[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

PETROLINA LTD.,

Appellants-Defendants,

v.

ATHINODOROS VASSILIADES

Respondent-Plaintiff.

(Civil Appeal No. 4978).

Contract—Contract required by law to be evidenced by writing—Cannot be varied by oral agreement—Oral variation of contract of lease of immovable property—Not valid—Section 77(1) of the Contract Law, Cap. 149.

Landlord and Tenant—Void lease—Tenants entered and remained in possession—They became tenants from year to year—Whether rent payable in advance.

By virtue of a contract of lease executed on the 7th October, 1959, the respondent (plaintiff) agreed to lease to the appellant (defendant) Company a piece of land in order to build a petrol station thereon.

The parties have, *inter alia,* agreed that the period of lease would be for 20 years, at a rental of £1 per year with the option on the part of the Company to terminate same after 10 years. It was also agreed that the petrol station would be run by the plaintiff for his own benefit and on a commission basis. It was further stipulated in the contract of lease that in the event of the defendant Company delaying the payment of rent over a period of 30 days from the date of service of a written demand for payment, by the plaintiff to the defendant, then the plaintiff would be entitled to terminate the agreement and to demand the eviction of the defendant Company as well as damages.

On the 9th February, 1961, both parties to the contract agreed orally to revise the amount of rent provided therein by increasing same to £500 per annum, payable retrospectively as from the 1st February, 1960. By means of a letter, addressed to the plaintiff, the defendant Company after confirming the increase of rent,

made it clear that the amount of £500.- would not be paid in cash to the plaintiff, but it would be credited to his debit account which at that time was debited with £4,000; and the letter added that for the period February 1, 1960 till January 31, 1961, this account was credited with the said amount of £500.

The defendant Company continued to credit the account of the plaintiff with the rent of £500 annually until January 24, 1968.

By a letter dated 9th March, 1968, the plaintiff reminded the defendants that the rent ought to have been paid as from the 28th January, 1968, and as the defendant Company failed to pay the rent the plaintiff's counsel addressed a new letter to the defendant Company on the 5th June, 1968, wherein he pointed out that as the latter failed to pay the rent within the period of 30 days stipulated in the contract, he was instructed to terminate, and by that letter he terminated the contract of lease.

There followed further correspondence between the parties' counsel and by a letter dated 18th June, 1968, plaintiff's counsel informed the defendant company that after the termination of their contract the latter were holding the premises as statutory tenants; and as the owner required the premises for the purpose of demolishing and re-building and/or for substantial alteration, counsel, by relying on s. 10 of the Rent Control (Business Premises) Law, 1961 (Law 17/61), gave them three months' notice, as from July 1, 1968, to vacate and deliver the premises to his client.

The trial Court held that the agreement as to the increase of rent was validly effected and that the original contract should be treated as varied accordingly.

The issues for consideration by the Court of Appeal were the following:

(A) Whether the contract as varied was wrong once it was made contrary to the provisions of s. 77(1) of the Contract Law, Cap. 149 which runs as follows:

"77.(1) Contracts relating to leases of immovable

property for any term exceeding one year shall not be valid and enforceable unless —

(a) expressed in writing; and

(b) signed at the end thereof, in the presence of at least two witnesses themselves competent to contract who have subscribed their names as witnesses, by each party to be charged therewith or by a person who is himself competent to contract and who has been duly authorised to sign on behalf of such party."

(B) Whether the tenant can be treated as holding the premises without a contract of lease.

(C) Whether the amount of rent as varied was payable in advance or not.

Held, (I) on issue (A):

If the contract is one which is required by law to be made and evidenced by writing, it *cannot be varied* by a new oral agreement, even if the variation relates only to a part of the contract which, if it stood by itself, would not be required to be in writing. (See *Goss* v. *Nugent (Lord)* [1833] 5 B. & Ad. 58).

Held, (II) on issue (B):

1. An instrument which is void at law, *i.e.* a lease for want of a deed, may operate, as an agreement for a lease even at law (see *Parker* v. *Taswell* [1858] 2 De. G. 59 and *Cowen* v. *Phillips* [1863] 33 Beav. 18).

2. Therefore since such agreement may be capable of being enforced by the remedy of specific performance, it appears that once the tenants have entered into possession under a void lease—and in the present case there is ample evidence that the defendants have entered and remained in possession—they thereupon became *tenants from year to year* upon the terms of the writing, so far as they are applicable to and not inconsistent with a yearly tenancy. (See *Doe d. Rigge* v. *Bell* [1793] 5 T.R. 472; and *Tress* v. *Savage* [1854] 4 E. & B. 36).

Held, (III) with regard to the third issue:

Once the amount of the rent for a number of years was credited in the books of the Company in favour

of the plaintiff at the end of the year we have reached the view that the rent of £500.- per annum was not payable in advance and that, therefore, the notice given was an invalid notice, once there was no rent due. We would allow the appeal, reverse the judgment of the trial Court, and dismiss the cross-appeal.

Appeal allowed.
Cross-appeal dismissed.

Cases referred to:

Stavrou v. *Stylianou and Another,* 23 C.L.R. 217;

Goss v. *Nugent (Lord)* [1833] 5 B. & Ad. 58;

Harvey v. *Grabham* [1836] 5 Ad. & El. 61;

Vezey v. *Rashleigh* [1904] 1 Ch. 634;

Morris v. *Baron & Co.,* [1918] A.C. 1 (H.L.);

Williams v. *Moss' Empires Ltd.* [1915] 3 K.B. 242;

Hartley v. *Hymans* [1920] 3 K.B. 475;

British and Benningtons Ltd. v. *North Western Cachar Tea Co. Ltd.* [1923] A.C. 48 (H.L.);

Parker v. *Taswell* [1858] 2 De. G. 59;

Cowen v. *Phillips* [1863] 33 Beav. 18;

Bond v. *Rosling* [1861] 1 B. & S. 371; 16 C.B. (N.S) 421;

Doe d. Rigge v. *Bell* [1793] 5 T.R. 472;

Tress v. *Savage* [1854] 4 E. & B. 36;

Walsh v. *Lonsdale* [1882] 21 Ch. D. 9.

Appeal and cross-appeal.

Appeal and cross-appeal against the judgment of the District Court of Limassol (Malachtos, P.D.C. and Vakis, D.J.) dated the 4th March, 1971 (Action No. 2288/68) whereby it was held that the plaintiff was entitled to a declaratory judgment that a contract of lease dated 7th October, 1969, was lawfully terminated and annulled.

A. Myrianthis, for the appellant.

R. Michaelides, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by :-

HADJIANASTASSIOU, J. : In this appeal, the defendant company, Petrolina Ltd., of Larnaca appeals from the Judgment of the Full District Court of Limassol dated March 4, 1971, whereby it held that the plaintiff, A. Vassiliades of Limassol was entitled to a declaratory judgment that the contract of lease dated October 7, 1959, executed between the parties (as amended on February 2, 1961) was lawfully terminated and annulled and/or became void and/or without any legal effect. The plaintiff cross-appealed alleging (a) that the finding of the Court that the premises were not reasonably required by the plaintiff was wrong both factually and legally, having regard to the provisions of s. 10(1)(h) of Law 17/61; and (b) that the Court failed to give weight to the evidence regarding the plaintiff's financial position.

The facts are these :- On October 7, 1959, the plaintiff, the owner of a piece of land situated at Gladstone Street in Limassol, executed a contract of lease with the defendant company whereby part of the said land was leased to the latter, in order to build thereon a petrol station known as the Petrolina petrol station. This contract of lease contained a number of terms and conditions, and I propose referring to some of them in due course.

It is clear that the parties have agreed that the period of renting the land would be for 20 years, at a rental of £1 per year with the option on the part of the company to terminate same after the expiration of 10 years. Furthermore, it was agreed that the company had to build a petrol station which would be run by the plaintiff for his own benefit and on a commission basis. Because a permit was required for the running of a petrol station, a permit was issued by the appropriate authority in the name of the plaintiff who in the meantime had also agreed to buy and pay in cash for petrol and other products sold by the said company.

According to paragraph 21, the agreement by virtue of which the second contracting party (plaintiff) undertook the sale and disposition of the products of the

company upon commission, can be terminated even before the expiration of the present agreement, after the service of a written document giving three months notice by the second contracting party to the first contracting party (defendant company) or upon the death of the second contracting party; and in any of the aforementioned cases the possession of the said property and products will vest as from that date of the said termination to the first contracting party, who will continue to possess same undisturbed, and the lease will continue until the termination of the present contract; with a rent of £C80 payable quarterly in advance, in lieu of the rent mentioned herein of £C1 yearly and with the right of the first contracting party to sub-let the said station for the rest of the period of the said lease.

It was further stipulated in the said contract of lease that in the event of the first contracting party delaying the payment of the rent over a period of 30 days from the date of service of a written demand by the second contracting party on the first for payment, then the second party would be entitled to terminate the said agreement and to demand the eviction of the first party as well as damages (para. 23).

On February 9, 1961, both parties to the contract of lease after consultations and negotiations, reached an agreement to revise the amount of rent fixed in the contract of lease, by increasing same to the amount of £500 per annum, payable retrospectively as from February 1, 1960. I should have added that this increase was mainly in consideration of the fact that the plaintiff undertook to build a tecalemit station out of his own expenses, which station would serve both the clientele of the petrol station, as well as that of the plaintiff.

In pursuance of this undertaking, the defendant company agreed to allow a credit of £500 and debit plaintiff's account accordingly, because under the contract of lease the plaintiff was bound to pay in cash for the products which the defendant company was selling to him. In spite of the fact that the plaintiff had to pay in cash, it appears that the plaintiff during that period was indebted to the defendant company in the sum of £4,000 on a fixed debit account. It was further agreed

between the parties that no interest would be charged on the debit account in question. According to the contents of a letter (*exhibit* 7), addressed to the plaintiff, the defendant company, after confirming the increase of rent, made it clear that the amount of £500 would not have been paid in cash to the plaintiff, but it would have been credited to his account known as "Payiou perithoriou" of £4,000. Then it was finally added that for the period February 1, 1960 till January 31, 1961, this account was credited with the amount of £500.

In pursuance of the said agreement the plaintiff built a tecalemit station and continued running both the petrol station and tecalemit until July 31, 1965, when he ceased to do so. The defendant company continued to credit the account of the plaintiff with the sum of the rent of £500 annually until January 24, 1968, when the whole amount was paid off and the account was closed.

On March 9, 1968, the plaintiff addressed a letter to the defendant company, reminding them that the rent ought to have been paid to him as from January 28, 1968, and requested them to do so as soon as possible (*exhibit* 8). Because the defendant company failed to pay the amount of rent, counsel for the plaintiff addressed a new letter on June 5, 1968, (*exhibit* 9) pointing out to the defendant company that because they had failed to comply and more than 30 days had elapsed from the date of the letter of his client, for the payment of the said rent, he was instructed to terminate, and by that letter he terminated the contract of lease of October 7, 1959 (as amended) reserving fully the rights of his client, and at the same time called upon the defendant company to call and collect their own materials, as it was provided in the said agreement.

On June 8, 1968, counsel on behalf of the defendants addressed a letter to counsel for the plaintiff and after he put forward certain reasons why his clients failed to pay the rent, he added that his own client had no right to terminate the contract of hiring. Counsel concluded that irrespective of the said arrangement, he enclosed a cheque for the sum of £500 in payment of the rent due (*exh.* 10).

On June 11, 1968, counsel for the plaintiff in reply

to counsel, after denying the contents of the letter (*exh.* 10) as being unacceptable and unfounded—said that it was the case of his client that the contract of lease was terminated and that he was returning the cheque with full reservation of the rights of his client (*exh.* 11).

There was further correspondence and on June 18, 1968, counsel on behalf of the plaintiff addressed a letter to the defendant company telling them that after the termination of their contract dated February 9, 1961, they were holding the premises as statutory tenants; and as the owner required the premises for the purpose of demolishing and re-building and/or for substantial alteration, in accordance with s. 10 of Law 17/61, he gave them three months' notice as from July 1, 1968, to vacate and deliver the premises to his client (*exh.* 12).

In the meantime, the plaintiff, in pursuance of his stand that he required the premises in question, applied to the Municipality of Limassol—being the appropriate authority—and obtained a building permit dated March 6, 1969.

On June 20, 1968, the new counsel of the defendant company addressed a letter to counsel for the plaintiff denying that the contract was terminated and/or that his client had a right to terminate same. Regarding the rent of £500, counsel added that although that rent was not payable in advance, nevertheless, his clients had never refused the payment of that rent and that that amount was available to him either in cash or by cheque (*exh.* 13).

It was the case for the plaintiff, before the trial Court, (a) that he was entitled to an order for possession of his property on the ground of lawful termination of the lease—the defendants having not complied with the written demand for payment of the rent; and (b) that the leased property was reasonably required by him for the purposes set out in his notice (*exh.* 12). On the contrary, it was the case for the defendant company that the contract of lease was never lawfully terminated by the plaintiff, and that it was still in force; and that in the alternative they claimed that if the contract was

terminated they were protected under the law being statutory tenants.

The trial Court, having considered both the documentary and other evidence before it, as well as the contentions of both counsel, came to the conclusion that "the agreement as to the increase of rent was validly effected and that the original contract must be treated as varied accordingly". Furthermore, the Court observed that from the contents of *exhibit* 7 itself "the variation of the original contract effecting increase of rent was reached in consideration..... of certain undertakings on the part of the plaintiff to erect a tecalemit station which he did".

Another point taken into consideration by the Court was that both parties to the contract of lease have treated it as varied and acted upon it for years. Learned counsel for the appellant urged in the forefront of his argument that the finding of the trial Court that the agreement as to the increase of rent was never validly effected by means of the letter addressed by the appellants to the respondent; and that the original contract as varied, was wrong once it was made contrary to the provisions of s. 77(1) of Cap. 149, which makes it imperative that the contract is required to be made in writing. There is no doubt that under the provisions of s. 77 of our law, contracts relating to leases of immovable property for any term exceeding one year shall not be valid and enforceable unless (a) expressed in writing and (b) signed at the end thereof in the presence of at least two witnesses..... by each party to be charged therewith or by a person who is himself competent to contract and who has been duly authorised to sign on behalf of such party. This section was judicially construed in *Stavrou* v. *Stylianou and Another*, 23 C.L.R. 217, but in my view, it is not an authority as to the question regarding the variation of the said contract of lease.

It has not been challenged by counsel that the original contract of lease was within the provisions of s. 77 of our law, and the question posed is whether the said contract was properly varied as to the increase of rent and whether such variation was legally made. It has been said in a number of cases in England that if the contract

is one which is required by law to be made and evidenced by writing, it cannot be varied by a new oral agreement, even if the variation relates only to a part of the contract which, if it stood by itself, would not be required to be in writing. If authority is needed, the case of *Goss* v. *Nugent* (*Lord*) [1833] 5 B. & Ad. 58, provides the answer. In that case, the plaintiff agreed in writing to sell to the defendant certain plots of land. In an action by the plaintiff against the defendant for the purchase money, the defendant pleaded that the title to one of the plots was defective. To this plea, the plaintiff replied that the defendant had orally agreed to waive the effect and to accept the existing title. The Court held that since the contract was one which was required by law to be evidenced by writing, the oral variation was not admissible and the defendant was entitled to succeed on the ground that a good title had not been made. (See also *Harvey* v. *Grabham* [1836] 5 Ad. & El. 61; *Vezey* v. *Rashleigh* [1904] 1 Ch. 634; *Morris* v. *Baron & Co.* [1918] A.C. 1, H.L. disapproving *Williams* v. *Moss' Empires Ltd.* [1915] 3 K.B. 242; *Hartley* v. *Hymans* [1920] 3 K.B. 475 and *British and Benningtons Ltd.* v. *North Western Cachar Tea Co.* [1923] A.C. 48 H.L.).

It should be added that the foundation on which this rule rests is that after the agreed variation the contract of the parties is not the original contract but that contract as varied, of which in its entirety there is no written evidence, so that the contract cannot be enforced. In *Morris* v. *Baron & Co.*, op. cit., it was said by Lord Dunedin at p. 31 :-

> "There is nothing in all this inconsistent with the well-established rule that a contract which the law requires to be evidenced by writing cannot be varied by parol: *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Stead* v. *Dawber*, 10 Ad. & E. 57; *Noble* v. *Ward*, L.R. 1 Ex. 117; *Sanderson* v. *Graves*, [1875] L.R. 10 Ex. 234. The foundation, I think, on which that rule rests is that after the agreed variation the contract of the parties is not the original contract which had been reduced into writing, but that contract as varied, that of this latter in its entirety there is no

written evidence, and it therefore cannot in its entirety be enforced."

In the light of the authorities and having regard to the argument of both counsel, we are of the view that the argument of counsel on behalf of the appellant succeeds on this issue because in our view, there was no valid variation of the original contract once the contract was within the provisions of s. 77 of our law.

The second question is whether once the contract as varied and cannot be enforced, the tenant can be treated as holding the premises without a contract of lease. It has been stated in England that an instrument which is void at law as a lease for want of a deed may operate in two ways: In the first place it may operate as an agreement for a lease (*Parker* v. *Taswell* [1858] 2 De. G. 59, *Cowen* v. *Phillips* [1863] 33 Beav. 18) even at law, and the Courts have construed a writing rather as a valid agreement for a lease than as a void lease. *Bond* v. *Rosling* [1861] 1 B. & S. 371. *Rollason* v. *Leon* [1861] 7 H. & W. 73 and *Hayne* v. *Cummings* [1864] 16 C.B. (N.S.) 421. Once, therefore, that agreement may then be capable of being enforced by the remedy of specific performance, it appears that once the tenant has entered into possession under a void lease—and in the present case there is ample evidence that the defendants have entered and remained in possession—they thereupon become tenants from year to year upon the terms of the writing, so far as they are applicable to and not inconsistent with yearly tenancy. *Doe d. Rigge* v. *Bell* [1793] 5 T.R. 472; and *Tress* v. *Savage*, [1854] 4 E. & B. 36. Thus it appears that the defendants in the light of the authorities, are entitled and have become tenants from year to year.

The third question is whether the amount of rent as varied was payable in advance or not. Counsel on behalf of the appellant has contended that once there was sufficient evidence both oral and documentary, that the amount of rent was payable at the end of the year, he argued that the plaintiff was not entitled to terminate the said contract because no rent was due.

The trial Court, in considering that question, has taken into consideration that the increased rent, according to

the letter *exhibit* 7 "would not be paid in cash but it would be credited to (plaintiff's) account (payiou perithoriou) and that that express condition had been assented to by the plaintiff". With this in mind, the Court came to the conclusion that the mode of payment should be considered to have been modified at least for so long as there was a balance standing to the debit of the plaintiff in the said account, with the necessary natural consequence that he could not, whilst there was such a balance, demand payment of the rent. Then the Court concluded that after the said account was satisfied, the defendants had to pay over the rent as increased according to their obligations, having in mind the intention of the parties and the proper construction of their agreement.

We have gone through the oral evidence and the documentary evidence, and it is clear in our view that once the amount of the rent for a number of years was credited in the books of the company in favour of the plaintiff at the end of the year, we find ourselves unable to agree with the decision of the learned trial Judge that once the amount due by the plaintiff was paid, the intention of the parties as evidenced from the terms of the contract showed that it was intended to be paid in advance and not at the end of the year.

In *Walsh* v. *Lonsdale* [1882] 21 Ch. D. 9, Jessel, M.R. on appeal, dealing with the question whether the amount of rent was payable in advance and whether the tenant was to be treated as holding on the terms of the agreement, said at pp. 14 - 15 :-

> .."The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say 'I have a lease in equity, and you can only

re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry'. That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."

For the reasons we have endeavoured to explain and in the light of the authorities, we have reached the view that the contention of counsel succeeds that the rent of £500 per annum was not payable in advance and that, therefore, the notice given was an invalid notice, once there was no rent due. We would allow the appeal, reverse the judgment of the trial Court, and dismiss the cross-appeal, but without an order for costs.

Appeal allowed.
Cross-appeal dismissed.
No order as to costs.