1906.
October 30.

Present: Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

WIJANAIKE *v.* DE SILVA.

D. C., Galle, 7,673.

Contract of lease—Implied convenant to put lessee in possession—Failure —Damages

It is an implied term of the contract of letting and hiring that the lessor should put the lessee in possession of the property let; and a lessor who fails to implement his contract by so doing is liable in damages for breach of contract.

THE facts and arguments sufficiently appear in the judgments.

Walter Pereira, K.C., S.-G., for the defendant, appellant.

Van Langenberg, for the plaintiff, respondent.

Cur. adv. vult.

30th October, 1906. HUTCHINSON C.J.—

This is an appeal by the defendant from a judgment of the District Court of Galle given on 2nd July, 1906.

The defendant, by a " deed of lease " dated 26th September, 1904, and attested by a Notary Public, leased to the plaintiff a number of coconut trees standing on land described in the lease for four years from the date thereof for Rs. 100 per annum. The plaintiff alleges that when he went to take possession he found other persons in possession of the most important lot of trees, and that those persons disputed his right to the trees and the defendant's title to them, and that in consequence he never received possession of any of the trees leased to him. He therefore sued for cancellation of the lease and for return of rent which he had paid in advance and for damages.

The defence was that the defendant did place the plaintiff in possession, and that the plaintiff had not suffered eviction by process of law and had failed to give the defendant due notice to warrant and defend the plaintiff's title.

The District Court found that the plaintiff never obtained actual possession of any of the trees, and that finding was clearly right upon the evidence.

But it is argued on behalf of the defendant that delivery of the lease was in law delivery of possession of the property leased; that the lessor after delivering the lease was not bound to deliver actual possession; and that the lessee cannot maintain such an action as this unless he has been evicted by law in an action of which he has given the lessor notice. That is to say, if I take a lease of a house or land by a document such as this and I find when I go to take possession that Mr. A is in possession, who denies the lessor's title, so that I am unable to get possession, I cannot make any claim against my lessor until I have sued Mr. A. It may be true that before my lessor delivered me the lease Mr. A was both in law and in fact in possession of the property; but the Solicitor-General, if I understand him rightly, would contend that the moment my lease was delivered to me Mr. A ceased to be and I began to be in possession. That is not the law. The law is that the lessor is bound to put the lessee in possession of the property leased; that is an implied term of the contract of lease; and if he fails to do so he is liable to pay the lessee damages for his breach of the contract.

Appeal dismissed with costs.

MIDDLETON J.—

I agree. It is not necessary for me to recapitulate the facts, but I quite concur in the opinion that the District Judge was right in holding that the defendant has not established that he has enabled the plaintiff to acquire vacant possession of the trees he leased to him (*Berwick's Voet*, p. 172).

It was the defendant's duty to give to the plaintiff, his lessee, such a possession of the trees that he might have the use of them (*Vanderlinden* 1, 15, 2; Vol. II., *Pereira's Laws of Ceylon*).

Here all that was done was a forcible marking by the defendant's agent in the presence of protesting claimants to the trees. It may well be that the plaintiff thought there was a possibility that he might get possession, and was content to wait for a period to see if it were physically possible, and tried again, but, in my opinion he never had that possession of the trees he was entitled to have conferred on him, viz., a possession such as would enable him to enjoy the fruits of his contract with the defendant.

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MIDDLETON J.

On the question whether a delivery of the deed of lease to a lessee is a delivery of possession of the property let by the lessor, I am unable to accede to the argument of the learned Solicitor-General. I think, as I stated at the argument, there is a very considerable difference between the symbolical delivery of possession of the *dominium* of a property, and the physical delivery of the right of occupation under a lease, which alone enables the lessee to enjoy the right which is conferred on him.

I think that the appeal must be dismissed with costs.