1957 *Present :* Basnayake, C.J., and L. W. de Silva, A J.

HINNIAPPUHAMY, Appellant, *and* KUMARASINGHA *et al.*, Respondents

S.C. 541—D.C. Hambantota, 307

Lease—Informal writing as basis thereof—Liability of the "lessee" to be ejected by subsequent lessee under a notarial lease—Requirement of notice to quit—Prevention of Frauds Ordinance (Cap. 57), s. 2.

A person in possession of immovable property under a non-notarial "lease" may be sued in ejectment by a subsequent lessee of the property on a duly executed notarial lease. In such a case, the defendant is not entitled to claim that he is a monthly tenant of his lessor and that he must therefore be given duo notice to quit before action can be instituted against him.

Bandara v Appuhamy[1] and *Ukkuwa v. Fernando*[2], not followed.

APPEAL from a judgment of the District Court, Hambantota.

N. E. Weerasooria, Q.C., with *S. W. Walpita*, for the plaintiff appellant.

Stanley Perera, for the defendant respondent.

Cur. adv. vult.

November 1, 1957. L. W. de SILVA, A.J.—

This is an action for ejectment and damages. The field in suit, in extent 13 acres and 16 perches, belonged to N. S. Doole on whose death it devolved on her three children, viz., the added defendant, and N. B. and N. S. Thalip. The added defendant became the administrator of his mother's estate on 27th March 1952. Six days later, he gave to the defendant a non-notarial writing purporting to lease the field in suit for a period of four years upon the condition that the defendant should aseweddumise the premises and give the added defendant one eighth share of the produce as rent. On 4th May 1953, N. B. and N. S. Thalip gave a notorial lease of the field to the plaintiff for a period of six years commencing from 1st September 1953. He instituted this action for the ejectment of the defendant and damages, alleging that he had been placed in possession of the property and the defendant had ejected him. The defendant denied that the plaintiff had obtained vacant possession and denied the right of the plaintiff to eject him or claim damages.

After trial the learned District Judge dismissed the plaintiff's action with costs. His findings are as follows :—

(1) The plaintiff had not obtained vacant possession from his lessors.

(2) The informal writing had been granted to the defendant by the added defendant as administrator without the court's sanction.

[1] *(1923) 25 N. L. R. 176.* [2] *(1936) 38 N. L. R. 125.*

(3) The informal writing is insufficient in law to give the defendant the rights of a lessee.

(4) The defendant is not a trespasser but a monthly tenant and cannot be ousted by his own lessor without due notice to quit.

(5) The plaintiff cannot eject the defendant since notice to quit had not been given by his lessor and since he had not acknowledged the title of the plaintiff.

(6) The defendant had not attorned to the plaintiff nor had he been noticed by the plaintiff to quit.

At the hearing of this appeal, learned Counsel for the appellant, relying on the decision in *Isaac Perera v. Baba Appu et al.*[1], argued that he was entitled to judgment by reason of his notarial lease since the defendant had no legal right to remain on the premises leased. Isaac Perera's case[1] decided that a lessee under a notarial contract, not being put in possession by his lessor who has a valid title to the property leased, can recover from third parties in adverse possession the use of such property for the period of his lease. Learned Counsel for the respondent however contended on the authority of *Ukkuwa v. Fernando*[2] that he was a monthly tenant under the added defendant and could not therefore be ejected without due notice given by him to quit.

The difficulty of solving what appears to be a simple problem arises from the conflict of opinions expressed by this Court in its decisions from time to time. These decisions fall into two groups. In one group, the question discussed is whether a person who takes a lease of a land for a period of years on an informal writing is a tenant-at-will or a monthly tenant. In some of the cases under this group it was assumed that such a person was either the one or the other, while in other cases in the same group the question was raised whether he was a trespasser.

I now proceed to deal with these two groups of cases. Where a lessee of a land on an informal document was sued in ejectment by a subsequent lessee of the land on a notarial document who had given him notice to quit within thirty days, Soertsz A.J. held in *Ukkuwa v. Fernando*[2] that the defendant lessee on the informal document was in the position of a monthly tenant who was entitled to a calendar month's notice, and that the plaintiff lessee who held the notarial lease from the common lessor could not sue the defendant in ejectment until the monthly tenancy had been determined by due notice given him by his lessor. It was further held that, in the absence of an attornment of the defendant to the plaintiff, or an assignment after notice of the lessor's rights to him, the plaintiff was not entitled to give the defendant notice to quit. Soertsz A.J. also held that the informal document failed of its purpose to create a lease of the land for five years because it was obnoxious to section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840 (Cap. 57), which required a lease of land, other than a lease at will or for a period

[1] *(1897) 3 N. L. R. 48.* [2] *(1936) 38 N. L. R. 125.*

not exceeding one month, to be notarially attested. He took the view that the document was however admissible in evidence for the purpose of ascertaining the legal position of the parties to it. He followed previous decisions of this Court referred to in his judgment, particularly the views expressed in *Bandara v. Appuhamy*[1] by Schneider J. who stated that

(1) the provision in section 2 of Ordinance No. 7 of 1840 was intended to shut out evidence, other than that of a notarially attested instrument, to prove a lease for any period exceeding one month ;

(2) it was not intended to shut out oral or documentary evidence contained in an informal document of a tenancy for a period not exceeding one month ;

(3) the Ordinance excluded tenancies of such a nature from its provisions.

Schneider J. summarized the English Law on the subject and stated :—

" It seems to mo, therefore, equitable and consistent with the spirit of the Ordinance and the intention of the parties to hold that the defendant is entitled to say, if I am not a tenant for a term of years contemplated by me and my lessor, there is no provision of the law which prevents me from being regarded as, at least, holding the land upon the footing of a monthly tenant. Such an interpretation of our Ordinance would be in accordance with the principles developed by English Jurisprudence on the interpretation and application of the English Statute of Frauds."

He concluded :—

" It seems to me that the defendant in the circumsatnces cannot be regarded as a trespasser, nor as tenant-at-will, or by sufferance, but only as a tenant for a period not exceeding a month."

The other group of decisions has taken the view that a person holding a notarial lease is entitled during his term to the legal remedies of an owner or possessor, *Ukku Amma et al. v. Jema et al.*[2]. Wijeyewardene J. stated :—

" I see no reason for drawing a distinction in Ceylon between short leases and long leases spoken of by textbook writers when we are considering the question whether a lessee has rights against third parties. *All that we have to consider is whether a lease is duly executed according to law. If a lease for any period exceeding a month is notarially attested it should be regarded as giving 'a species of ownership in land'* (Lee : Introduction to Roman-Dutch Law, Fourth Edition, page 161), *and vesting in the lessee proprietary rights which could be enforced between third parties.*"

[1] *(1923) 25 N.L.R. 176.* [2] *(1949) 51 N.L.R. 254.*

Wijeyewardene J., with whom Pulle J. agreed, adopted the views expressed by the Judges in *Carron v. Fernando et al.*[1] where Garvin A.C.J. referred to the observation of Hutchinson C.J. in *Abdul Azeez v. Abdul Rahiman*[2]:—

> "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.*"

Garvin A.C.J., making particular reference to section 2 of Ordinance No. 7 of 1840, stated :—

> "This is a requirement which must be complied with if it is to be of any force or avail in law."

We are in respectful agreement with the views expressed by Wijeyewardene J. and Garvin A.C.J. since in our opinion they are in complete accord with the provisions of section 2 of Ordinance No. 7 of 1840 which lays down that no document affecting immovable property, unless notarially attested, other than a lease at will, or for any period not exceeding one month, shall be of force or avail in law. With great respect, we are unable to agree with the view taken by Schneider J. in *Bandara v. Appuhamy*[3] and adopted by Soertsz A.J. in *Ukkuwa v. Fernando*[4] for the following reasons :—

(1) The intention of the parties and the spirit of the Ordinance cannot be taken into account in interpreting its provisions which are free from ambiguity. If, as stated in *Bandara v. Appuhamy*[3], the provision in section 2 was intended to shut out evidence, other than that of a notarially attested instrument, to prove a lease for any period exceeding one month, we do not understand why such a document is admitted for the purpose of enabling a party to prove a tenancy exceeding one month.

(2) Section 2 is much more drastic than the fourth section of the English Statute of Frauds, as observed by the Privy Council in *Adaicappa Chetty v. Caruppen Chetty*[5] and repeated by the Privy Council in *Saverimuttu v. Thangavelauthan*[6]. This opinion is the very opposite of the view taken in *Bandara v. Appuhamy*[3]. Principles developed by English Jurisprudence on the interpretation and application of the English Statute of Frauds cannot therefore be applied to our Ordinance No. 7 of 1840.

(3) A contract which shall be of no force or avail in law is void. In a South African case, *Wilken v. Kohler*[7], Innes J. in interpreting a statute which laid down that "No contract of sale of fixed property shall be of any force and effect unless it be in writing signed by the parties thereto "[6] said :—

[1] *(1933) 35 N.L.R. 352.*
[2] *(1909) 1 Cur. L. R. 271.*
[3] *(1923) 25 N.L.R. 176.*
[4] *(1936) 38 N.L.R. 125.*
[5] *(1921) 22 N.L.R. 417 at 426.*
[6] *(1954) 55 N.L.R. 529.*
[7] *(1913) A. D. 135.*

No emphatic adjectives, and no redundant repetition could express a conclusion of nullity more effectually than do the simple words which the Legislature has employed.

(4) A contract which is of no force or avail in law cannot be interpreted to mean that it is of some force or avail in law since there are no qualifying words. To give such an interpretation is to grant to a party to a void contract a legal status which the Ordinance has not recognized.

(5) Section 2 of the Ordinance excepts from its operation a lease for any period not exceeding one month. The limit placed by these words cannot be extended so as to give relief in law to one who violates that law.

(6) The Preamble is: "an Ordinance to provide more effectually for the Prevention of Frauds and Perjuries." It is therefore not a statutory provision for the benefit of a particular class of persons.

For the reasons we have given, we are of the opinion that the defendant is a trespasser, the informal writing is a nullity and the plaintiff is entitled to judgment against him. We therefore allow the appeal and set aside the judgment and decree in the learned District Judge and direct him to enter a decree in terms of the prayer in the plaint on the basis of the damages as found at the trial. The defendant-respondent must pay the appellant his costs both here and in the court below. The added defendant must also pay the costs of the appellant in the court below since he denied at the trial the right which the appellant has established.

BASNAYAKE, C.J.—I agree.

Appeal allowed.