Present : Bertram C.J. and De Sampayo J.

1920.

In the Matter of the Application of J. E. DE SARAM, Notary Public, regarding Stamp Duty on Deed No. 467.

Stamp Ordinance—Money advanced to owner of a plumbago pit—Agreement to work the pit and pay off debt and to recover further plumbago of a specified value—Agreement by owner to pay a certain sum for every ton.

An instrument headed "deed of agreement" was to the effect that the party of the first part, who had advanced money already to the owner of a plumbago pit, should dig the pit, work off his debt, clear his expenses, and should then be allowed to develop the pit, extract plumbago to the value of Rs. 20,000, and should then hand the pit as a fully developed pit back to the owner, and that the owner, in consideration of the advantage he derived from having the pit fully developed, should pay to the other party a small sum on every ton of plumbago he wins from the pit so developed.

Held, that the deed was neither a conveyance, nor a lease, nor an agreement, and had to be stamped under Art. 28 as a deed not specially provided for.

Croos-Dabrera, for the appellant.—The instrument in question is in no sense a conveyance. In order to constitute a conveyance or transfer there should be a complete transference of rights. No *dominium* passes by this deed. The grantee is given the right to take all the plumbago from a certain pit until a sum of money advanced by him to the grantor is liquidated. There are other incidental and minor covenants, after the happening of which the property is to go back to the grantor. The document is to all intents and purposes a lease. If the essential and distinguishing features of a lease are present in any instrument it is liable to stamp duty as a lease. *Panditatilleke v. The Commissioner of Stamps*.[1] This instrument should, therefore, be stamped as a lease or as a document not otherwise charged in the schedule nor expressly exempted from stamp duty. In *Panditatilleke v. The Commissioner of Stamps* [1] the document was stamped with a stamp of Rs. 10.

Dias, C.C., for the Attorney-General.—The language of the document shows that *dominium* is to vest in the grantee. A fresh conveyance would be necessary to re-vest title in the grantor. To constitute a valid lease under the Roman-Dutch law there should be a fixed and limited time and a certain sum of money as hire or rent. *Walter Pereira 663.* In this document there is no fixed period, nor is there any certainty about the rent. It cannot therefore be held to be a lease. The case of *Panditatilleke v. The Commissioner*

[1] *(1909) 12 N. L. R. 69.*

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of Stamps [1] is distinguishable. There the lease was for a fixed period, and the lessee was to give a share of the gems dug from the land. In this case the so-called lessee is to get a share of the plumbago, which is practically a portion of the land. A usufructuary mortgagee was held not entitled to plumbago dug from the land. *Arana v. Ibrahim Lebbe.*[2] And in *Nonihamy v. Silvá*[3] it was held that he was only entitled to the interest on the proceeds thereof. This document cannot be said to be one "not otherwise charged nor expressly exempted."

The deed in question was as follows:—

Agreement.

No. 467.

Don Senaris Senarat Yappa of Wattagama of the first part and Philip de Silva Thanapathy of Bambalapitiya of the second part send greetings:

Whereas the party of the first part is seized and possessed of under and by virtue of deed No. 8,090 dated 23rd day of November, 1918, attested by R. A. F. Jayasinghe, Notary Public of Kandy, the property fully described in the schedule annexed hereto called Gederawatta:

And whereas the said party of the first part has agreed with the party of the second part to deliver and give over the said property with the plumbago pit C. P. No. 170 on it, together with all the plumbago, machinery, implements, tools, &c.:

Now these presents witness that I, the party of the first part, do hereby give over and deliver the said plumbago pit with the aforementioned implements, and I, the party of the second part, do accept the same subject to the following conditions and covenants.

The conditions above referred to:—

1. This agreement is to come into force from the 10th day of April, 1919.

2. The party of the second part to utilize the plumbago till his expenses incurred in connection with the working of this pit are covered, and till the sum of Rs. 9,655·62, now due to him, is made up; and thereafter the said party of the second part to return and deliver back to the party of the first part the said pit without damaging the same, together with the machinery, implements, &c., in the conditions in which they are found at the time of suspension of the working thereof.

3. The party of the first part to have the right at reasonable times to inspect the pit books and the implements, tools, &c., till the above loan is settled.

4. That until the loan is settled the second party cannot remove plumbago from the land without exchanging receipts, and in the event of the absence of the first party, if the herein-named Dissanayaka Mudiyanselage Kiribanda attaches his signature to the receipt, it should be treated as signed by the said first party; that the first party should sell at Colombo the plumbago dug out from the said pit in the aforesaid manner at a proper rate with the consent of the second party.

5. That the second party can make proper use of the road between the two houses and the sheds and cottages built in connection with

[1] *(1909) 12 N. L. R. 59.* [2] *(1919) 21 N. L. R. 182.*
[3] *(1919) 21 N. L. R. 197.*

the work, and that he cannot do anything to endanger the trees and plantations thereon.

6. That until plumbago is dug out from this pit the second party should pay Dissanayaka Mudiyanselage Kiribanda of Bulatwatta Walawwa Rs. 22 monthly and obtain receipts, and the amounts so paid should be added as supplementary sums to the loan due from the first party.

7. That in the event of any dispute arising as an obstacle to the second party's digging out plumbago, the first party and the said Dissanayaka Mudiyanselage Kiribanda should settle it and be answerable for the same.

8. That after the amount is settled by the first party in the aforesaid manner, if there are profits from the pit, the second party should be allowed as a mark of pleasure to dig out plumbago not exceeding Rs. 20,000 in value, and thereafter the first party should pay the second party Rs. 25 for each ton of plumbago dug out from the said pit; that if the amounts due from the first party to the second party are completely settled upon this deed, the purpose of deed No. 329 of December 6, 1919, attested by Notary J. E. de Saram of Colombo should be regarded as fulfilled.

The aforesaid parties do hereby for themselves and on behalf of their heirs, executors, administrators, and assigns agree to fulfill the above covenants.

In witness whereof the said two parties have set their signatures to this and two others of the same tenor at Colombo on this 10th day of April 1919.

The schedule above referred to :—

All those lands called Dodamgaspitiyekumburepallewatta . . . .

(Signed in Sinhalese) Arnolis Fernando.

This is the signature of Eddie Simon Fernando : (Signed) E. S. Fernando.

(Signed) J. E. de Saram,
Notary Public.

This is the signature of Don Senaris Senarat Yapa : (Signed) D. S. S. Yapa.

(Signed in Sinhalese) B. Kiribanda.

This is the signature of Philip de Silva Thanapathi : (Signed) Philip de Silva.

November 23, 1920. BERTRAM C.J.—

This is an appeal under section 32 of the Stamp Ordinance, 1909, against an adjudication by the Commissioner of Stamps under section 30 of that Ordinance. The document, which is the subject of the appeal, is of a somewhat peculiar character, and some difficulty has arisen in the case owing to the fact that the translation submitted to the Commissioner of Stamps differs in material particulars from the translation which is annexed to the document as submitted to us. I will follow the first translation, as it appears on examination to be more accurate. The document is headed "Deed of Agreement," and it relates to a plumbago pit. It declares that the first party has hereby delivered to the second party the pit in question, and it provides that out of the plumbago to be dug from the pit by the second party a certain debt of Rs. 9,655·62 shall be liquidated;

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that the plumbago extracted from the pit by the party of the second part shall belong to him, and that after the expenses incurred in winning the plumbago and liquidating the aforesaid debt have been provided for, the pit shall be delivered back to the party of the first part. There is a subsequent clause, however (clause 8), which provides that the party of the second part, after the liquidation of the debt, shall be entitled to extract plumbago to a value not exceeding Rs. 20,000, and that, after plumbago to this value has been extracted, the party of the first part, who is apparently at this point assumed to be once more to be in possession of the pit, shall as a token of pleasure pay to the party of the second part Rs. 25 per ton in respect of the plumbago which he may subsequently extract from the pit.

The document is a peculiar one. The meaning apparently is that the party of the first part, who has advanced money already to the owner of the pit, shall dig the pit, work off his debt, clear his expenses, and shall then be allowed to develop the pit, and in so doing to extract the plumbago to the value of Rs. 20,000, and shall then hand the pit as a fully developed pit back to the owner, and that the owner, in consideration of the advantage he derives from having the pit fully developed, shall pay to the other party a small sum of every ton of plumbago he wins from the pit so developed.

Mr. Dias, who appears for the Crown, contends that this document is a conveyance. Mr. Croos-Dabrera, who appears for the appellant, says that it is a lease, or that, if it is not a lease, it is a "deed or instrument not otherwise charged in the schedule" under paragraph 28 of the first part of schedule B. Let us consider, in the first place, whether the document is a lease. The essentials of a lease, according to the Roman-Dutch law, are explained in sub-section (7) of *Walter Pereira's Laws of Ceylon* on page 663 and the following. It appears that ordinarily speaking a lease must be for a fixed or limited time, and in consideration of a certain sum of money as hire or rent. The learned author is there following the words of Van der Linden. Certainly, this document does not fulfil these conditions. We have been referred to a case decided by the Full Bench—*Panditatilleke v. The Commissioner of Stamps* [1]—in which a very wide definition of a lease is quoted from Touchstone cited in *Stroud's Legal Dictionary*. In the case there under consideration the property was handed over for a definite time, and in return for a definite rent. So that that case is no authority whether the document in this case is a lease. I cannot see myself that the document is of a sufficiently definite character to be regarded as a lease. Is it then a conveyance?

Mr. Dias pressed upon us the suggestion that it was, in fact, a conveyance subject to a condition that in a certain event the property would be re-conveyed. I am unable to read the words in that

[1] *(1909) 12 N. L. R. 59.*

sense. It does not appear to me that the words referring to the delivery of property are capable of being regarded as words of conveyance. They are certainly not words of art for this purpose. Nor is their ordinary significance such that they imply a conveyance. The test it this. Is another notarial document really necessary for the purpose of re-vesting the property, I understand that the word used both for delivery and for delivery back simply signifies " giving charge." If that is so, I do not think that the document can be regarded as a conveyance. We are thus brought by a process of exclusion to paragraph 28 of the schedule above referred to, and it seems to me that the document comes within that paragraph. To quote the words used on page 666 of Walter Pereira's work with reference to the document there under discussion, " it constitutes a contract by itself which has no special name." In my opinion, therefore, the stamp duty to which it is liable is Rs. 10 under paragraph 28.

The appellant maintained that the proper stamp was only a stamp of 50 cents. He stamped the document accordingly, and maintained that it was rightly stamped. This contention fails. It is true that in this Court Mr. Croos-Dabrera did not seek to maintain the original contention advanced in the petition of appeal. But, in the circumstances, I think that both parties must pay their own costs.

DE SAMPAYO J.—I agree.