1907.
March 25.

Present: Mr. Justice Wood Renton.

ISLA MARICAR *v.* ANDRIS APPU.

C. R., Colombo, 2,179.

Use and occupation—When action lies—Express or implied contract necessary.

An action for use and occupation will not lie unless there has been a contractual relationship, express or implied, between the parties.

APPEAL from a judgment of the Commissioner of Requests (J. S. Drieberg, Esq.).

The facts are fully set out in the judgment.

A. L. R. Asserappa, for the defendant, appellant.

B. Koch, for the plaintiff, respondent.

Cur. adv. vult.

25th March, 1907. WOOD RENTON J.—

The respondent sues the appellant for two months' ground rent of a portion of land alleged to have been taken on a parol lease (from month to month) by the latter from the former for the purpose of erecting a shed upon it. The appellant denies the lease, and says that he occupies the land in question as the tenant of one Kuppa Udayar Lebbe Marikar under a lease by deed, which is put in evidence. The respondent has also a lease by deed from Kuppa Udayar Lebbe Marikar of the same land, and it appears to me that the real dispute between the appellant and the respondent is as to whether a clause in that lease by which the lessor reserves the right to " himself " to put up buildings on the land demised enables him to let that right to a third party. With that question I have not, however, to deal now. The claim before me is a claim for rent. At the trial the following issues were settled (I substitute

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for the sake of clearness the terms " respondent " and " appellant " for " plaintiff " and " defendant "):—

(1) Did the respondent let to the appellant the premises referred to in the plaint?

(2) If so, what rent is due?

(3) Is the respondent entitled to anything, and how much, for the use and occupation of the premises in question?

The learned Commissioner of Requests answered the first issue in the negative. It follows, therefore, that nothing is due to the respondent by way of rent. But the learned Judge proceeded to hold that he had a good claim for compensation for use and occupation, and he awarded him Rs. 16.66 on that footing. With the greatest respect, I think that this decision is wrong.

An action for use and occupation will not lie unless there has been a contractual relationship, either express or—as in the case of a tenancy by sufferance—implied, between the parties (see *Woodfall, Landlord and Tenant, 15th ed., p.* 570, and authorities *ad loc cit.*). In the case of *Tew v. Jones* (1) the defendant and another person conveyed to the plaintiff an undivided moiety of several houses, of which they were seized as devisees in trust. Of one of the houses the defendant had been in possession for twenty-five years before—and he continued to occupy it after—the conveyance. There was no evidence of any express contract of tenancy between him and the plaintiff for his occupation subsequent to the conveyance, or of any holding by him by the plaintiff's permission. The Court of Exchequer held that, whatever might be the plaintiff's remedy in trespass, an action for use and occupation would not lie.

I have come to the same conclusion in the present case. The findings of the Commissioner negative express tenancy, and there is nothing to show tenancy by sufferance. On the contrary, it is plain on the face of the record that the appellant claims to be in possession not under, but adversely to, the respondent. If the respondent thinks he has a remedy in trespass or otherwise, it is open to him to try it. The appeal must be allowed with costs here and below.

I desire to add that, in my opinion, neither the English case of *Hellier v. Silloc* (2) nor the Ceylon case of *Perera v. Fernando* (3), to which Mr. Koch referred me, is any authority for the proposition that an action for use and occupation will lie in the absence of express or implied tenancy. In *Hellier v. Silloc* the *ratio decidendi* was that the defendant had occupied by the plaintiff's permission. In *Perera v. Fernando* a parol lease was averred and admitted, and the question was whether the plaintiff could recover for use and occupation under it.

Appeal allowed.

(1) (1844) 13 *M. & W.* 12. (2) (1850) 19 *L. J. Q. B.* 295.

(3) *Ram.* (1863-1868) 83.