Present: Porter J. and Jayewardene A.J. 1923.

SILVA *et al.* *v.* KUMARIHAMY.

135—D. C. Ratnapura, 3,681.

Lease of land to owner—Is possession by lessee possession of the lessor?—Prescription—Evidence Ordinance, s. 116—Estoppel— Res judicata.

A lease to an owner of his own property is not valid in law, and a person who possess his own property under a lease from another does not possess under or on behalf of that other.

Semble, section 116 of the Evidence Ordinance, 1895, applies only to cases in which the owner-lessee is *let* into possession by the lessor, and does not extend to cases in which the owner-lessee takes on lease a property of which he is already in possession.

In April, 1911, the defendant leased for nine years to M lot X, and the boundaries in the deed of lease included an adjoining block Y, of which M was owner. In 1919, on the termination of the lease, the heirs of M were prepared to surrender the lot leased exclusive of Y. The defendant brought an action against the fourth plaintiff (the widow of M) for rent and ejectment.

The Court held in July, 1921, that under the terms of the lease the fourth plaintiff was bound to give up possession, and the defendant was placed in possession in November, 1921. In September, 1921, plaintiffs, who were the widow (fourth plaintiff) and children of M, instituted the present action for declaration of title. The defendant pleaded prescription claiming the possession by his lessee from April, 1911, to September, 1921, as his possession.

Held, that defendant had not acquired title by prescription, and that the fourth plaintiff was not barred by the decree in the former action from asserting her title to one-half of the lot.

THE facts are set out in the judgment.

E. W. Jayewardene, K.C. (with him *Soertsz*), for defendant-appellant.—The old case was between the same parties and operates as *res judicata*, and the same matter cannot be reagitated between the same parties. Martenis was lessee under the defendant's predecessor in title of this lot now in dispute, and Martenis' possession is possession which accrued to the benefit of the defendants. A lessee cannot plead the *exceptio domini* (*Voet 19, 2, 32*). This principle of the Roman-Dutch law is embodied in section 116 of the Evidence Ordinance.

Arulanandan (with him *R. C. Fonseka*), for plaintiffs-respondents.—The finding of the District Judge in both cases shows that Martenis was never let into possession of lot 1 by the defendant.

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The inclusion of lot 1 within the boundaries recited in the deed of lease was an obvious mistake, and therefore Martenis cannot be said to be a tenant of the defendant's predecessor. Martenis was in possession by virtue of his own right.

The case reported in *3 Bal. 115* is expressly in point, and is binding on the Court. The old tenancy case was wrongly decided, and cannot operate as *res judicata, 33 Mad. 102 ; 39 Cal. 848.* A tenant may always show that his conduct was due to mistake or ignorance of fact. *Caspersz on Estoppel, section 241.*

Jayewardene, in reply.

Cur. adv. vult.

October 19, 1923. JAYEWARDENE A.J.—

In this case the plaintiffs, as the heirs of one Martenis de Silva, sue the defendant to be declared entitled to a piece of land called Aluliaddegodawatta. The fourth plaintiff, the widow, also claims compensation for a house built by her on the land. The defendant denies the title of the plaintiffs, and claims the land as a part of a land called Bandarawatta. He also alleges that he leased this piece of land along with the rest of Bandarawatta to Martenis in the year 1911 for nine years, and that he has acquired a title by prescription to the land through his lessee Martenis and his heirs. The learned District Judge has decreed the claim of the plaintiffs, and the defendant appeals. We have no hesitation in agreeing with the learned Judge that the paper title to the land in dispute is in the plaintiffs, but the question of prescription raises a difficulty. The land Bandarawatta is admittedly the property of the defendant, and the land leased to Martenis as Bandarawatta is depicted in the plan No. 100 filed in the case, and is shaped like a shield. A portion to the north, about a rood in extent, is cut off from the rest of the land by the high road from Ratnapura to Pelmadulla. The portion claimed by the plaintiffs which they call Aluliaddegodawatta is in this northern block, and is marked lot No. 1 and tinted blue. On the east and west of it are lands belonging to the defendant which he says are parts of Bandarawatta. The correct northern and eastern boundaries as given in the lease of Bandarawatta, which extended beyond the road, included within them the land in dispute—lot No. 1. Possession under the lease continued for the full term, that is, till 1919, and at the termination of the lease the plaintiffs were prepared to surrender all the land included within the boundaries except their land Aluliaddegodawatta (lot No. 1). Thereupon, the defendant brought an action in February, 1920, against the fourth plaintiff as the heir of Martenis for ejectment, rent, and damages. He alleged that after the death of Martenis, the fourth plaintiff continued to act on the lease, and paid rent up till October, 1920. In her answer the fourth plaintiff denied all the allegations in the plaint, and that she ever paid rent.

and sets up a title to the land Aluliaddegodawatta in dispute in this case. Several issues were framed, but the most important ones were: (1) Did defendant's husband take the portion now in dispute on lease from plaintiff? (2) If so, is defendant estopped from denying plaintiffs' claim? The District Judge after trial found that although the portion in dispute was included within the boundaries given in the lease of 1911, it was recognized and possessed as a distinct and separate land, known by the name Aluliaddegodawatta, and that the defendant never acknowledged plaintiffs' right to it. He decided both issues in the negative. On appeal this judgment was set aside, and in the course of its judgment this Court said :—

> "The first issue appears to have raised the question as to whether there was a lease; and the second, if so, was the defendant estopped from denying the plaintiffs' claim. The fifth issue raised the question whether even if a lease had been executed it had been acted upon. With regard to the first issue, the learned Judge has found that there was a lease, P 1. It would seem that by the terms of the lease the lessees covenanted to deliver up possession at the expiration of the term. The learned Judge has found that the land dealt with under the lease is the land plaintiffs seek to eject the defendant from. The learned Judge then proceeded to deal with evidence relating to the defendant's assertion that she was entitled independently to lot No. 1. No issue was raised on this point, and the evidence is not relevant. Under the terms of the lease the lessees were bound to give up possession to the lessor, and the defendant claims to be the heir to her husband. No question of title after that finding could be gone into in this action. I would accordingly allow the appeal, and give judgment for plaintiffs as prayed for, except in regard to damages which counsel for the appellant does not press."

This judgment was delivered on July 13, 1921, and the fourth plaintiff was ejected and the lessor placed in possession on November 29, 1921. In the meantime, on September 30, 1921, the plaintiffs instituted the present action for a declaration of title. On that date the lease had been in operation for over ten years. The defendant alleges that whatever title Martenis and his heirs, the plaintiffs, may have had to the land has been extinguished by the land having been possessed by his lessee, which he claims as possession on his behalf for over the prescriptive period of ten years. The learned Judge, in the course of his judgment, says :—

> "I am of firm opinion that this planting agreement (that is, the lease of 1911) was a ruse to secure this Naboth's vineyard of lot (1), a very desirable trading site, part of which (lots B and C) have been previously encroached by the Bandaras.

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"I do not think that Martenis ever contemplated the leasing of lot (1)—the lot in dispute—which was already planted and possessed by him, or that he ever paid rent in respect of it."

He also held that the plaintiffs and their predecessors in title always possessed the lot in dispute and gave judgment for plaintiffs as prayed for.

It is contended for the defendant that this judgment is wrong, and that in view of the jugment of this Court in the previous case it is no longer possible to say that Martenis never took the lot in dispute on lease, or that he never paid rent in respect of it. The judgment of this Court in the previous case is, no doubt, *res judicata* on certain points, for instance, it can no longer be contested by the fourth plaintiff, who alone was a party to that action, that lot No. 1 was never included in the lease. I do not think the plea of estoppel can be extended to cover any other issues or the issue of title arising between the parties. This estoppel does not bind the first three plaintiffs who are also heirs of Martenis, but were not parties to the previous action. However that may be, lot No. 1 undoubtedly formed part of the land leased to Martenis, and if Martenis and his successors in title possessed the land over the prescriptive period, is the lessor entitled to establish a claim by prescriptive possession through his lessee, who is proved to be the owner of the land. The period of possession by the lessee and his heirs is, according to the defendant, between April 26, 1911, the date of the lease, and September 30, 1921, the date of the institution of the action—a period of over ten years.

To establish a title by prescription, there must be actual possession by a person as of right by himself or by persons deriving title from him, such as a lessee, licensee, servant, or other agent. The possession of the latter is in law the possession of the lessor or owner. But according to the Roman-Dutch law, differing from the English law and the Indian law on the point where the lessee is the owner, this principle does not apply. *Voet* (*41, 3, 17*) stating the modes in which *usucapio* or prescription might be interrupted (*usurpatio*) says :—

Continuationi possessionis opponitur usurpatio, quæ est interruptio possessionis et usucapionis, sic ut actio domino competens per eam perpetuetur. Et vel naturalis vel civilis est. Illa rursus vel nobis volentibus, vel invitis fit. Volentibus nobis contingit interruptio, si rem derelinquamus, aut alii tradamus animo amittendæ possessionis. Quin imo, si is, qui rem alienam usucapere cœperat, eandem domino ex causa venditionis, locationis, aut pignoris, aliave simili tradiderit, usucapionem, interrumpi placuit (licet alias locando aut pignori dando rem extraneo non amittamus eam possessionem,

quæ ad usucapionem necessaria est, quamdiu per editorem aut conductorem possidetur). Cum enim neque emtio neque conductio neque pignus rei suæ consistere possit, ideoque usucapiens non intelligatur possessionem retinuisse per corpus domini, que neque ex emtionis neque ex conductionis neque ex pignoris titulo rem suam tenere poterat, aut usucapientis possessioni ministerium præbere, et tamen usucapiens naturalem dimiserit possessionem, ac in dominum transtulerit; absurdum esset, illam domini possessionem contra semet ipsum ad usucapiendum alteri, rem domino vendenti vel locanti, prodesse.

Burge, in his *Commentaries* (*original ed., vol. 3, p. 22*), adopts the law as laid down by Voet which is derived from the Roman law. He says :—

" Opposed to the continuation of possession is *usurpatio*, as it is called by the civil law writers, or the interruption of the possession. Its effect is to save to the owner his competent right of action.

" The *usurpatio* may be either natural or actual, or it may be only civil or constructive.

" The natural or actual usurpation takes place with or without our consent.

" It is said to take place with our consent when we either abandon the property, or deliver it to another with the intention of relinquishing the possession.

" If the property, in respect of which the person had commenced the *usucapio*, should be delivered by him on sale, or lease, or pledge to its owner, the *usucapio* is interrupted. But if he had leased or pledged it to a stranger, that possession which was necessary for *usucapio* would not be lost, so long as it was in the possession of the tenant or creditor, because it would be absurd to suppose the possessor holding under any other title than that of owner, and least of all to hold the possession so as to create in another a title adverse to himself."

Pothier, in his *Treatise on Prescription* (*p. 393*), says :—

" It is beyond doubt that the possessor of a thing who gives it to anyone *who is not the owner* by way of lease, deposit, or loan continues to possess it and prescription runs in his favour. For a lessee, tenant, depository, or borrower holds a thing only for and in the name of him from whom it was received and the latter possesses by them."

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Savigny, in his well-known work on *Possession* (*Bk. II., section 725, p. 207*), says :—

> "The following cases have been improperly considered as exceptions to the rule that the tenant only possesses in the name of the owner : First, where the tenant is, at the same time, owner of the subject which previously had been in another person's possession, it is true that the previous possession then ceases. But the reason of this merely is, that in such case no contract or demise is recognized ; that is, therefore, no exception to the rule, but a clear example of it."

These authorities go to show that under our law a lease to an owner of his own property is not valid in law (see also *Voet 19, 2, 4* (*Berwick's Translation, p. 201*), and *Maasdorp, vol. 3, chapter 17, p. 199*), and that a person who possesses his own property under a lease from another does not possess under or on behalf of that other. The English law, as I said, is different. Thus in *William v. Pott* [1] it was held—

> "That possession of an agent is possession of the principal ; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate."

And Lord Romilly, M.R., said :—

> "I am satisfied that this was an adverse possession the whole time. In the first place, I am of opinion that the possession of the agent is the possession of the principal, and that in this case the Rev. Walter Jones Williams could not have made an entry as long as he was in the position of agent for his mother, and that he was not in possession of and could not get into possession, or make any entry for that purpose, without first resigning his position as her agent ; and that he must have written to his mother, saying : 'The property is mine ; I claim the rents, and I shall apply the rents for my own purposes' ; and thereupon he might have made an entry, and so would have altered the position of principal and agent."

The law in India is similar to that in England. In the *Secretary of State for India v. Krishnamoni Gupta*,[2] the Privy Council observed :—

> "It may at first sight seem singular that parties should be barred by lapse of time during which they were in physical possession and estopped from disputing the title of the Government. But there is no doubt that the possession of the tenant is in law the possession of the landlord

[1] *(1871) 12 L. R. Eq. Cases 149.*

[2] *(1902) 29 Cal. 518 at 534.*

or superior proprietor, and it can make no difference whether the tenant be one who might claim adversely to his landlord or not. Indeed, in such a case, it may be thought that the adverse character of the possession is placed beyond controversy." See also *Krishnadixit v. Baddixit.*[1]

The principle laid down in the Roman-Dutch law was adopted by Lascelles C.J. and Wendt J. in *Fernando v. Menika,*[2] although the authorities were not referred to. In the course of his judgment Lascelles C.J. said :—

" It is admitted that the plaintiffs' paper title is a good one, but it is said that, inasmuch as the possession of the tenant is the possession of the landlord, the plaintiff by possessing under the lease for fifteen years has prescribed as against himself in favour of his landlord, the defendant. It is true that for the purpose of acquiring title by prescription, possession by the tenant is sometimes equivalent to possession by the landlord ; and encroachment, for example, made by the tenant would enure to the landlord's benefit. But the condition of adverse possession must first be satisfied. The plaintiff, in the first instance, entered by virtue of his conveyance. Can it be said that when he took the lease in 1888 the character of the possession of his own land changed ; and that he then began to possess his own land on behalf of his landlord adversely to himself ? "

I think we ought to follow this judgment, as it is consistent with the principles of the Roman-Dutch law. In this view the first, second, and third plaintiffs are clearly entitled to prove their title, and as the learned District Judge has found that they have proved their title, they must be declared entitled to half the land.

As regards the other half which is claimed by the widow, we have to consider the effect of the previous judgment in connection with the facts. The District Judge has found that no rent was ever paid for this piece of land, so that until the decision of that case she never admitted the right of the defendant. In fact she says she never heard of the lease till she was sued on it. She was in undisturbed possession of the land on a title which has been held superior to that of the defendant. In these circumstances, can it be said that she or Martenis was in possession of the land under the lease as tenant of the defendant, or that the effect of the judgment of this Court is to make her a tenant for the whole term of the lease ? I do not think so. What that case decided was that the portion of land in dispute was included in the land leased, and that she was bound to surrender the land to the defendant

[1] *(1913) 38 Bom. 53.*

[2] *(1906) 3 Bal. 115.*

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in terms of the lease and to pay damages. As I said that decision is *res judicata* on the question whether the land in dispute was part of the land leased to Martenis, and the question of title was left to be decided in another action. If it had been proved that she had paid rent for the land or had otherwise acknowledged the title of the defendant, her position might have been different. She is not barred by that decision or by lapse of time from raising the question of title in this case. She is compelled to admit that the land in question was leased to her husband. Notwithstanding such admission, she is entitled to assert that her possession was not adverse to her own rights as owner. She was undisturbed in her possession, and there was no occasion for her to bring an action to establish her title. I think that until the decision of the Supreme Court in that case, she had no cause of action against the defendant. The cause of action arose when it was declared that she should be ejected from the land. She then promptly brought this action. On a consideration of all the circumstances of the case, it is impossible to say, on the authorities I have cited, that she had conferred on the defendant a prescriptive title by her own possession. She should be declared entitled to the other half of the land.

Before concluding, I may point out that it might be legitimately asked how the above-stated principle of the Roman-Dutch law can be reconciled with another well-known principle of the same law on which the appellant's Counsel strongly insisted that a lessee cannot plead the *exceptio domini*. *Voet* (*19, 2, 32*) says that the restitution of a thing hired cannot be delayed by the *conductor* pleading the *exceptio domini*, although he might be able easily to prove his own ownership, but he must by all means first surrender the possession and then litigate as to the proprietorship. Or, as Maasdorp puts it—

> "A lessee is not entitled to dispute his landlord's title, and consequently he cannot refuse to give up possession of the property at the termination of the lease on the ground that he himself is the rightful owner of the same. His duty in such a case is first to restore the property to the lessor, and then to litigate with him as to the ownership."

This principle has always prevailed in Ceylon, and it is embodied as a part of the law of estoppel in section 116 of the Evidence Ordinance, which is as follows :—

> "No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of such tenancy, a title to such movable property ; and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

These two principles appear to be contradictory of each other. For where the lessee is the owner, if the lease to him is null and void, he ought to be entitled to establish the invalidity of the lease when sued by the lessor in ejectment. But the lessee in such a case is said to be debarred from pleading the *exceptio domini*. Schorer in his *Notes to Grotius* appears to have noticed this inconsistency, and says :—

> " Grotius lays down, upon the authority of the law referred to by Groenewegen, that a hiring of one's own property, concluded in ignorance, is null and void ; and so it is, but the lessee will be bound first to restore possession, and then to litigate with respect to the ownership, and this is the case even though the lessee may be able to prove the ownership quite easily." See *Nathan's Law of South Africa, vol. II., section 900.*

This difficulty may be overcome if we restrict the estoppel to cases in which the owner-lessee is *let* into possession by the lessor, and do not extend it to cases in which the owner-lessee takes on lease a property of which he is already in possession. This is to some extent supported by the passage from *Voet (47, 3, 17)* where he speaks of the interruption of the lessor's possession, implying thereby that at the time the owner-lessee took the lease, the lessor was in possession and in course of acquiring a title by prescription. This difference is well marked in the English law, where the general principle that a tenant is estopped from disputing his landlord's title is thus stated :—

> " A tenant whilst in possession is estopped from disputing that at the time he *received* possession, the landlord from whom he received it had a good title to the premises. A tenant is not estopped from disputing the title of a person from whom he did not actually receive possession of the premises." See *Everest and Strode's Law of Estoppel, 2nd ed., pp. 209 and 275.*

It has been suggested in India that section 116 of the Indian Evidence Act, which is identical with section 116 of our Evidence Ordinance, applies only to cases where the tenant has been let into possession by the landlord (*Lall Mahomed v. Kallanus*[1]). Section 116 has been held not to be exhaustive of the law of estoppel as between landlord and tenant, and the estoppel continues not only during the continuance of the lease, but till possession is surrendered (*Bhaiganta v. Himmal*[2]), and not withstanding this section the tenant can prove that the landlord's title has expired, or that he has been evicted by title paramount (*Ameer Ali and Woodroffe's Law of Evidence, 6th ed., p. 800*, and *Cader v. Hamidu*[3]). There

[1] *(1884) 11 Cal. 519.* [2] *(1916) 24 Cal. L. J. 103.*
[3] *(1921) 23 N. L. R. 91.*

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is good reason for creating such an estoppel where the landlord has surrendered his own possession to the tenant, but the reason for a similar estoppel where the tenant continues a possession which he had before the lease is not so obvious. In the present case, if the law is as I have stated, the fourth plaintiff should have been afforded an opportunity of constesting the lessor's title in the previous action, as Martenis was not let into possession by the defendant, but was in possession in his own right at the date of the lease. But she was held not entitled to do this, as by the very terms of the lease the lessee had expressly agreed to surrender possession at the termination of the lease. Hence she was directed to surrender possession, and bring a separate action to decide the question of title.

The appeal is dismissed, with costs.

PORTER J.—I have had the opportunity of reading the judgment of my brother Jayewardene in this appeal, with which I entirely agree.

Appeal dismissed.