Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Van Langenberg.

June 7, 1910

PEIRIS *et al. v.* PERERA.

D. C., Chilaw, 3,605.

Lease of coconut trees for one year—Should be by notarial agreement—Lessee under verbal lease bound to compensate owner for produce enjoyed by lessee.

A contract by which a person gives another the right to the exclusive possession of specified coconut trees for a year, for the purpose of drawing toddy from them, must be notarially executed. A lessee who enjoyed the produce of the trees under a verbal lease would, however, be bound to compensate the owner for the produce.

THE facts are fully set out in the judgment of Van Langenberg A.J.

Chitty, for appellant.—The agreement set out in the plaint is void in law, as it is not contained in a notarial document. It is an agreement whereby an interest in land is sought to be created. Counsel cited *Board of Health and Improvement, Trincomalee, v. Subramaniapillai;* [1] *Perera v. Amarasooriya;* [2] *Pereira's Laws of Ceylon, vol. II., page 557.*

B. F. de Silva, for the respondents.—The case of *Fernando v. Themaris* [3] is a binding authority. The defendant has taken the produce of the trees and must pay compensation in any case.

Cur. adv. vult.

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The plaintiffs bought from the Crown the right to buy and sell arrack in the Chilaw District for the years 1903 and 1904. The plaintiffs say they sold to the defendant the right of selling arrack at a particular tavern for Rs. 1,500, and that they gave possession of seventy-five coconut trees to the defendant with a right to draw toddy from them for that year, and that defendant was to pay them rent at the rate of Rs. 8 per tree. They further claim Rs. 100 for arrack sold by them to the defendant. Certain payments were made by the defendant, and the plaintiffs bring this action for a balance due to them of Rs. 871.75. There was no written agreement between the parties. In his answer the defendant pleaded that the agreement sued upon was bad in law, and on the merits denied the agreement set out in the plaint, and stated that the

[1] *(1906) 2. A. C. R. 146.* [2] *(1909) 12. N. L. R. 87.*
[3] *(1892) 2. C. L. R. 183.*

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agreement between him and the plaintiffs was that he should buy all the arrack he wanted from the plaintiffs, paying them, so he says in his evidence, Rs. 8 for every gallon, this being Rs. 3 in excess of the value of the arrack, and that he paid all sums due to the plaintiffs.

Among the issues framed were these:—

"What was the agreement between the parties; was it valid in law?

"Was there a subsequent agreement between the parties as set out in the second paragraph of the answer?"

The learned Judge believed the evidence called for the plaintiffs, and I am not prepared to say he was wrong in so doing. He entered judgment for the plaintiffs for the amount claimed. The defendant has appealed. In appeal it was argued that the agreement was one affecting immovable property, and that under section 2 of Ordinance No. 7 of 1840 a writing attested by a notary was necessary. This does not affect the agreement to pay Rs. 1,500. As regards the coconut trees, I gather from the evidence that the contract was that the defendant had the right to the exclusive possession of seventy-five trees for a year for the purpose of drawing toddy from them. This seems to me to be an interest affecting immovable property, and I think that under the Ordinance the contract should have been in writing and attested by a notary. The case of *Fernando v. Themaris* [1] was cited, in which Withers J. would appear to have held the contrary. The details of the contract are not set out in the report, and it is difficult to say how far that decision would apply in the present case. The defendant in this case has, however, enjoyed, as he admits, the produce of about forty trees, so that he would be bound to compensate the plaintiff for this. I am not disposed to send the case back for the trial of the issue as to what would be reasonable compensation, first, because the District Judge in believing the evidence of the plaintiff must necessarily have believed that seventy-five trees were given over to the defendant; secondly, there is no suggestion that Rs. 8 is an extravagant claim to make in respect of each tree; thirdly, I am not satisfied that the objection based in the Ordinance No. 7 of 1840 was taken in the Court below; the point is so simple that an issue could have been plainly stated in unmistakable terms. The petition of appeal does not mention the point, unles it is concealed in the words that there was "no valid agreement" between the parties, and I gather from the judgment of the Judge that the argument addressed to him was that the agreement should have been in writing under the Sale of Goods Ordinance. I would dismiss the appeal with costs.

HUTCHINSON C.J.—I concur.

Appeal dismissed.

[1] *(1892) 2 C. L. R. 183.*