1923.

Present : Schneider J.

BANDARA *v.* APPUHAMY.

115—C. R. Gampola, 5,757.

Lease—Lessor placed in possession by owner under a writing which was not notarially executed—Lease for three years—Subsequent lease to third party—Action in ejectment by subsequent lessee—Lessee under informal lease a monthly tenant, and not tenant-at-will—Notice necessary before ejectment.

Where a person is in possession of a land by virtue of a non-notarial lease for a number of years, he is to be regarded as a monthly tenant, and not as a tenant-at-will or tenant by sufferance or trespasser. He is entitled to a month's notice before ejectment.

THE facts appear from the judgment.

Navaratnam, for plaintiff, appellant.—An agreement for a period exceeding a month can be of no force or avail unless such a contract is entered into formally in conformity with section 2 of Ordinance No. 7 of 1840. In the present case the respondent relies on an informal document purporting to create a lease for a term of three years. To let him set up thereunder the plea of monthly tenancy and claim a month's notice would be to ignore the provisions of the said Ordinance. Apart from this, the informal document itself makes the tenure conditional upon the execution of a formal lease, and contemplates the precarious character of the tenancy. As there was nothing of a monthly character impressed upon the agreement, in *The Secretary of State for War v. Ward* [1] it was held that a tenant in possession, under an agreement invalid in law was merely a tenant-at-will, and was liable to be evicted without any demand prior to the institution of the action.

[1] *(1901) 2 Br. Rep. 256.*

H. V. Perera, for defendant, respondent.—The question is whether the defendant is in unlawful possession. Though the promise to allow the defendant to possess the land for three years is not binding on the plaintiff's lessor in the absence of a notarial lease, yet having put the defendant in possession as his tenant, it is not open to him to deny that defendant is his tenant. Being a tenant, the defendant is entitled to notice to quit. His possession is lawful till he is so noticed.

As to the length of notice required, it has been held that a person in the position of the defendant is entitled to a month's notice. *Wambeek v. Le Mesurier* [1] and *Buultjens v. Carolis*.[2] The case of *The Secretary of State for War v. Ward* (*supra*) is distinguishable. The defendant is not a tenant-at-will, because there was no agreement creating a tenancy-at-will. Nor is there any reason to treat him as a tenant at will. On the contrary, it is equitable that he should be given at least the same rights, as regards notice to quit, as a monthly tenant.

Navaratnam, replied.

July 31, 1923. SCHNEIDER J.—

In this case the plaintiff sued the defendant in ejectment from an allotment of land, alleging that the defendant was in wrongful possession of it to the plaintiff's loss and damage. He claimed possession by virtue of a notarially attested deed dated November 4, 1922, whereby one Ukku Banda had demised the land to the plaintiff for a period of five years from the date of the instrument. In his answer the defendant denied knowledge of the lease pleaded by the plaintiff, and stated that he was in possession of the land by virtue of a lease granted to him by the plaintiff's lessor by a writing not notarially attested for a period of three years from November 4, 1921, and that he had paid the rent in full for the said term of three years.

The material issues upon which the parties went to trial raised the questions: whether the plaintiff could maintain his action against the defendant, whether the defendant was in wrongful possession, and whether the answer disclosed a lawful defence to plaintiff's claim ? The plaintiff gave evidence, and stated that after the execution of the deed in his favour he went to the land and found the defendant in possession under the informal writing. He also stated that he did not get possession of the land. It is noticeable that the plaintiff does not expressly state that he demanded possession from the defendant. In the informal writing granted by the owner of the land, Ukku Banda, to the defendant, it is set out that the informal writing was entered into till a regular

[1] *(1898) 3 N. L. R. 105.*

[2] *(1919) 21 N. L. R. 156.*

1923.

SCHNEIDER J.

Bandara v. Appuhamy

lease was executed. Ukku Banda also declares in his writing that he thereby leases the premises to the defendant for a term of three years.

The learned Commissioner dismissed the plaintiff's action on the ground that the defendant, being in possession of the land under an informal agreement, was not in wrongful possession, and was entitled to a month's notice before his tenancy could be terminated. From the judgment the plaintiff appealed.

On behalf of the appellant, Mr. Navaratnam contended that the defendant's tenure was that of a tenant-at-will, and not a monthly tenant. He relied on the case of *The Secretary of State for the War Department v. Ward* (*supra*), in which Moncreiff A.C.J. and Browne J. held that the defendant in that case was only a tenant-at-will, and not a monthly tenant. To my mind that case is no authority for the proposition of law put forward in support of the plaintiff's claim in this case. The facts of that case are clearly distinguishable. The plaintiff there leased to the defendant a portion of land by an informal writing, in which the defendant promised to pay to the plaintiff a certain sum as rent for a year, and in which both parties agreed that the tenancy might be terminated by six months' notice on either side. The plaintiff, in accordance with this agreement, terminated the tenancy by due notice, but the defendant, instead of quitting the land, continued to forward moneys as if the tenancy were on foot. The plaintiff accepted these payments under protest, and claimed to hold them as security for the damage he would sustain. Upon these facts it is obvious that the defendant was in the position of an over-holding tenant, and therefore liable to be ejected without notice at the instance of the plaintiff, his landlord. No question as to the effect of the informal lease was involved, because, admittedly, the lease was terminated by due notice. I must, therefore, regard whatever is said by the learned Judges who decided that case, as to the effect of the informal lease, as mere *obiter dicta*. Both Judges expressed the opinion that the informal lease was bad, and did not operate to create a monthly tenancy, but neither Judge discussed the bearing of the provisions of Ordinance of 1840 as to the effect of an informal lease, where the tenant is put in possession and continues to be in possession, and where he has paid the rent.

On behalf of the respondent, the case of *Wambeek v. Le Mesurier* (*supra*) and *Buultjens v. Carolis* (*supra*) were cited and relied upon. The former of these cases was considered by Browne J. in the case of *The Secretary of State for the War Department v. Ward* (*supra*), to which I have already referred. He refused to follow it. I am unable to appreciate the reasons he gives, and, as I have already stated, what he says in that case is mere *obiter dicta*. The case of *Wambeek v. Le Mesurier* (*supra*) was decided by Laurie J. sitting by himself. There the plaintiff had let the defendant into possession of a land

upon an informal writing, agreeing to grant a lease of it for five years. The plaintiff in breach of the agreement sued the defendant in ejectment, and Laurie J. held that the defendant upon entering into possession under the informal lease became a tenant from month to month upon the terms of the writing, as far as they were applicable to and not inconsistent with a monthly tenancy. He cited two English cases, *Doe d. Riggie v. Bell*[1] and *Clayton v. Blackey*,[2] and also two local cases—one from *Grenier's Reports (C. R. 1,873), page 16*, and *Perera v. Fernando* from *Ramanathan's Reports (64–68), page 83*. There is one other local case which might be grouped with these two local cases, that is a case decided by Creasy J. and reported in *Grenier's Reports (C. R. 1,874), page 1*. In all these three cases the question considered was the right of a landlord to recover rent from a tenant who had been let into possession upon an informal agreement of lease for a term exceeding a period of one month, and in all three cases this Court held that the landlord could sue for use and occupation upon a quasi-contract which was created *ex re*. Accordingly, they did not decide the precise question which arises on this appeal.

In the case of *Perera v. Fernando (supra)*, in the judgment of this Court the provisions of the English Statute of Frauds corresponding to section 2 of our Ordinance No. 7 of 1840 were compared with the provisions of our Ordinance and discussed. It was pointed out that the English Act provides that no action shall be brought upon parol agreements as not complying with the provisions of the law as regards the form of the agreement, whereas our Ordinance enacts that such agreements are to be of no " force or avail in law." The view was there adopted that the effect of our Ordinance was to render such agreements invalid for want of formality, but not invalid as being illegal. Several English cases were cited in the judgment, and there is clear indication all through the judgment that the Court accepted the English cases as authority supporting the view it took of the effect of section 2 of the Ordinance No. 7 of 1840. This judgment is referred to in the case of *Nanayakkara et al. v. Andris et al.*[3] by Bertram C.J., who stated that the difference of phraseology between the English Enactment and our own had been minimized in *Perera v. Fernando (supra)*. He also states that he found it difficult to believe that the change of phraseology in our Ordinance was intended to exclude, or had the effect of excluding, the application of the legal principles, which had been developed in England for mitigating the strict rigour of the Enactments of the Statute of Frauds. He also cited Lord Halsbury's judgment in *Rochefoucald v. Boustead*, where speaking of section 2 of our Ordinance No. 7 of 1840, Lord Halsbury said " that section does not appear to affect equitable rights."

[1] *(1793) 5 T. R. 471 (2 R. R. 642).* [2] *8 T. R. 3 (4 R. R. 575).*
[3] *(1921) 23 N. L. R. 193.*

1923.

SCHNEIDER J.

Bandara v. Appuhamy

The English cases cited by Laurie J. in *Wambeek v. Le Mesurier* (*supra*) support his judgment. The case of *Buultjens v. Carolis* (*supra*) was decided by Loos J. and me. In that case I did not discuss the law applicable, but decided it upon the assumption that the case of *Wambeek v. Le Mesurier* (*supra*) had been rightly decided. When, therefore, the point was again raised in this appeal, I thought it desirable to reserve judgment in order that the authorities might be carefully considered by me before judgment was delivered. I have since looked into a large number of English cases, and consulted *Woodfall's Law of Landlord and Tenant.*

The English law might be shortly summarized as follows :—

(1) By the Statute of Frauds leases for more than three years and all agreements for leases, however short, must be in writing (*29 Car. 2 c. 29*).

(2) By the Real Property Act, 1845, leases for more than three years must be by deed (*8 and 9 Vict. c. 106*).

(3) Although a contract for a lease must be in writing and signed to be sued upon as such, yet he who enters and pays, or agrees to pay rent under an oral contract for a lease, or otherwise partly performs the contract, may obtain a decree for a lease, that is for specific performance (Statute of Frauds, section 4). *Nunn v. Fabian.*[1]

(4) " If the tenant enter into possession under a void lease, he thereupon becomes tenant from year to year upon the terms of the writing, so far as they are applicable to and not inconsistent with a yearly tenancy (*k*). Such tenancy may be determined by the usual notice to quit at the end of the first or any subsequent year thereof (*l*) ; and it will determine, without any notice to quit, at the end of the term mentioned in the writing (*m*). But if the lessee do not enter, he will not be liable for not taking possession (*n*) ; nor, on the other hand, will an action lie against the lessor for not giving possession at the time appointed for the commencement of the term but before the lease is executed (*o*). The effect of the Real Property Act, 1845 (*8 and 9 Vict. c. 106*), is not to put an end to oral leases, but merely to superadd to such leases as are required by the Statute of Frauds to be in writing, the necessity of their being by deed." (*Woodfall's Law of Landlord and Tenant, 18th ed., p. 148,* and the cases referred to in the notes at the foot of that page.)

(5) Although in section 1 of the Statute of Frauds it was enacted that all leases *et cetera* created by livery and seisin only or by parol shall have the force and effect of leases, &c., at will only, yet it has been held that such leases, &c., may

[1] *(1864) L. R. 1 Ch. 35.*

change into tenancies from year to year when any of the agreed rent is paid and received. (*Tress v. Savage, 4 E. & B. 36; Doe d. Rigge v. Bell (1793) 5 T. R. 471, 2 R. R. 642.*)

The case of *Perera v. Fernando* (*supra*) was decided by a Full Bench of this Court, and the question as to the interpretation of section 2 of Ordinance No. 7 of 1840 was essential to the decision of the case. It seems to me, therefore, that it should be regarded as a decision binding upon this Court in regard to the construction of section 2 of Ordinance No. 7 of 1840. If I may so say with all respect, I agree with the opinion expressed in that judgment as to the effect and intention of section 2 of Ordinance No. 7 of 1840. The words of section 2 applicable to this case are the following :—

> " No contract or agreement for establishing any interest affecting the land (other than a lease-at-will or for any period not exceeding one month) shall be of force or avail in law, unless the same shall be in writing and signed by the party making the same in the presence of a licensed notary public and two other witnesses, and unless the execution of such writing be duly attested by such notary and witnesses."

The intention of the Ordinance is the prevention of frauds and perjuries, and, therefore, when it says that a lease not executed with the prescribed formalities shall be of no force or avail in law, it seems to me that what was intended was to shut out evidence, other than that of a notarially attested instrument, to prove a lease for any period exceeding one month. 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. The Ordinance is careful to expressly exclude tenancies of such a nature from its provisions.

In this case the defendant was placed in possession by Ukku Banda, the plaintiff's lessor. The defendant, therefore, was lawfully in possession. He cannot be treated as a trespasser until the relation of landlord and tenant between him and Ukku Banda is terminated. How that relationship can be terminated would depend upon the question whether the defendant is a tenant-at-will or a monthly tenant. The informal writing which he relies upon is unavailing to invest him with the rights of a lessee under a lease for a term of three years, because of the provisions of the Statute Law that such a lease shall be by a notarially attested instrument. But does that provision of the law render the agreement under which the defendant entered an agreement constituting a tenant-at-will. I think not. It was not the intention of either party that the

1923.

SCHNEIDER J.

Bandara v. Appuhamy

tenancy should be of that description; on the contrary, their intention was to create a tenancy for a term of three years, but the Ordinance then steps in and says that the agreement is not enforceable as a lease for that term of years. It seems to me, 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. I would adopt the language of Bertram C.J. in *Nanayakkara et al. v. Andris et al.* (*supra*), and say " it is open to our own Courts to apply these same principles to our own corresponding Ordinance, and it can hardly be contested that it is reasonable that they should do so."

Giving that interpretation to section 2 of our Ordinance would create no hardship in the case of a person claiming possession under a formal lease. It is the duty of his lessor to give him vacant possession. If the lessor fails to do that, he has his remedy against the lessor, and it would be always open to his lessor to terminate the tenancy of the person in possession by due notice. When the tenancy has been so terminated, the lessee himself would be entitled to sue the person in possession in ejectment, but so long as the tenancy of the person in possession has not been terminated by the lessor and the tenant in possession has not attorned to the lessee, the lessee has no right of action against the tenant in possession.

In *Woodfall's Law of Landlord and Tenant* (*18th ed.*), *at page 258*, he says " a tenancy-at-will is where lands or tenements are let by one man to another to hold at the will of the lessor; in this case the lessee is called tenant-at-will, because he has no certain or sure estate; for the lessor may put him out at any time he pleases." The relation between Ukku Banda and the defendant clearly does not come within this description, therefore defendant was not a tenant-at-will. At page 259 in the same work it is stated " if a man enter under a void lease, he is not a disseisor, but a tenant-at-will (*f*), under the terms of the lease in all other respects except the duration of time (*g*); and when he pays or agrees to pay any of the rent therein expressed to be reserved, he becomes a tenant from year to year upon the terms of the void lease so far as they are applicable to and not inconsistent with a yearly tenancy (*g*)." It is said that such a person becomes a tenant-at-will because of the provisions of the Statute of Frauds, section 1, that all parol leases for terms of years shall have the force and effect of leases-at-will only.

The defendant is not a tenant by sufferance as Browne J. thought was the case in *The Secretary of State for the War Department v. Ward (supra)*, because a tenant by sufferance is one who comes in by right and holds over without right as if a tenant for the life of another continue to hold after the death of him for whose life he entered. The defendant's claim is that his tenancy was not terminated. It seems to me that the defendant in the circumstances 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. He is entitled to claim that the relation between him and Ukku Banda should be terminated by due notice, that is, of a month. That has not been done, and he is entitled to remain till it is done.

I would therefore dismiss the appeal, with costs.

Appeal dismissed.