that a sum of Rs. 38,650 is undisclosed income of the assessee for which he is liable to pay income tax. The learned acting Attorney-General has pointed out that this sum of Rs. 38,650 is arrived at as follows :

Rs.	72,480·00 hotel profits
	10,000·00 savings from salary
	37,000·00 arbitration award
	5,000·00 cash in hand
	7,927·00 debts due in France
	7,500·00 De Bossu's debt
	20,000·00 married lady's money
	159,907·00

If this sum is deducted from the Rs. 198,557·10 which the assessee had in the bank, the balance is Rs. 38,650·00 which the assessee admits in R 2 is undisclosed income for which he has to pay tax. The Attorney-General further pointed out that the contention now advanced was not taken before the Board of Review.

The evidence before the Commissioner, oral, documentary and circumstantial, giving the go-by to R 23 and R 29, amply justify his findings. I dismiss the appeal and confirm the assessment determined by the Board of Review with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

1949 *Present :* **Wijeyewardene C.J. and Pulle J.**

UKKU AMMA *et al.*, Appellants, *and* JEMA *et al.*, Respondents

S. C. 78.—D. C., Kurunegala, 4,281.

Lease—Exceeding one month—Pro tanto *alienation—Lessee not put in possession—His right to sue third parties in possession—Lessor not a necessary party—No distinction between short and long leases.*

A lessee under a notarial lease who has not been put in possession of the property leased can bring an action against third parties in possession of the property and compel them to surrender possession to him without making the lessors parties to the action. The distinction between short and long leases is not part of the law of Ceylon.

APPEAL from a judgment of the District Judge, Kurunegala.

H. W. Jayewardene, for defendants appellants.

H. V. Perera, K.C., with *C. R. Gunaratne* and *W. D. Gunasekara*, for plaintiffs respondents.

Cur. adv. vult.

October 24, 1949. WIJEYEWARDENE C.J.—

One H. M. Appuhamy who owned the land forming the subject matter of this action mortgaged it in 1928. At a sale held in satisfaction of the hypothecary decree entered against him, the executors of the Last Will of the mortgagee purchased the property in 1939 and conveyed it by deeds executed in 1942 and 1945 to three devisees named in that Last Will. Those devisees leased the property to the plaintiffs by P8 and P9 of 1947 for six years commencing from June 12, 1947. The instruments P8 and P9 have been duly attested by a Notary.

The plaintiffs filed this action in July, 1947, pleading that the defendants disputed their right to possess the property under P8 and P9. The first defendant is said to be the widow of H. M. Appuhamy. The second defendant is the daughter of H. M. Appuhamy and is married to the third defendant. They all denied the title of the lessors of the plaintiffs and pleaded that H. M. Appuhamy was in possession of the land as owner up to the time of his death. The District Judge gave judgment for the plaintiffs.

The only point that was argued by the appellants' Counsel was that the plaintiffs who did not get possession under P8 or P9 could not sue third parties without making the lessors parties to the action, as the lease in their favour was for a period under ten years. He contended that such a lease did not amount to an alienation unlike a lease *in longum tempus*. He relied on an observation of Lawrie, A.C.J. in *Issac Perera v. Baba Appu et. al.*[1] and cited in support of his argument Wessels on the Law of Contract in South Africa, Volume 1, sections 1734 to 1740, Voet (Berwick's Translation) 19.2.1 and van Leeuwen's Censura Forensis 1.4.22.5 and some other authorities.

The question whether an action such as this could be maintained without making the lessor a party did not arise for adjudication in *Issac Perera v. Baba Appu et al.* (*supra*), as the lessor was, in fact, a party to that action. Moreover, Withers, J. who delivered the main judgment in the case held, in very clear terms, that a lessee under a notarial lease who had not been put in possession of the property could bring an action against third parties in possesssion of the property and compel them to surrender possession of the property to him. In giving that opinion, Withers, J. referred to the remarks of Bonser C.J. in *Goonewardene v. Rajapakse et al.*[2] that in Ceylon "we ought to regard a notarial lease as a *pro tanto* alienation, and we ought to give the lessee, under such a lease, during his term, the legal remedies of an owner or possessor".

There is no doubt that, under the Roman law, the *conductor* had only a right *in personam* against the *locator*. If his right to possession is disputed by the *locator* or by a stranger, he could not invoke the aid of the interdicts by which possession was restored. He could only bring an action for damages against the locator for breach of contract. The latter alone could sue the trespassers, and, if he failed to do so, he committed a breach of the contract (Hunter's Roman Law, pages 506–507). According to Nathan, this principle of the Roman law which holds that the contract of lease is entirely a matter between *locator* and *conductor* and gives the

[1] (*1897*) *3 New Law Reports 48.* [2] (*1895*) *1 New Law Reports 217.*

latter no separate right or remedy against third parties, was not adopted in Holland (Nathan, Common Law of South Africa, Volume 2, Second Edition, page 919). According to Lee, the position was somewhat slightly different. He says, " this principle prevailed in some parts of Holland, (at all events as regards short leases) and found expression in the proverb, *Koop breekt huur* (sales break hire) . . . . Elsewhere and later the rule was reversed, *Breekt koop geen huur* (sale breaks no hire), *Huur gaat voor koop* (hire goes before sale) ; with the result that the hirer could make good his right to the land against any third person to whom his landlord might have sold it ". (Introduction to Roman Dutch Law, Fourth Edition pages, 158–159).

Closely connected with the question of the extent of the rights of a lessee is the question as to the formalities to be observed in respect of a contract of lease. Under the Roman law, the contract need not be in writing. A change was brought about under the Roman-Dutch law chiefly through Placaats dating from 1452. The Jurists are not all agreed on the question whether these Placaats deal with houses or required only after-leases (Nahuyr) of lands to be in writing. There was further the question whether under the Roman-Dutch law a lease for any length of time and, in particular, for a long period, required to be executed *coram lege loci* in order to render it valid against third parties. On this question too there was a conflict of opinion among the Jurists. Some thought that there was no need for such formality, some, that a lease for over ten years should be so executed, while others thought that only a lease for twenty-five years or more required such formal execution. (Wille on Landlord and Tenant, 1910 edition, pages 99–107).

The position in the later stages of the Roman-Dutch law of Holland was that a lease gave the lessee proprietary rights, provided, of course, that the lease was executed in accordance with the formalities required by law.

In South Africa there was a development of the law brought about by judicial decisions and legislation. The position there is described by Lee as follows:—" with statutory exceptions, the validity of a lease as between the parties is independent of the presence or absence of writing, and a lease which is good between the parties is also good as against persons claiming through the lessor by lucrative title. As regards purchasers and creditors the law is otherwise. A short lease is absolutely valid against them. A long lease if only registered against the title, or if the purchase was made or the credit given with the knowledge of the lease. Such is the general law but there are statutory variations ". (Introduction to Roman-Dutch Law, pages 159–161).

I see no reason for drawing a distinction in Ceylon between short leases and long leases spoken of by text book writers, when we are considering the question whether a lessee has rights against third parties. All that we have to consider is whether the lease is duly executed according to law. If a lease for any period exceeding a month is notarially attested it should be regarded as giving "a species of ownership in land" (Lee : Introduction to Roman Dutch Law, Fourth Edition, page 161), and vesting in the lessee proprietary rights which could be enforced between third

parties. If the lease is duly registered, it is entitled to prevail even against those claiming title from the lessor under deeds executed prior to the lease but registered subsequently. Therefore, I would respectfully adopt the views expressed by the Judges in *Carron v. Fernando et al.* [1] Though the appellants' Counsel attempted to distinguish it on the ground that the lease considered in that case was for a period of over ten years, it is clear from the judgments that the distinction between short and long leases was not recognized as part of the law of Ceylon.

I would dismiss the appeal with costs.

PULLE J.—I agree.

Appeal dismissed.

[IN THE PRIVY COUNCIL]

1949

NAGALINGAM, Petitioner, *and* THANABALASINGHAM *et al.*, Respondents

S. C. 1-2—D. C. Point Pedro, 2198

Privy Council—Application for conditional leave to appeal—Refusal by Supreme Court—Application for special leave to appeal.

APPLICATION to the Privy Council for special leave to appeal from a judgment of the Supreme Court which is reported in *50 N. L. R. 97.*

Stephen Chapman with *Kamala Tyabji* for the petitioner.

No appearance for the respondents.

In *Nagalingam v. Thanabalasingham et al. (1949) 50 N. L. R. 396,* application was made for conditional leave to appeal to the Privy Council from a judgment of the Supreme Court dated October 13, 1948. Notice of the application served on the respondents had wrongly described the judgment in respect of which the application was to be made as being dated October 11, whereas in fact there was no judgment of that date, the correct date being October 13. The Supreme Court dismissed the application mainly on this ground, holding that the requirements of the rules set out in the Schedule to the Appeals (Privy Council) Ordinance should be strictly complied with. The petitioner, thereupon, applied to His Majesty in Council for special leave to appeal from the judgment

[1] *(1933) 35 New Law Reports 352.*