

Present : Garvin A.J.

1921.

HELENIS v. HENDRICK *et al.*

242—C. R. Colombo. 78.45i.

Informal lease of land for three years—Forcible ouster by lessor—Action for damages—Appeal—Security for costs—Notice.

Where a person entered into occupation as a tenant of an agricultural land on an informal lease for three years, but was ousted forcibly by the lessor ~~before~~ the expiration of the period.

Held, that the lessee could have been ousted only by due process of law, and he could maintain an action for damages against the lessor.

THE facts are set out in the judgment.

E. G. P. Jayetilleke, for respondent, took the preliminary objection that no notice of the tender of security for cost of appeal had been given to the respondent.

J. S. Jayawardene, for appellant, submitted that the respondent must be taken to have waived such objection, as his proctor had consented to the security for costs of appeal.

The objection was overruled.

J. S. Jayawardene, for appellant.—The action is maintainable although there was no notarial agreement. The appellant cannot be regarded as a trespasser. He has all the rights of the monthly tenant, and the document being non-notarial must be construed so as to be consistent with a tenancy that does not require a notarial writing (3 *N. L. R.* 105 ; 21 *N. L. R.* 156 ; 299 *C. R.* Galle, 9,280¹).

The appellant is clearly entitled to damages for forcible and unlawful ouster.

E. G. P. Jayetilleke, for respondent.—The action cannot be maintained without a notarial document (2 *C. A. C.* 121). The appellant is not entitled to any damages.

Jayewardene, in reply.

Cur. adv. vult.

¹ *S. C. Min.*, Oct. 6, 1916.

1921.

November 9, 1921. GARVIN A.J.—

*Helenis v.
Hendrick*

This case must go back for a trial of all the issues properly arising on the pleas of the parties.

The facts so far as they are at present available would seem to show that plaintiff was a market gardener, and for the purposes of his business took over from the defendants, for a term of three years, a piece of agricultural land on a non-notarial document referred to in the proceedings as an informal lease. He appears to have laid out nurseries, and, in other ways, developed the land in the ordinary course of his business as market gardener. Some two years after he first entered into occupation, the defendants, his lessors, ousted him, and it is alleged "uprooted all the plants grown by the plaintiff and appropriated the vegetables for themselves."

The defendants answered that they entered into possession because plaintiff failed to pay the third year's rent, and pleaded, further, that the action was not maintainable because there was no notarial attestation of the signatures to the informal writing on which plaintiff relied.

The Commissioner upheld the contention that plaintiff's action was not maintainable; and the plaintiff appeals. The plaintiff is not seeking to enforce the lease. He recognizes that inasmuch as the writing was not notarially attested, he cannot resist the defendants should they chose to go behind their agreement and determine his occupation. This, however, must be done in accordance with law, and not by way of forcible ouster.

But a person in the position of the plaintiff is not without remedy against a forcible or illegal entry. He is not a trespasser, but was let into possession by the defendants as their tenant, and as such could only be ejected by due process of law.

If, as is alleged, the plaintiff was forcibly ousted, he is clearly entitled to some damages. On the material before me I am unable to say what these damages should be. I would, therefore, set aside the judgment *pro formâ* and remit the case for trial upon the footing that, as a pure matter of law, the action is maintainable, leaving all other questions to be determined after trial.

A preliminary objection was taken to the hearing of this appeal founded on the ground that no notice of the tender of security was given to the respondent. I find, however, that security for costs of appeal was fixed on a motion by appellant's proctor on which the respondent's proctor had endorsed his consent. This motion is dated July 25, 1921, while the appeal was not entered till the day following. Under these circumstances the respondent must be deemed to have waived the notice required by section 756.

The appellant is entitled to the costs of this appeal.

Sent back.