KATAH *v.* K. CHELLARAM AND SONS

WEST AFRICAN COURT OF APPEAL (Coussey, P., Luke, Ag. C.J. (Sierra Leone) and Verity, Ag. J.A.): March 26th, 1957
(W.A.C.A. Civil App. No. 30/56)

[1] **Evidence—burden of proof—creation of tenancy—burden on party setting up tenancy to prove creation:** In a dispute as to whether or not a tenancy has been created, the burden is on the party setting up the tenancy to prove its creation (page 10, lines 6–8).

[2] **Landlord and Tenant—creation of tenancy—burden of proof—burden on party setting up tenancy to prove creation:** See [1] above.

[3] **Landlord and Tenant—creation of tenancy—holding over—holding over and payment of rent not proof of creation of periodic tenancy—test is intention of parties:** A mere holding over by a tenant after the expiration of his lease and the acceptance of rent by the landlord are evidence but not conclusive proof of the creation of a tenancy from year to year; the test is whether it was the intention of the parties to create such a tenancy and this is a question of fact (page 10, lines 1–6; page 10, lines 15–20).

[4] **Landlord and Tenant—determination of tenancy—statutory tenancies—"tenant" in Rent Restriction Ordinance, 1953, s.12(1) includes former tenant remaining in occupation—neither agreement to give up posession on named day nor breach of agreement renders section inapplicable:** The protection of tenants under s.12(1) of the Rent Restriction Ordinance, 1953 extends to persons who began as tenants and continued in occupation without any legal right to do so, except possibly such as the Ordinance itself confers; an agreement in the contract of tenancy to give up possession on a named day does not prevent the Ordinance from applying and a failure to give up possession does not amount to a breach of an obligation of the tenancy in terms of exception (a) to s.12(1) which will render the section ineffective (page 11, lines 18–24; page 12, lines 18–21).

The appellant brought an action against the respondents in the Supreme Court claiming recovery of possession of certain premises.

At the expiration of a 10 year lease granted by the appellant to the respondents the latter remained in possession of the premises and paid a further quarter's rent. The respondents again failed to vacate the premises at the end of the quarter and the appellant gave them notice to quit, having meanwhile entered into a lease with a third party. The respondents did not comply with the notice and the appellant instituted the present proceedings. Two days later the respondents applied for the rental value of the premises to be

assessed under s.5 of the Rent Restriction Ordinance, 1953. By their defence they pleaded (i) that upon the expiration of the lease a fresh tenancy from year to year was created by the conduct of the parties and the notice to quit was inadequate; and (ii) that the appellant was precluded from recovering possession by reason of s.12 of the Ordinance. The trial judge rejected the appellant's contention that her claim was within exceptions (a) and (c) of s.12(1) of the Ordinance and dismissed the suit.

The appellant appealed on the following grounds: (a) the trial judge erred in holding that upon the facts as he found them a tenancy from year to year was created; (b) the case did not fall within the Rent Restriction Ordinance; and (c) if the Ordinance were applicable the respondents were disentitled to protection by virtue of exception (a) to s.12(1), having broken an obligation of the tenancy.

Cases referred to:

(1) *Barton* v. *Fincham*, [1921] 2 K.B. 291; [1921] All E.R. Rep. 87, *dicta* of Scrutton, L.J. applied.

(2) *Remon* v. *City of London Real Property Co., Ltd.*, [1921] 1 K.B. 49; (1920), 123 L.T. 617, *dicta* of Bankes, L.J. applied.

Legislation construed:

Rent Restriction Ordinance, 1953 (No. 19 of 1953), s.12(1):
The relevant terms of this sub-section are set out at page 10, lines 31–35; page 11, lines 36–40.

Nelson-Williams for the appellant;
Dobbs for the respondent.

VERITY, Ag. J.A.:

This is an appeal by the appellant from a judgment dismissing her claim for recovery of possession of certain premises in Freetown.

The facts as found by the learned trial judge are that at the expiration of a 10 years' lease granted by the appellant to the respondents on December 31st, 1954, the latter remained in possession of the premises, paying a further quarter's rent to March 31st, 1955, which the appellant accepted. The precise circumstances in which the respondents remained in possession and the appellant accepted the rent were in issue and the learned judge found the conflicting evidence before him that although the appellant as the result of

certain discussions in January 1955—"formed the impression that she would get the premises at the end of March," nevertheless the learned judge was "not satisfied that there was any such undertaking to vacate the premises by the defendants."

At the end of March the respondents failed to vacate the premises and the appellant thereupon gave them notice to quit at the end of the ensuing quarter, that is to say, June 30th. With this notice the respondents did not comply and on July 18th the appellant issued the writ in these proceedings to recover possession. On July 20th the respondents made application for the rental value of the premises to be assessed under the Rent Restriction Ordinance, 1953.

By their defence the respondents pleaded first, that upon the expiration of the lease a fresh tenancy from year to year was created by the conduct of the parties and that the notice to quit was inadequate and, secondly, that the appellant was precluded from recovering possession by reason of the provisions of s.12 of the Rent Restriction Ordinance.

The learned judge, rightly considering that the first of these questions was one of fact, held that such a tenancy had been created and that the notice was insufficient in law. He held also that the premises were within the protection of the Ordinance. Counsel for the appellant at the trial sought to show that in such a case the circumstances brought the appellant's claim within exceptions (a) and (c) of s.12(1) and that she was entitled to recover possession in so far as the Ordinance was concerned. The learned judge found the argument relating to exception (a) obscure and was unable to deal with it. In regard to exception (c) he rightly found it inapplicable to the circumstances of this case. Upon both grounds, *i.e.*, inadequacy of notice and statutory protection from eviction, he found for the respondents and dismissed the suit.

The appellant has appealed against the decision of the court below upon both grounds and Mr. Nelson-Williams who appeared before this court on behalf of the appellant submitted first that the learned judge erred in holding that upon the facts as he had found them a tenancy from year to year was created; secondly, that the case did not fall within the Ordinance; and thirdly, if the Ordinance is applicable then the respondents are disentitled to protection by virtue of exception (a) to s.12(1).

In the event I do not think that the first of these considerations necessarily arises but it may be convenient to deal briefly therewith.

It is not to be assumed that from a mere holding over and acceptance of rent a tenancy from year to year is to be implied. It is in each case a question of fact as to whether in the particular circumstances it is shown to have been the intention of the parties to create such a tenancy or whether the facts go to show that there was no such intention. It is, of course, upon the party setting up the tenancy to prove its creation and if the question is upon the facts left in doubt he has failed to discharge the onus laid upon him. In the present case it appears to be clear from the learned judge's findings that no such intention has been established, for while no undertaking was given by the respondents to vacate the premises at the end of March, the learned judge found that the plaintiff as the result of the discussion was left with the impression that they would do so and entered into a lease of the premises to a third party from April 1st, "Payment of rent" as is rightly said by the learned editors of *Hill & Redman's Law of Landlord & Tenant,* 12th ed., at 31 (1955) ". . . is not conclusive as to the creation of a tenancy from year to year; it is only evidence of such a tenancy," and if it is to be inferred from the conduct of the landlord that there was no intention to create such a tenancy then in my view no such tenancy is to be implied. This would appear clearly to be so from the learned judge's findings of fact and I think he erred in inferring from those facts that an intention to create a fresh tenancy is to be implied.

In so far as the first contention of the appellant is concerned I think it is well founded, but this does not conclude the matter for it remains to be considered whether, irrespective of the nature of the tenancy subsequent to March 31st, 1955, the appellant is precluded from recovering possession by reason of the Rent Restriction Ordinance, 1953. Section 12(1) of the Ordinance provides that, subject to certain exceptions:

> "Where the rental value of any dwelling house or shop has been determined under this Ordinance or is in course of being so determined no order or judgment for the recovery of possession of such dwelling house or shop or the ejectment of a tenant therefrom shall be made or given by any Court. . . ."

Section 5 of the Ordinance makes provision for the application by the owner, tenant or sub-tenant of any dwelling house or shop for the determination of the rental value thereof.

It is beyond doubt that the premises involved in this case fall within the definition of "shop" in s.2 of the Ordinance, and it is established that application has been made by the respondents under

s.5. It is submitted, however, that on July 20th, 1955, the date upon which such application was made, the respondents were no longer tenants of the shop. Their original lease had expired, no tenancy from year to year had been created and any tenancy which may have arisen subsequent to the expiration of the lease had been terminated, it is submitted, by the notice to quit. Thereafter they were trespassers. This contention is attractive and, but for the interpretation which has been given to analogous legislation in England, might have appeared well founded.

In *Remon* v. *City of London Real Property Co., Ltd.* (2) the facts were not dissimilar. In the course of his judgment in the Court of Appeal, Bankes, L.J. said ([1921] 1 K.B. at 54; 123 L.T. at 618):

> "In no ordinary sense of the word was the respondent a tenant of the premises on July 2 [the date upon which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 came into force]. His term had expired. His Landlords had endeavoured to get him to go out. He was not even a tenant at sufferance. It is however clear that in all the Rent Restrictions Acts the expression 'tenant' has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, some one whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him."

It is to be observed that in *Remon's* case the occupant of the premises was held to be a tenant within the meaning of the Act even though at the date of the commencement thereof his "tenancy" in any ordinary sense of the word had already ceased. So much the more, in my view, are the respondents to be deemed tenants when the Ordinance or its predecessor was in force throughout the term of the original tenancy and the tenants were in a position to bring themselves within the protection of the Ordinance at any time by the mere application to have the rental value determined thereunder.

Counsel sought, however, to avail himself on behalf of the appellant of exception (a) to s.12(1) of the Ordinance in so far as it provides that the substantive prohibition of the sub-section shall not be effective where—"any obligation of the tenancy . . . so far as it is consistent with the provisions of this Ordinance has been broken or not performed. . . ." It is submitted that under the original lease the respondents covenanted to "yield the said premises . . . at the

end of the tenancy," and that their failure to do so was in breach of an obligation of the tenancy.

Unfortunately for the validity of this contention the question was decided by the Court of Appeal under the analogous Act to which I have already referred, in *Barton* v. *Fincham* (1), where Scrutton, L.J. said ([1921] 2 K.B. at 297–298; [1921] All E.R. Rep. at 90):

> ". . . [P]ossession can only be obtained by order of a Court, which order can only be made if certain specified facts are proved. One of these facts is that an obligation of the tenancy, so far as the same is consistent with the provisions of this Act, has been broken. This qualification was necessary, for every tenancy contains an obligation to deliver up possession at the end of the tenancy, of which obligation staying in possession is a breach. The qualification was not contained in the Act of 1915, but was held, I think rightly, by Astbury, J. in *Artizans Dwellings Co.* v. *Whitaker* ([1919] 2 K.B. 301) to be necessarily implied, as without it the whole sub-section would be meaningless. A tenant who agrees in the contract of tenancy to give up possession on a named day does not contract out of the Act, and the agreement does not prevent the provisions of the Act from applying. . . ."

While, therefore, I am of the opinion that the learned trial judge erred in holding that there was a tenancy from year to year, he was in my view right in finding that the respondents were protected by the Ordinance and in declining to make an order for recovery of possession. It is, perhaps, unfortunate that by reason of the respondents' conduct in holding over, coupled with their belated application for determination of the rental value, the appellant has been placed in her present position and deprived of the increased rent which would have accrued to her under the lease into which she has entered with a third party. It may be, however, that the committee established under the Ordinance may, if so moved, find reason to increase the rental value.

In any event it is with some reluctance in all the circumstances that I have reached the conclusion that this appeal must be dismissed and that there appears no reason to deprive the respondents of their taxed costs thereof which I would therefore allow.

COUSSEY, P. and LUKE, Ag. C.J. (Sierra Leone) concurred.

Appeal dismissed.