1898.
May 18.

DAVITH *v.* NADORIS.

C. R., Colombo, 442.

Promissory note—Action by indorsee against maker—Failure of consideration as between maker and payee—Land purchased, but possession thereof not delivered—Knowledge of indorsee—Defence against indorsee.

Plaintiff sued defendant on a promissory note granted by defendant to A and indorsed by him to plaintiff. Defendant pleaded that the note was granted by him to A for part of the purchase amount of a land sold by A to defendant, but that A having failed to put defendant in possession of the land, the consideration for the note failed, and that plaintiff took the note with knowledge of these facts—

Held, that the facts disclosed a good defence.

Ramasamy v. Veerappa (*1 S. C. R. 91*) distinguished.

PLAINTIFF sued defendant on a promissory note granted by him and endorsed by the payee to plaintiff on the day next subsequent to its date. Defendant pleaded that he made and granted it as part of the consideration for a sale of land to him by the payee ; that the payee never put him in possession thereof ; and that possession of the land was actually held by certain purchasers under the payee's father, whose title was superior to that which the payee professed to give ; and that the plaintiff had notice of all these matters.

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At the trial the Commissioner on reading this answer, which his predecessor had accepted, dismissed the action.

Plaintiff appealed.

Bawa appeared for him.

De Vos, for defendant, respondent.

18th May, 1898. BROWNE, A.J.—

Would the defence have been a good one if the payee had been the plaintiff? As at present advised, I consider it would. The case differs from the precedent cited at *1 S. C. R. 91*, in that there the possession had been given, and here it had not. Even, however, though the execution of the conveyance was sufficient delivery of possession to enable the purchaser to sue the possessor, the purchaser on not getting actual possession of the land has, in my judgment, two courses open to him. He may sue his possessor duly citing his vendor, and if he fails afterwards reclaim the price he has paid. Or if he has only promised to pay the price and finds his vendor's title was truly defective as against that of the possessor, he may wait till he shall be sued on his promise and then plead failure of consideration, taking the risk of having to prove the defect in his vendor's title.

The position of the indorsee of the note is not better than that of the payee, if the indorsee had full notice of the matters which would preclude the latter from recovering thereon.

I remit the action for trial. No doubt the Commissioner will, to shorten proceedings at the trial, try to ascertain at as early a stage as possible the sufficiency of defendant's proof that plaintiff had knowledge that the payee's title was defective, as the defence will be mainly dependent thereon.

All costs to abide the result.