1897.
June 25 and July 20.

ISAAC PERERA *v.* BABA APPU *et al.*

D. C., Kurunegala, 1,148.

Lease—Right of lessee not in possession to compel third parties in possession of leased premises to yield to him such possession.

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.

IN this case the plaintiff, a lessee of certain premises under a notarial lease from the first defendant, sued his lessor, the first defendant, and the other defendants, to obtain possession of the premises leased. The defendants pleaded that the plaintiff, never having had possession of the premises, could not sue the defendants in ejectment. The District Judge held that the plaintiff's lessor had title to only a moiety of the premises claimed, and gave the plaintiff judgment for such moiety.

The defendants appealed.

Asserappa, for first and second defendants, appellants.

Jayawardena, for third defendant.

Dornhorst and *Wendt*, for plaintiff, respondent.

20th July, 1897. WITHERS, J.—

The only question argued before us was one of law, and it was this : Can a lessee of land, for a term of years under a notarial lease, who has not been put in possession by his lessor, compel third parties, in possession of the premises, to yield him such possession as he would be entitled to as lessee ?

An opportunity was given to counsel to search for any authority in our courts on that point. The nearest approach to it is the passage in Mr. Justice Clarence's judgment (*1 S. C. R. 145, 1891, Pinhami v. Puran Appu*) :—" By a late decision of the majority of " the Court, which is binding on me, a purchaser is allowed " to maintain an action to eject from the land a party claiming " adversely to his vendor, even though he himself has never " had any possession under his purchase. It was admitted by " respondent's counsel that the principle of this latter decision " extends to a lessee." No doubt, under the old law, there were many general rules common to the two contracts of sale and lease,

just as the vendor is bound to deliver the thing sold in such a manner that the purchaser may have the full enjoyment and possession as if the thing belonged to himself (*vacuum possessionem tradere*), so the lessor of a thing is bound to place the use of that thing at the disposition of the hirer. So, again, there were three elements common to the two contracts, viz., the thing sold or let, the price, to be paid for the thing itself or for the use of that thing, and the consent of the parties. In later years our Court has brought the analogies between the two contracts more closely together than seems to have been the case in former times. In the case of *Gunewardena v. Rajapakse* (*1 N. L. R. 217, 1895*) the Chief Justice expressed himself thus :—" In my opinion we ought to " regard a notarial lease as a *pro tanto* alienation, and we ought to " give the lessee, under such a lease, during his term, the legal " remedies of an owner or possessor."

I subscribed to that opinion. It therefore seems to me to follow that a lessee, under a notarial contract, can recover from third parties in adverse possession the use of the property for the time to which he is entitled under his lease, assuming of course that his lessor had the right to let him what he asks for.

Here, the landlord is found to have had the right to let a moiety of the premises for a term of years to the plaintiff, so that the contesting defendant is bound to let the plaintiff have the use of a moiety of the premises for the term mentioned in his lease. The plaintiff seems to be content with that judgment, for he has not appealed from it. It ought, in my opinion, to be affirmed.

LAWRIE, A.C.J.—

I agree to affirm the judgment. This is an action by a lessee who never got possession against his lessor, and also against those in possession, who refused to let him in. The presence of the lessor, as defendant, seems to me to remove the difficulty I would have felt had the lessee sought to get a declaration of his lessor's title, and a decree for possession and damages, in an action brought only against the men in possession.

I hesitate to say that they are liable to be sued by the lessee in an action to which the lessor is no party, for in such an action the question of title could not be finally decided and the defendants would be exposed to further litigation at the instance of the lessor. In an action like the present that is impossible, because the lessor, being a party, is bound by the judgment.