1922.

Present: Bertram C.J. and Porter J.

MARALIYA *v.* FERNANDO.

429—D. C. Ratnapura, 3,538.

*Lease of ground share of plumbago lands—Is delivery of possession necessary?—Vacant possession—Is there a difference between lease and sale—Lease of a chose in action—Lease of rents of tenements—Lease of taxes and tolls—*Actio conducti—*When damages may be recovered from lessor for not delivering possession—Remission of rent or damages.*

A lessor must give possession of the thing let to the lessee. In the case of a lease of a chose in action, the requirement as to delivery of possession is fulfilled by the execution of the assignment; for example, in the case of the lease of the rents of a line of tenements, a formal attornment from each tenant to the lessee is not necessary.

But in addition to the right to be put into possession the lessee is also entitled to "quiet enjoyment." Consequently the *actio conducti* lies when the lessee is not permitted to enjoy the thing leased. This action lies whether the obstruction to the enjoyment of the property is due to any act of the lessor or to the act of a third party, and notwithstanding the fact that the lessor acted in good faith.

"If your tenant is prevented from enjoying the farm leased to him, either by you or some one whom you can restrain, you must pay him damages in which his anticipated profits may be included. If, however, he is so excluded by some one whom you cannot restrain, or by reason of *vis major*, you are only responsible to him for a remission of rent."

Where the lessee of the ground share of certain plumbago lands was prevented from getting his ground share by reason of certain antecedent contracts, the lessor had entered into with the minors—

Held, that he was entitled to recover damages.

THE facts are set out in the judgment.

Pereira, K.C. (with him *Samarawickreme, Batuwantudawa, H. V. Perera*, and *R. C. Fonseka*), for appellant.

E. W. Jayawardene (with him *D. B. Jayatileke* and *Croos-Dabrera*), for respondent.

October 5, 1922. BERTRAM C.J.—

In this case plaintiff is a trustee of a vihare, and his claim is for arrears of rent due under a lease of the temple's ground share of certain plumbago lands. The learned District Judge has so fully and lucidly set out the complicated history of the transaction, that I need only refer to the facts very briefly. The lease was executed on September 6, 1912. The defendant is the lessee. According to his own account of the matter, when he took measures to prepare for collecting the ground share leased to him, he found that he was precluded from doing so by certain arrangements which his lessor has made with the persons mining on the property, inconsistent with his own rights under the lease. These persons were four in number: Jayasinghe Bandara, Mathias Bandara, Dharmawardene Bandara, and Abraham Bandara. There had been certain negotiations between these persons, the temple trustee, and other persons claiming an interest in the land, and at this stage the position appears to have been as follows: An agreement (dated October 9, 1910) had been come to with Jayasinghe, Mathias, and Dharmawardene Bandara, under which these persons, on certain conditions precedent being complied with, one of which was the payment of a sum of Rs. 8,750 each, were to receive a mining lease of the temple lands. But it was expressly provided that the payment of this sum of money should be in full and final settlement, and discharge of all claims which the trustee might have in respect of plumbago which the three persons might excavate between the date of the agreement (October 9, 1910) and the execution of the promised lease. The position of the other Bandara, Abraham, was less clear, and, even up to the end of the argument in this Court, it remained imperfectly explained. The result, however, as the case was presented to us, was this: That defendant, the lessee of the ground share, found himself for some time unable to collect the rent leased to him. because his lesser had thus precluded himself from recovering any ground share for plumbago mined by Jayasinghe, Dharmawardene, and Mathias Bandara until the execution of the promised lease. The promised lease was signed by various parties interested, at different dates extending from March 28 to some time in June, 1913, but the plaintiff states that he could not get in any rent until September, 1913. He was further prevented from recovering the rent due to him from Abraham, by the fact that Abraham had

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disputed his right to collect it. In the result he did not secure the enjoyment of three-fourths of the rent leased to him from September 6, 1912, to some time in September, 1913, and of the remaining quarter from September 6, 1913, to some date in September, 1916. As a result of failing to secure what his lessor had bargained to give him, he sustained, so he alleges, very heavy losses in the way of anticipated profits, and he claims these profits in reconvention.

The case was heard before the learned District Judge on March 3 and 24 and April 27 and 28, 1921. The judgment, however, was not delivered till August 30, over four months after the conclusion of the argument. The learned Judge holds, as a matter of law, that the defendant was not legally entitled to collect any ground share from the four persons referred to until the execution of the promised lease. " Until such time the Bandaras had an absolute right to everything they could (get) out of the land without the payment of ground rent. " With regard to the facts he does not make any explicit finding, but he implies that in his opinion no ground rent was paid to the defendant until the execution of the lease referred to ; but he appears to hold that the plaintiff was under no obligation to give to the defendant anything more than he actually received. He suggests that it is reasonable to think that the defendant who engaged a proctor to look into title must have known of the deed by which the plaintiff disenabled himself from collecting the ground share until the execution of the lease. This supposed knowledge of the defendant is a conjecture, and not based upon any evidence. At any rate the learned District Judge does not appear to suggest that this supposed knowledge of the defendant affects the legal position. He holds upon the interpretation of the deed that " there is nothing in this deed by which the lessors undertook to recover the dues for defendant, or to compensate him for any deficit or refusal on the part of the diggers to pay the one-ninth or one-tenth, " *i.e.*, the ground share.

The learned Judge does make one finding of fact, the effect of which is not clear to me. He says: " I find that Mathias Bandara has been most punctilious in paying his dues. " Inasmuch as the learned Judge holds elsewhere that nothing was due from Mathias Bandara until the execution of the lease, I take it that his finding must be interpreted to mean that Mathias Bandara paid everything that was due after the execution of the lease. The learned Judge gave judgment for the plaintiff as prayed for. He adds : " I consider that defendant had been under a misapprehension, for which he cannot blame the plaintiff, at the time he took the lease, but he had found out his real legal position before he filed this answer. So I, with some reluctance, order him to pay the plaintiff's costs. " The learned Judge clearly means that he considers the defendant was wrong in law, that he was not entitled to collect any ground share for the periods referred to, that he had not in fact succeeded in

collecting it, and that the plaintiff was not responsible for the loss defendant had so sustained.

In this Court the argument took a somewhat singular course. Mr. H. J. C. Pereira accepted what must be taken to be the learned Judge's finding of fact, and also his principal conclusions of law, namely, that the defendant was precluded from collecting the part of the ground share leased to him through the antecedent arrangements made by the plaintiff ; but on this finding, and on this conclusion, he argues that he is in law entitled to judgment, inasmuch (so he puts his case) as the lessor had not fulfilled his obligations to put the lessee into possession. Mr. E. W. Jayawardene, on the other hand, for the respondent, contests Mr. Pereira's legal argument, and says that as regards putting into possession the plaintiff had done all that he was required to do. This was a question of law which the learned District Judge had left wholly unconsidered. On the other hand, Mr. Jayawardene traverses the finding of fact which Mr. Pereira had accepted, and insists that on the true view of the evidence the defendant had received the whole of the ground share from the commencement of the lease in his favour, and that he had sustained no loss at all.

Mr. Jayawardene is not without some apparent material for what appears to be on the face of it a surprising proposition. He relies principally on what has the appearance of being a formal admission, and is as follows :—

Mr. Jayawardene reinforces these admissions by the evidence of Mathias. Mathias appears to be a somewhat singular character. Apparently out of nervousness at having to give evidence before the learned Judge, he fortified himself (as the learned Judge himself observes, " quite unnecessarily ") with what Mathias himself refers to as " two or three drinks. " His evidence accordingly at one stage of the case became incoherent, and the learned Judge fined him for a contempt of Court (a fine which we have remitted on his making a suitable expression of regret to the Judge in Chambers) But the learned Judge, in his subsequent judgment, passes a warm encomium on Mathias, saying that he was much impressed with his sturdy honesty, and that his evidence was quite convincing. Mathias, in his evidence says: " I gave the ground share to the Temple even before I got the lease as a matter of charity. I gave the ground share in 1912. " He produces a letter of January 13, 1913 (P 20) from defendant, in which defendant authorizes him to pay the ground share to one De Mel, and to take receipts from De Mel as he had done before. Further he produces two receipts from the defendant for the delivery of certain quantities of plumbago.

This evidence has an imposing appearance, but, in my own opinion, if it be carefully examined, there is very little in it.

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Further, it is absolutely impossible to believe that if the plaintiff had in fact received the ground share from the Bandaras, he could possibly have gone through the elaborate comedy, which upon this hypothesis he must have been playing. He writes repeated letters of complaint, he makes offers of settlement, he presses his complaint before the Committee personally, he produces his books in the Court. The whole of this is too elaborately foolish a proceeding to attribute to him.

With regard to Mathias it is most unfortunate that these facts were not adequately investigated in the Court below. The two receipts, on examination, are found to relate to the ground share due since the execution of the sublease. Moreover, they refer only to a single pit, and no claim is made by the plaintiff in respect of that pit. P 20 is certainly a surprising document, but it was never put to the defendant in cross-examination. It appears to have been forgotten until, during the argument, it occurred to the Judge to put it to the defendant, and to ask him what he had to say about it. Defendant, who seems himself to have been surprised at the document, says : " I admit this letter. I cannot explain this without consulting De Mel. "

A claim of this sort is, in my opinion, not one that can be disposed of by evading the main issue and by the production of irrelevant admissions in legal documents, or by the piecemeal production of detached papers in this unusual manner. The points to which I have just referred may, no doubt, be relevant incidentally to what ought to have been the main question of fact in the case. Unfortunately, no issue was framed as to whether in fact the plaintiff did or did not collect the ground share during the period under discussion. It would be impossible in my opinion at this stage of the case to allow such an issue to be determined by these indirect and fragmentary circumstances, more particularly as the conclusion we are asked to draw from them is in direct conflict with what must be taken to be the learned District Judge's finding of fact. It is, in my opinion, best that there should be a regular and formal trial of this issue.

But if the position as to the facts is unsatisfactory, the position of the law cannot be described as less so. The real legal question in the case turns out not to have been considered at all. Mr. Pereira based his whole argument on the supposed obligation of a lessor to give his lessee vacant possession. Mr. Jayawardene, who does not dispute this supposed obligation of a lessor, contends with very great force that it could have no application to the lease of a chose in action like the present lease. He maintained, citing references from both Voet and Sande, that the assignee of a chose in action can only be put into possession by being vested with his assignor's rights, and that in the absence of any special covenant the assignee takes the risk of not being able to enforce the right

assigned to him. But if the legal position be further examined, it will be found that no question of vacant possession arises, nor is there any occasion to consider any supposed difference in this respect between a lease of land and a lease of a chose in action. The paragraph in *Voet* (*19, 1, 10*) explaining the nature of vacant possession, to which I drew attention in the course of the argument, and which was there discussed, relates not to leases, but to sales. There is no doubt a special obligation in the case of a lease to put the lessee in possession, but it is not the same as the obligation to give *vacua possessio* in the case of a sale. It was settled in *Wijenaike v. Silva* [1] that it is the duty of the lessor to give tangible and effective possession of the thing leased, and that the mere delivery of a deed or the giving of symbolical possession will not do. That decision was based on the authority of *Vanderlinden* (*1, 12, 1*):—

> "From the contract of letting and hiring the following obligations arise. On the side of the lessor: to give the lessee possession of the thing let at the time fixed, in order that he may have the use of it."

We asked Mr. Pereira in what way the lessee of a chose in action as, for example, the lessee of the rents of a line of tenements, could be put into possession of the rights leased to him except by completion of the assignment of those rights. He suggested that it was the obligation of the lessor in such cases to procure a formal attornment from each tenant to the lessee. There is no authority for this proposition, which is wholly new, and is inconsistent with the nature of contracts of this description, which are designed to relieve the lessor of the trouble of dealing with his own tenants. If it were necessary to decide the point, with regard to the three Bandaras, I should be of opinion that in the case of a lease of a chose in action the requirement cited in *Vanderlinden* was fulfilled by the execution of the assignment. But it is not this obligation of the lessor which is really here in question. The really relevant obligation is that next stated by *Vanderlinden*, namely—

> "For quiet enjoyment of the thing let, both on the part of the lessor and others."

The whole subject will be found fully discussed in *Pothier's Commentary on the Pandects 19, 2, 1.* It is there laid down and explained by reference to the *Digest* in the fullest manner that the *actio conducti* lies when the lessee is not permitted to enjoy the thing leased. This action lies whether the obstruction to the enjoyment is due to any act of the lessor or to that of a third party, and notwithstanding the fact that the lessor acted in good faith.

[1] *(1906) 3 Bal. 36.*

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In some cases the lessee is entitled to damages; in others only to a remission of the rent. See *Digest 19, 2, 33.*

> " Nam et si colonus tuus fundo frui a te aut ab eo prohibetur, quem tu prohibere ne id faciat possis, tantum ei præstabis, quanti eius interfuerit frui, in quo etiam lucrum eius continebitur : sin vero ab eo interpellabitur, quem tu prohibere propter vim maiorem aut potentiam eius non poteris, nihil amplius ei quam mercedem remittere aut reddere debebis."

That is to say, if your tenant is prevented from enjoying the farm leased to him, either by you or some one whom you can restrain, you must pay him damages, in which his anticipated profits may be included. If, however, he is so excluded by some one whom you cannot restrain or by reason of *vis major*, you are only responsible to him for a remission of rent. It seems clear on this principle that in a case like the present where the lessee is said to have been prevented from enjoying the thing leased through the antecedent arrangements of his lessor, he can recover damages.

This then is the real legal question to be determined so far as relates to those whom I have described as the three Bandaras. With regard to Abraham Bandara we do not even now know what his position was. We are told that he took up the position that he was mining under a lease from the incumbent of the temple, prior to the appointment of a trustee under the Buddhist Temporalities Ordinance, and that he claimed to be responsible to this incumbent alone. If this was the position that he took up; it was an untenable one, but from papers which came to light, at the close of the argument, it seems possible that his position has not been fully appreciated. This is a point for further inquiry. If it, indeed, is the fact that he took up this untenable position, then it seems to me that it was for the defendant to enforce his rights by suit. From a study of the paragraphs in which Voet describes the effect of a cession of a chose in action (see Voet 18, 4, 14 and 15), from the physical impossibility of putting a lessee into possession of such a right, and from an absence of any reference to any obligation of this nature in any of the textbooks, I am of opinion, as at present advised, that the assignee of the lease of a chose in action cannot claim any further assurance in addition to his document of title. It is everywhere recognized that taxes may be the subject of a lease. See *Vanderlinden 1, 11, 7:*

> " The requisite essentials to this contract are a thing capable of being let on hire, whether movable or immovable, corporeal or incorporeal, as the farming of tolls and taxes."

It would be preposterous to suppose that under a lease of tolls or taxes there is an obligation on the part of a lessor to procure a formal admission for the benefit of his lessee from every toll or

tax-payer. It is for the lessee, if necessary, to enforce his rights by suit.

As I have before intimated, the facts of the case still remain in obscurity. Inasmuch as the right of the Bandaras to be excused from payment of ground share depends on two conditions precedent: (1) the entering up of a judgment in an action and (2) the payment of a sum of money; it might have been expected that it would either have been proved or formally admitted that these conditions were fulfilled. But there are no traces of this in the record. The facts with regard to Abraham are even more obscure. The date from which the exemption of the Bandaras from their obligations ceased has not been defined. It seems to have been thought sufficient to accept defendant's statement that he did not succeed in getting in his ground share until September, 1913. In my opinion the decree should be formally set aside, and the case should go back for further inquiry, so that the facts may be more fully and specifically investigated, and that they may be then dealt with in the light of the legal principles above explained. With regard to the costs, in my opinion, the appellant must pay respondent's costs of appeal; costs in the Court below to be costs in the cause. It is mainly through the fault of the appellant, or his advisors, that it proves impossible to present the appeal before us in a manner that was at all satisfactory. Up to the last neither the defendant nor those who appeared for him on the appeal could give any explanation of the admissions in the pleadings and affidavit above referred to or of P 20. The apparent significance of these documents ought to have been realized by those appearing for him, and his explanation ought to have been secured. In the same way he was responsible for the obscurity which still remains as to the position of Abraham. For these reasons, I think, he should pay the costs of the appeal.

I would further add that in my opinion this is a case that ought to be settled. If plaintiff's claim is to be accepted, he has sustained very considerable losses. On the other hand, he very generously, at one stage of the story, offered to settle his claim for a remission of rent. It is hardly likely that after this prolonged litigation he would consent to the same terms now. But if his claim against the temple is sustained, it can hardly be enforced without seriously impairing the temple's endowments. The dispute arises out of very special conditions which are now a thing of the past, namely, the boom in plumbago mining during the war. As I have said, it seems to me, that an effort should be made to settle the case on an equitable basis.

PORTER J.—I agree entirely with the judgment of the learned Chief Justice, and consider with him that this case is eminently one for an equitable settlement of all disputes between the parties.

Sent back.