

## PERERA v. CASIM.

1902.

January 15.

*D. C., Colombo, 12,644.*

*Lease—Claim to possession as between a lessee under a husband and a lessee under a wife—Title of purchaser in execution, at a Fiscal's sale, of husband's and wife's interest—Agreement between purchaser and husband to annul sale and hold as tenant under husband.*

P, claiming possession of a land as a lessee under Mr. K, sued C in the Court of Requests for rent, and his action was dismissed for want of proof that C was P's tenant. Thereupon P sued C in the District Court for a declaration that he (P) was entitled to possession for five years from August, 1898, as lessee under Mr. K.

*Held*, that C, who was a tenant under Mrs. K. was entitled to continue in possession so long as P was unable to prove a better title than C's.

*Held*, further, that, as C's father had bought at a Fiscal's sale all the life interest of Mr. and Mrs. K in the property in 1883, the title was in C's father and his heirs, notwithstanding that a notarial agreement had been made soon after the Fiscal's sale between Mr. K and C's father that the latter should re-convey to the former the property sold by the Fiscal and consider himself a tenant of Mr. K, and notwithstanding that the relation of landlord and tenant subsisted between K and C's father from 1883 to 1893, and between K and C himself from 1893 to 1st August, 1898, when Mr. K's lease to plaintiff and Mrs. K's lease to defendant began.

THE plaintiff sued the defendant for a declaration that he was entitled to the possession of a house in Kayman's gate, Colombo, for five years from August, 1898, as a lessee under one Mr. Kelaart.

It appeared that the property originally belonged to Miss Mortier, who married Kelaart in 1871; that under a writ of execution against him, the Fiscal sold the house in 1883 by auction to defendant's father, who, however, agreed with Mr. Kelaart to treat the sale as of no effect, and to consider himself a tenant under Kelaart; that in pursuance of this agreement a notarial deed was drawn up, by which Kelaart let the property to the defendant's father for nine years and nine months as from October, 1883; that when this lease expired, Kelaart let the house for five years, commencing from 8th August, 1893, to the defendant; in 1894, Kelaart leased it to plaintiff with effect from 1st August, 1898, which was the day after the expiry of the lease to the defendant commencing from 8th August, 1898, to the defendant; in 1894, Mrs. Kelaart leased it to the defendant with effect from 1st August, 1898.

1902. The Additional District Judge (Mr. Felix Dias) dismissed  
January 15. the plaintiff's action by the following judgment:—

“ The defendant is in possession, and has been so for many years. The plaintiff sued the defendant some time ago in the Court of Requests to recover rent from him as his tenant from August, 1898, but it was held in that case that the defendant was not the plaintiff's tenant. That decree is still in force, and the plaintiff cannot re-open the question of the defendant's tenancy, but must stand or fall by the superiority of his own title.

“ It is admitted on both sides that the house was the property of Mrs. Charles Kelaart for life, with a valid *fidei commissum* in favour of her children. Mrs. Kelaart is still alive, but her husband died in 1895. In 1893 the defendant took a lease of the premises from Mr. Kelaart for five years ending 31st July, 1898, and before that lease expired Mr. Kelaart gave the present lease in 1894 to the plaintiff with effect from the 1st August, 1898. The defendant now has a fresh lease, executed by Mrs. Kelaart in December, 1898, but with effect from 1st August, 1898. The plaintiff's contention is that the defendant, having admitted the title of both Mr. and Mrs. Kelaart by taking leases from them, is now estopped from denying their title, and, inasmuch as the husband in his lifetime had the power to deal with all his wife's property (which as regards this house consisted of her life interest in it), his lease to the plaintiff for the five years must be considered good, provided Mrs. Kelaart lives so long.

“ If the question rested merely on the strength of Charles Kelaart's lease to the plaintiff in 1894 as against the wife's lease to defendant in 1898, after the death of her husband, there can be no doubt that the earlier lease ought to be held to prevail. But that is not the whole case. The contest is not between a landlord and tenant, nor between persons claiming under one and the same landlord. The status of Mrs. Kelaart was completely altered after the death of her husband, and her position when she gave her lease to the defendant in 1898 can in no way be said to have been identical with that of her husband. Under the circumstances it appears to me that the doctrine of estoppel will not apply. It was quite competent for Mrs. Kelaart herself to question the validity of titles derived from her husband, and so too is the defendant entitled to do the same. He is in possession, and has been decreed by a competent Court not to occupy the position of a tenant under the plaintiff, and so he can remain in possession and call on plaintiff to strictly prove his title. And it matters not, for the purposes of this case whether he is a lessee under

Mrs. Kelaart or any one else, or is a hostile possessor on his own account.

1902.  
January 15.

“ In my opinion the plaintiff has completely failed to prove his title, for it cannot be denied that in 1894. the date of his lease, his lessor, Mr. Kelaart, had no title. In October, 1883, his whole interest (*i.e.* the whole of his wife's life estate) was sold up by the Fiscal under a writ, and conveyed by a valid transfer in November, 1883, to one Tamby Carim, the defendant's father. That transfer has been duly registered, and is still in force. It has been urged that that transfer was superseded by a notarial deed P 4 made in September, 1883, between Mr. Kelaart and Tamby Carim, but I cannot see how that deed can be said to have annulled the Fiscal's transfer to the purchaser. At the date of P 4 the Fiscal had not even conveyed the property to Tamby Carim, and the deed did not purport to re-convey to Kelaart the property that had been sold, but only contains a promise for a future re-conveyance. No such re-conveyance appears to have been made, and so I must hold that the title was in Tamby Carim and his heirs from the date of the Fiscal's transfer.

“ Hence the plaintiff's title under Charles Kelaart is worthless and his action must be dismissed with costs ”.

Plaintiff appealed.

*H. Jayawardene.* for appellant.—The Fiscal's transfer was superseded by the deed of lease for nine years odd to defendant's father, who surrendered his rights as owner and acknowledged himself tenant under Mr. and Mrs. Kelaart. As soon as the relation of landlord and tenant was thus established, the doctrine of estoppel comes into operation. Defendant's father did not dispute the title of the Kelaarts. It is true that the Fiscal's conveyance to him was made after the deed of lease, but the Fiscal's conveyance must be treated as enuring to the benefit of the Kelaarts. And defendant himself having taken a lease from Mrs. Kelaart in 1898 is estopped from denying either her title or her husband's title to the land, as he had power to deal with all his wife's interest in the property.

No appearance for respondent.

15th January, 1902. BONSER, C.J.—I see no reason to interfere with this judgment. I think it is right in law.

WENDT, J.—I concur.