1954 *Present :* **Pulle J. and Swan J.**

M. U. M. SAMEEM *et al.*, Appellants, *and* W. W. DEP, Respondent

S. C. 316—D. C. Colombo, 5,896/L

Possessory action—Right of a tenant to bring it—Test of possessio civilis*—Limits of its applicability—Prescription Ordinance (Cap. 55), s. 4—Rent Restriction Act.*

A contractual or statutory tenant who has been forcibly ousted from his premises, is entitled to maintain a possessory suit against the person dispossessing him.

As against a spoliator the person dispossessed need not prove *possessio civilis* to be restored to possession.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *E. R. S. R. Coomaraswamy* and *E. B. Vannitamby*, for the defendants appellants.

Sir Ukwatte Jayasundera, Q.C., with *Ivor Misso* and *S. Rodrigo*, for the plaintiff respondent.

Cur. adv. vult.

[1] *(1927) 1 K. B. 826.*

May 10, 1954. PULLE J.—

This is an appeal in which the principal parties concerned are the plaintiff and the second defendant. There are three other defendants who are brothers of whom the first defendant is the son-in-law of the second. Judgment has been entered for the plaintiff declaring him entitled to the possession of premises No. 323, Main Street, Colombo, for ejectment and damages.

The whole case, so far as the evidence goes, turns on a simple issue of fact, namely, whether on November 29, 1949, the plaintiff as the tenant of the Public Trustee was in occupation of the premises in question and whether he was forcibly dispossessed by the defendants or whether the 2nd defendant was in occupation as a sub-tenant under the plaintiff. The evidence both oral and documentary has covered a large area. It has been carefully considered by the learned trial Judge and it would unduly lengthen this judgment if all the submissions made to us on the finding of fact are subjected to a further analysis. On the whole we agree with the verdict of the trial Judge that the evidence in support of the plaintiff's case is overwhelming. It suffices to deal with two points stressed at the argument.

The defendants produced the promissory notes D1 and D2 dated respectively 15th March, 1947 and 1st May, 1947, granted by the 1st and 2nd defendants to two chettiyars. In these notes the address of the makers is given as No. 323, Main Street. Reliance was placed on this address in support of the defendant's case that they were carrying on business at the premises in their own right as early as 1947. The payee on the second note was one A. P. R. P. L. Palaniappa Chettiyar. A kanakapulle of the payee calling himself A. P. R. P. L. Palaniappa Chettiyar gave evidence to the effect that he used to recover monies due on D2 at No. 323. Complaint is made that his evidence has been viewed with suspicion because he did not disclose himself specifically as the clerk to the firm of the payee. I cannot say that the Judge was wrong in putting himself on his guard against a witness who appeared to identify himself as the payee on the note, whereas he was only a clerk. But apart from this the learned Judge has carefully analysed the evidence of this witness and satisfied himself that the address in D2 and the fact that the witness may occasionally have seen the 2nd defendant at No. 323 could be explained in a manner consistent with the evidence called for the plaintiff.

It has been strongly urged that a letter D7 of 19th December, 1947, addressed in connection with a criminal matter to the Inspector-General of Police by the 2nd defendant in which he stated that he was carrying on business at No. 323 should have been accepted by the Judge as confirmation of the 2nd defendant's evidence and that, further, the theory on which the letter is accounted for by the Judge is unsatisfactory.

I think that the way in which the Judge has dealt with D2 and D7 must be looked at in the general context of his judgment. He had formed a very favourable view of a number of independent witnesses called

to support the plaintiff on the crucial issue whether prior to 29th November, 1949, the plaintiff carried on business at No. 323. Unless it could be said that D2 and D7 completely undermined the evidence of all these witnesses the Judge was justified in formulating a theory to explain D2 and D7, although in the case of D7 the theory may not commend itself as the true reason as to why the 2nd defendant said he was carrying on business at No. 323, if in fact, according to Mariampillai, the representatives of Millers Limited and the Public Trustee, Inspector Weerasooriya of the Pettah Police, Police Sergeant Piyadasa and the watcher Ramasamy and also according to a number of documents, the sole owner of the business was the plaintiff.

In my opinion it would be entirely unjustifiable to disturb the finding of fact in favour of the plaintiff that he being the occupier of premises No. 323 was forcibly ousted by the defendants.

There remains to be decided whether the submission is good that the plaintiff cannot maintain the action because he was only a monthly tenant. The argument was on these lines. The plaintiff in his plaint asked for a possessory decree. Such a decree could only be passed in favour of a person having a *possessio civilis* but as the plaintiff was a monthly tenant and not a notarial lessee he was not entitled to maintain the action. No plea was taken in the answer that the action in the form in which it was instituted did not lie. As far as the issues go it was raised whether the plaintiff could maintain the action, if the court found that the 2nd defendant was a sub-tenant of the plaintiff. The point of law raised at the argument in appeal was consequently not dealt with in the judgment.

A large number of authorities have been cited on behalf of both parties and I do not propose to deal with everyone of them. Cases like *Ukku Amma et al. v. Jema et al.*[1] can be distinguished on the ground that they were not possessory actions contemplated by section 4 of the Prescription Ordinance (Cap. 55). If *possessio civilis* is the rigid test I do not find it easy to follow how a usufructuary mortgagee whose possession terminates on the payment of the principal debt has been given the right to institute a possessory suit. Vide *Banda v. Hendrick et al.*[2]. In this case Wood-Renton J. cites with approval a dictum of Bonser C.J. in *Changarapillai v. Chelliah*[3] that the possessory action is a most beneficial one whose operation the Court should seek to enlarge rather than to narrow. On a parity of reasoning I should say that a tenant who like the plaintiff is protected by the Rent Restriction Act has a large beneficial interest in the property in the sense that, if he performs what may be called the statutory covenants, he has rights of occupation and enjoyment which in his life time could only be brought to an end by the surrender of occupation to his landlord or eviction by legal process and the remedy of a possessory suit should be extended to vindicate these rights.

It seems to me that as against a spoliator the person dispossessed need not prove *possessio civilis* to be restored to possession. Wille on Landlord

[1] *(1949) 51 N. L. R. 254.* [2] *(1907) 1 A. C. R. 81.*
[3] *(1903) 5 N. L. R. 270.*

and Tenant states in Chapter XV, " If the landlord ejects the tenant either forcibly or illicitly he commits an act of spoliation against the tenant and the tenant is entitled to a *mandament van spolie* or order replacing him in occupation or possession of the premises *immediately and before the landlord can take any further legal steps and as a preliminary to any inquiry or investigation into the merits of the case.*" *A fortiori* the remedy should be available against a stranger.

Dealing with the character of possession to justify a *mandament van spolie* Professor R. W. Lee states in the Introduction to Roman-Dutch Law, 1946 ed. p. 165,

" It is given not merely to the possessor in the strictest sense, but to a trustee or lessee and to any other person who holds by lawful title ' with the intention of securing some benefit for himself as against the owner, such as a borrower, and, perhaps, to any other person in actual control." In my opinion occupation of a property by a contractual or statutory tenant is to hold it by lawful title. The case of *Meyer v. Glendinning* [1] cited by Professor Lee is interesting. There a racehorse trainer succeeded in obtaining a spoliation order against the owner who having entrusted some horses to the trainer removed them from the stables without notice to and consent of the trainer. While on the subject of *mandament van spolie* I should add that in *Goonewardene v. Pereira* [2] approved in *Silva v. Appuhamy* [3] Bonser C.J. said that he was not prepared to assent to the proposition that where there is an ouster by violence of the person who is possessor of the property, anything more was required to be proved by him than that he was in possession and that he was violently ousted. In those circumstances the plaintiff did not have to prove possession for a year and a day.

To the facts of this case I would apply the words of Buchanan A.C.J. in *Wilsnach v. Van der Westhuizen and Haak* [4] in which a licensee under a local authority of a house was evicted by the respondents who purported to have obtained a title deed in their favour.

" The whole foundation of the rule for the restoration of property taken possession of in this way is, that a spoliator is not entitled to take the law into his own hands, and a person who takes the law into his own hands must restore the property and establish his right thereto in a peaceable manner or in a court of law. "

On the findings of fact there was not the vestige of a right in the defendants to have taken possession of the premises.

The appeal fails and should be dismissed with costs.

SWAN J.—I agree.

Appeal dismissed.

[1] *(1939) C. P. D. 84.*
[2] *(1902) 5 N. L. R. 320.*
[3] *(1912) 15 N. L. R. 297.*
[4] *(1907) S. C. 600.*