1949 *Present :* **Jayetileke S.P.J. and Canekeratne J.**

KARUNASENA, Appellant, *and* COORAY, Respondent

S. C. 96—D. C. Ratnapura, 8,020

Statute of Frauds—Lease of land—Informal—Agreement to dig for plumbago—Further agreement to fill up pits at end of period—Damages for failure to do so—Recoverable.

Defendant entered into an informal agreement giving him the right to dig for plumbago on a certain land. He also agreed to fill up the pits at the end of the period before giving back the land. An action for damages for failure to fill up the pits was dismissed on the ground that the agreement was not enforceable by reason of the provisions of the Statute of Frauds.

Held, that the Statute of Frauds did not apply. The lease could be considered as one renewable from month to month and the agreement in question was not inconsistent with such a tenancy.

APPEAL from a judgment of the District Judge, Ratnapura.

E. B. Wikramanayake, K.C., with *C. Jayawickreme*, for plaintiff appellant.

C. Thiagalingam, for defendant respondent.

Cur. adv. vult.

June 22, 1949. CANEKERATNE J.—

This is an appeal by the administrator of the estate of one Singhe from a judgment dismissing an action to recover a sum of Rs. 750, as damages from the defendant.

The defendant entered on a land called Udagawakumbura, with the consent of Singhe and in terms of the agreement, P1, for prospecting for plumbago and continued in possession of it till November, 1944. The learned Judge held that the estate of Singhe has suffered damages to the extent of Rs. 550 by reason of the failure of the defendant to do something which he now refuses to do because the agreement was not made in a notarial document, but he dismissed the action as the aid of the Statute of Frauds, 1840, was invoked by the defendant.

An informal or parol agreement, which fails to conform to the Statute is inoperative, because of the initial defect in its constitution unlike an informal agreement falling within the English Statute of Frauds of 1676 which is valid but unenforceable. If the question was *res nova*, perhaps it might be contended that an agreement which is of no force or avail in law cannot be enforced directly or collaterally. But it is well settled by a series of decisions extending for a long period that the statute has no application to certain executed agreements. It is settled that when one has been in occupation of another's land upon an agreement void under the Statute but not illegal, the latter can recover compensation for the use and occupation of the land and that the writing, if any, or the promise by words could be used as evidence of the quantum of the compensation.[1]

A promise, bargain, contract or agreement for establishing any interest affecting land must be embodied in a notarial document—a lease at will and a lease for any period not exceeding one month are excepted from the operation of the section. The agreement, P3, conferring an exclusive right to sink pits for plumbago is one affecting land. There is here, a right to go in and hold the land for the purpose stated ; it conferred on the defendant the right to be there for the purpose of sinking pits and gave him possession of the land, although it was for a limited purpose. It was not disputed at the argument that he was not a tenant by sufferance. He was not a tenant by will, for it was not a permissive possession which was revocable at any moment. He was a monthly tenant of Singhe in terms of the agreement. For a person entering into possession upon such an agreement becomes tenant from month to month upon the terms of the writing so far as they are applicable to, and not inconsistent with, a monthly tenancy [2].

The agreement may be considered from two points, as one creating a tenancy for a month only or for a period exceeding a month. Here the defendant in consideration of being permitted to sink pits as he likes and take the income, less the ground share, in another's land agreed to fill up the pits. No definite term is mentioned in the agreement, nor was there any agreement as to the amount of plumbago to be taken,

[1] *Perera v. Fernando, (Raman : 1863–68), 83.*
Nanayakkara v. Andris, (1921), 21 N. L. R. 193.
[2] *Wambeck v. Le Mesurie, (1898), 3 N. L. R. 105.*
Kaluwa v. Hakensa, (1909), 1 Cur L. R. 89.
cf. Kanagaratna v. Banda, (1923), 25 N. L. R. 129, 135, 136.

or as to the time during which the defendant should keep up his business or as to the nature of the pits—these are sometimes superficial. The parties may well have expected that the agreement would continue in force for more than a month ; it may have been very improbable that it would not do so ; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the agreement was ; but whether the agreement, according to the reasonable interpretation of its terms, required that it should go on for more than a month ; if within a month after entry on the land he had abandoned his whole business of prospecting or for any other reason, such as the absence of plumbago or lack of means, had ceased to need the use of the land, the tenancy would have come to an end. There may be a tacit relocation of a lease, by this is meant the renewal of the lease by the fact of the tenant remaining in possession without a formal renewal of the lease and without opposition from the land-lord, coupled with payment of what is due as rent or compensation for the use of the premises ; at the expiration of the time which was originally fixed by the agreement or which becomes fixed by operation of law, the lease is held to be tacitly continued or renewed.[1] The effect of a tenant like the defendant being allowed to keep possession, by tacit relocation, after the expiration of the first month, is to renew the lease from month to month, each time for a month only. It is difficult to contend that a promise to fill up the pits and deliver the premises to the owner is inconsistent with the terms of a monthly tenancy.

Judgment should be entered in favour of the plaintiff for this sum ; the respondent will pay the costs of trial and the costs of appeal.

JAYETILEKE S.P.J.—I agree.

Appeal allowed.