1932 *Present :* **Macdonell C.J. and Dalton J.**

DE SILVA *v.* SENARATNE.

301—D. C. Kalutara, 15,886.

Lease—Failure to give vacant possession—Trespasser claiming title under lessor—Claim for damages against lessor.

The rule that a lessee who has obtained vacant possession of the leased premises must, in the first instance, sue a trespasser in ejectment does not apply, where the trespasser claims title under the lessor.

In such a case, the lessee is entitled to sue the lessor for damages.

APPEAL from a judgment of the District Judge of Kalutara.

L. A. Rajapakse, for defendant-appellant.

N. E. Weerasooria, for plaintiff-respondent.

October 4, 1932. MACDONELL C.J.—

The facts in this case are that the plaintiff, who owns and leases cinnamon bearing land, took on April 11, 1928, the lease of two lands, No. 1 Polkutuwewatta and No. 2 Alubogahakurunduwatta, from one Francis Senaratna for 2½ years to commence on November 1, 1928, paying Francis Rs. 600 cash in advance. The reason for this postponement of the date when the lease was to take effect was because another man was then in possession of these two lands as lessee, and there is sufficient

[1] *(1907) 3 Balasinghams reports 243.* [2] *(1907) 2 A. C. R. 165.*
[3] *(1905) 1 A. C. R. 27.*

evidence to show that this lessee was the person described in the evidence as the "Uggalboda man" and as "Velun Baas". The plaintiff seems to have discovered that Francis Senaratna, his lessor, was not the owner of land No. 2, but that Francis' mother was. Consequently he took a further lease No. 572 executed to him by the defendant, the mother of Francis, on June 29, 1928, of the same two lands to commence on December 1, 1928, recited to be for the same consideration, viz., Rs. 600; really the consideration was the forbearance by plaintiff to sue the said Francis for having leased him a land to which Francis had no title. Plaintiff, it may be stated, does not live near these two lands, but at some little distance. It would appear that land No. 1 bears better cinnamon crops than land No. 2 and plaintiff asserts that though he got possession of land No. 2 and took crops therefrom—this would be in the early months of 1929—he was not able to take possession of land No. 1 since the prior lessee Velun was still in possession and would not quit. He complained to the defendant who "promised to settle", but evidently she did not settle, and the evidence of one of defendant's own witnesses shows that this Velun was still in possession about the latter part of the year 1929. Evidently he had remained on after his own lease had expired, and from all the circumstances one can conclude that his doing so was with the acquiescence and probably the assistance of the defendant and her son Francis, one or both. On October 29, 1929, the plaintiff commenced the present action against the defendant claiming damages and alleging that she had not given him peaceful and vacant possession of land No. 1.

In reply the defendant avers that land No. 1 was the property of her son Francis and says that she did give possession of land No. 2, and she also alleges fraud on the part of plaintiff and her son in getting her to execute lease No. 572. The case went to trial on certain issues of which the following are important:—

"(1) Was the deed of lease No. 572 executed merely as proof that the defendant would not disturb the lessee in the possession of the second land mentioned in the deed of lease or was it executed and did the defendant undertake to place the plaintiff in possession of both the lands leased?

(3) Did the plaintiff obtain possession of both the lands leased to him?

The evidence of the plaintiff was that he did not get possession of land No. 1 so as to peel any cinnamon off it and that defendant, when complained to, promised to put things right but did not. A cinnamon peeler called for the plaintiff gave evidence that another man peeled land No. 1 and that he was still in possession, and one of the defendant's witnesses shows that this man was the former lessee Velun, as has been stated. The only evidence suggesting that the plaintiff did get possession was that his complaint to the headman was not made till October, 1929, whereas his difficulties as to possession would have been in the early months of that year, and that then he only mentioned "disputes" but not inability to get possession, also that his cinnamon peeler, giving evidence, says "Polkutuwewatta, land No. 1, was also weeded by us and somebody else peeled the cinnamon. We took one and a half months over that, then some people came and disturbed our possession." As to this last piece

of evidence it may be pointed out that possession so as to be able to weed is not a particularly beneficial possession—the prior lessee Velun may have been quite glad to see someone else doing the weeding for him—and that the evidence is quite uncontradicted that the plaintiff never got possession of land No. 1 for the purpose of peeling cinnamon, that for which he leased the land. The learned District Judge, in his judgment duly considered the evidence as to a servant of the plaintiff having weeded, as tending to show possession by the plaintiff, and concluded on the whole evidence as follows:—"In the circumstances it cannot be said that the defendant had given effective vacant possession of the first land to the plaintiff." I do not think on the evidence that one can say that he was wrong or that it was proved that plaintiff ever did get vacant possession of this land No. 1.

On the appeal it was strenuously argued that the evidence showed that the plaintiff had obtained possession and that therefore his action was misconceived and should have been brought against the trespasser Velun and not against the defendant. On the balance of testimony I think the learned District Judge was right in holding that possession was never given.

Even however if the evidence were that possession was given, the rule that if you have once obtained possession action must be brought not against the lessor but against the trespasser, at the same time warning the lessor of the trespass, does not seem to apply where the trespasser claims title under the lessor. See per Wood Renton J. in *Alagiawanna Gurunanse v. Don Hendrick.*[1] "A lessee who has been put into vacant possession of the property demised cannot, in the absence of an express covenant by the lessor in the lease empowering him to do so, bring his lessor into Court against the latter's will as a defendant to an action brought by him against third parties, not claiming title under the lessor, who have ousted him from possession." Here the lessor is the sole defendant but the same principle would seem to hold. The third party does claim title under the lessor, then the objection to suing the lessor herself disappears. The passage from the *Censura Forensis IV., c. 19, s. 10,* cited in *10 N. L. R. 311* seems to recognize the same distinction. "*Tradere hic non est simpliciter de manu in manum conferre, aut in nudam detentionem emptorem deducere, sed vacuam possessionem praestare, id est, liberam ab omnibus possessoribus et detentoribus justis.*" Then Velun holding possession against the plaintiff would be a *possessor et detentor justus,* that is to say, he would claim under title from the owner, plaintiff's lessor. If that is so the defendant could not maintain that she had given vacant possession since there was another person then in possession by title—lease or at the very least licence—under her. The evidence, as I have said, is sufficient to raise the very strong presumption that this prior lessee Velun was in possession with the support or at the very least the acquiescence of the defendant. On either ground, therefore, I think this appeal fails and must be dismissed.

The plaintiff gave evidence, as to damages, which was not contradicted. The learned District Judge found the damages reasonable and there is no evidence on the record to suggest the contrary. The appeal is dismissed with costs.

[1] *13 N. L. R. at 232.*

DALTON J.—

I agree that the appeal must be dismissed, defendant having failed to give vacant possession of the first land to the plaintiff. It is to be noted that neither in her pleadings nor in her evidence does she say she as lessee ever gave plaintiff possession of this land. Francis, her son, was not called by her as a witness, for a fairly obvious reason since he could not help her case, a third party being in possession of the property. Vacant possession means such possession as can be legally maintained against a third party (*Jamis v. Suppa Umma et al.*[1]), and that possession, "possession unmolested by the claims of any other person in possession" (*vide Ratwatte v. Dullewe*[2]), both mother and son knew under the circumstances here they could not give.

The fact that one of the plaintiff's workmen had done some weeding on the land, that fact standing alone and in face of other facts upon which plaintiff relies, is quite insufficient to support defendant's case. Plaintiff did not live in the locality, and as the trail Judge points out, this weeding was done at a time when the land was unoccupied.

Appeal dismissed.