950.

The learned Commissioner whilst holding that P2 was at common law sufficient to determine the tenancy took the view that it was not such a notice as came within the comtemplation of section 13 (1) (*b*). But he held that the defendant was in arrears of rent and that the plaintiff's claim for ejectment must therefore succeed. As regards the defendant's claim for damages he held that the defendant was not entitled to any damages

because he had no right to draw water from the plaintiff's kitchen. He also held that there was no legal justification for the non-payment of rent by the defendant after 1.9.50. In the result the claim in reconvention was dismissed and judgment entered for the plaintiff as prayed for in the plaint.

Mr. Jayewardene's contention is that the defendant was not in arrears of rent. He argues that after the tenancy was determined by D1 there was no rent payable. What the defendant was liable to pay was damages and not rent. The learned Commissioner was therefore in error in holding that the plaintiff was entitled to sue in ejectment under section 13 (1) (*a*). In this connection he drew my attention to section 15 of the English Act and section 14 of our Act. The former expressly provides that so long as the tenant retains possession of the premises he must observe all the terms and conditions of the original contract. The latter, on the other hand, makes no such provision but only states that when an action in ejectment against a tenant is dismissed his occupation of the premises for any period prior or subsequent to such dismissal " shall be deemed to have been or to be under the original contract of tenancy ". In the circumstances he contends that after 1.10.50, there being no legal obligation on the defendant to pay rent, it could not be said that rent was in arrear for one month after it became due as required by section 13 (1) (*a*). I am unable to agree with that view. In my opinion a tenant must, in order to claim the protection of the Act, fulfil all his obligations under the contract of tenancy. He cannot have it both ways so as to be able to call, in a manner of speaking, " Heads I win—tails you lose ".

In this case however, I think there can be no question that the defendant was in arrears of rent. It is common ground that the plaintiff sent the defendant the notice to quit D1 terminating the tenancy on 31.8.50. It is also common ground that the defendant on 12.8.50 gave the plaintiff the document P2 which runs as follows :—

P2

" I the undersigned P. J. Chacko doing business at 354, Skinner's Road North, Colombo, do hereby write to inform D. K. Mody Mudalaly of 190 Skinner's Road North, Colombo as follows :—

I am in receipt of your registered letter and in reply beg to state as follows :—

I hereby agree to vacate and give peaceful possession of the premises No. 354, Skinner's Road North on 30th November 1950 and also I have no objection in your closing the backside door by expanded metal.

I have to request you to kindly pay me Rs. 1,000 which you have told me to give me free if I am leaving the premises on 30th November 1950.

Sgd. P. J. Chacko.

Dated 12th August, 1950. "

Referring to this document the learned Commissioner had held that the registered letter mentioned therein is the notice to quit D1 ; and that although P2 is signed only by the defendant it is the " formal record of a

previous oral agreement arrived at between the parties but committed to writing in the absence of the plaintiff". What then would be the combined effect of D1 and P2 ? I think the correct answer would be that the defendant accepted the plaintiff's notice D1 and asked for and obtained an extension of time till 30.11.50 to quit the premises. The plaintiff could not therefore have sued the defendant in ejectment before 1. 12. 50, for the tenancy was not determined until 30.11.50. Document P2 as interpreted by the learned Commissioner clearly gave the defendant the right to remain as tenant till 30.11.50 and precluded the plaintiff from acting on the notice to quit D1. Viewed at in this light, P2 might even be construed as notice given by the tenant within the contemplation of section 13 (1) (*b*). Be that as it may there can be no doubt that by reason of P2 the tenancy was not in fact determined till 30.11.1950. The defendant was therefore clearly in arrears of rent when this action was brought.

The only other point to consider is whether by bringing all rents into Court up to the date of filing answer the defendant could escape the consequences of his default. In *George v. Richard* [1] Nagalingam J. took the view that where the arrears were tendered before the filing of the action the landlord could not maintain the action. My learned brother came to that conclusion upon the construction of section 8 of the Rent Restriction Ordinance which provided that no action for the ejectment of the tenant could be instituted unless rent had been in arrear for one month after it had become due. His interpretation of that stipulation was that the arrears must exist at the date of institution of the action. In the course of his judgment my learned brother said :—

> " In the present case, therefore, it is essential for the plaintiff to show that not only had the defendant allowed the rents to remain unpaid for over a month as they fell due, but that in fact the rents remained so unpaid even at the date of institution of action. The plaintiff is clearly unable to establish the second requirement. The rents that were in arrears were tendered to him before institution of action, and he wrongfully refused to accept them. The plaintiff must in these circumstances be deemed to have been paid the rents on the dates they were tendered, and therefore it must follow that the tenant was not in arrear with his rent. "

It is hardly necessary for me to refer to the case of *Fernando v. Samaraweera* [2] where Basnayake J. expressed the view that 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. The *ratio decidendi* of that case appears to me to be that the sending of cheques by the tenant for rent due does not amount to payment of rent where no receipts are given and the cheques are not cashed.

[1] *(1948) 50 N. L. R. 128.* [2] *(1951) 52 N. L. R. 278.*

However, in the case of *Suyambulingam Chettiar v. Pechchi Muttu Chettiar* [1] de Silva J. refused to follow *George v. Richard* [2] and held that the landlord's right to eject his tenant cannot be taken away from him by the tenant's tendering the arrears of rent before the institution of legal proceedings.

In this case there is not even the suggestion that arrears of rent were tendered before action was filed. So that the effect of a tender does not arise.

The appeal is dismissed with costs.

Appeal dismissed.