1931 *Present:* **Macdonell C.J.**

NAGAMUTTU *v.* SITTAMBARAPILLAI.

55—C. R. Mallakam, 5,896.

Agreement—Action for money lent—Oral agreement to possess land in lieu of interest—Prescription.

Where in an action for the recovery of money lent the defendant pleaded prescription, an oral agreement to possess land in lieu of interest may be proved for the purpose of averting prescription.

APPEAL from a judgment of the Commissioner of Requests, Mallakam.

R. Ramachandram, for plaintiff, appellant.

September 24, 1931. Macdonell C.J. —

In this case the plaintiff-appellant sued the defendant-respondent for the recovery of Rs. 120 lent to the defendant-respondent in the year 1920. The plaintiff-appellant stated that in August, 1921, the defendant-debtor had requested him " to take and enjoy the produce of the land situated at Siruvilan called Thaduvan in extent 30 lachams varagu culture, with palmyras and young palmyras, till he pays the said sum of Rs. 120 in lieu of interest, accordingly the plaintiff possessed the said land and enjoyed the produce thereof till February 8, 1930 ", and it was averred by the plaintiff-appellant that he had so taken possession and paid himself the interest out of the produce up to February, 1926, when the defendant rendered the land so occupied by the plaintiff profitless by cutting and removing the olas from the palmyra trees. To this the defendant replied at length, admitting the oral agreement and possession by the plaintiff-appellant thereunder, but stating that the terms of it were totally different from those averred by the plaintiff-appellant; and he also counterclaimed under the same oral agreement rent Rs. 70. He further pleaded that the claim of the plaintiff was prescribed and his action not maintainable in the absence of a written agreement under Ordinance No. 7 of 1840. The learned Commissioner held in accordance with this plea that the action was prescribed and dismissed it with costs.

It seems to me that this appeal must succeed. The plaintiff-appellant is not seeking to set up any contract or agreement for effecting the sale, purchase, transfer, assignment, or mortgage of land, or for establishing any security, interest, or incumbrance affecting land, nor any contract or agreement for the future sale or purchase of land. His case put shortly is this. He claims that interest has been paid him for a continuous period so as to defeat prescription, and he simply asks to be allowed to bring proof as to the manner in which that interest has been paid. So put, and I think that is the correct way of putting his case, it will be seen that it has nothing to do with Ordinance No. 7 of 1840, section 2, at all. In its facts this case does not seem to me distinguishable from *Ameresekere v. Ameresekere* [1], where money having been lent interest was not actually paid but the debtor allowed the creditor to occupy a house of the debtor, the rent for it to be set off against the interest due on the loan; per Wood Renton C.J. " We have here to do, not with a fresh acknowledgment of indebtedness, but with the question whether there was not such a payment

[1] *18 N. L. R. 508.*

of interest as would keep the original debt alive.. I see no reason why the existence of an agreement for payment may not be established by implication from the circumstances of a case." The present case is stronger for the appellant, since the agreement and the occupation thereunder are admitted by the defendant and it is only the terms of that agreement that are in dispute. There is a succession of cases from *Perera v. Fernando*[1], which established that there can be an action based upon use and occupation although the use and occupation were under a verbal agreement. Neither party could sue to enforce that verbal agreement for use and occupation, but, there having been the use and occupation, certain liabilities, *e.g.*, to pay compensation for the use and occupation, will arise to which the Courts will give effect. *Kanagaratna v. Banda*[2] and *Sinno Appu v. Appu Sinno*[3] are later cases to the effect that an action for use and occupation on a parol agreement will lie.

I would also wish to point out this. If the judgment now appealed from were to stand, the defendant-respondent would be at liberty to obtain judgment for use and occupation by virtue of the verbal agreement which the plaintiff-appellant is to be debarred from using as an acknowledgment of interest and therefore of the debt upon which interest is said to have been paid.

The judgment appealed from must be set aside and the case remitted to the learned Commissioner to be heard and determined in the usual course. The appellant to have the costs of this appeal, all other costs to abide the event.

Appeal allowed.