1915.

Present: Wood Renton C.J. and De Sampayo A.J.

WIJESINGHE *et al.* v. CHARLES.

21—D. C. Colombo, 38,784.

Vendor and purchaser—Right of vendor to bring action after sale to eject tenant after giving notice to quit—Landlord and tenant.

Where a purchaser has not elected to take a property with the vendor's tenant in occupation and insists on the vendor giving him free and exclusive possession, the contract of tenancy as between the vendor and the tenant continues, and the vendor may, in spite of the sale, take the ordinary steps to eject him and recover damages.

THE facts are fully set out in the judgment.

A. St. V. Jayewardene, for defendant, appellant.

E. W. Jayewardene, for plaintiffs, respondents.

Cur. adv. vult.

February 19, 1915. DE SAMPAYO A.J.—

The defendant was a monthly tenant of certain premises under the plaintiffs, who were the owners thereof. On January 8, 1914, the plaintiffs sold the premises to one Y. D. David, and, presumably with the view of giving possession to the purchaser, they on April 2, 1914, gave notice to the defendant to quit and deliver possession of the premises at the end of May, 1914. The defendant not having complied with the notice, the plaintiffs brought this action to eject the defendant, claiming also arrears of rent from October 1, 1913, up to May 31, 1914, and damages for unlawful possession since the latter date. The defendant in his answer admitted his liability to pay the rent up to the date of sale, but denied the validity of the notice to quit, and pleaded that the contract of tenancy between the plaintiffs and defendant was determined by the sale of the premises. The argument on behalf of the defendant is that the effect in law of the sale was that the defendant became tenant of the purchaser and was liable for the rent only to him, and that any notice to determine the tenancy should be given by him. There is no doubt that under the Roman-Dutch law a purchaser has the right to recover the rent accruing since the sale from a tenant who had been let in by the vendor. The authorities on the point will be found collected in *Silva v. Silva.*[1] That decision also went to the extent of holding that the purchaser could enforce, not only the payment of rent, but also the other obligations of a tenant, though in my judgment in that case I acceded to this view with some

[1] *(1913) 16 N. L. R. 315.*

hesitation. The defendant in this case goes a step farther, and maintains that the purchaser is bound, whether he is willing or not, to accept the tenant as his own. I do not think that the authorities go that length. The strongest statement of the law is in Wille on *Landlord and Tenant in South Africa 221*, which says: "A purchaser from the landlord of the property leased steps into the shoes of the landlord and receives all his rights and becomes subject to all his obligations, so that he is bound to the tenant and the tenant is bound to him in the relation of landlord and tenant." But this is no authority for the proposition that, notwithstanding the purchaser's ordinary right to demand from the vendor vacant possession of the property sold, he must in all cases be content to take possession subject to the tenant's right of occupation. It seems to me that *Voet 19, 2, 19*, which is the main authority on this subject, contains an explanation of the underlying principle. For, after stating that a singular successor like a purchaser must bear with the tenants to the end of the term (*ad finem usque ferre debet*) if they are willing to pay him the rent, he says the reason is that, as by the acquisition of ownership a purchaser would according to natural reason have had the fruits and use of the thing, it is equitable that at least what represents the fruits, viz., the rent, should come to him. That is to say, the perception of the rent is a mode of possession to which he becomes entitled by the purchase, but nowhere is it stated that the purchaser is bound to accept such performance of the vendor's obligation to give him vacant possession. It is clear that a purchaser in this connection has two courses open to him when a third party is in possession of the property at the time of the sale: he may either stand on the strength of the title and sue the third party in ejectment, or he may at once bring the action *ex empto* against his vendor for failure to implement the sale by delivery of possession. (*Gurunnanse v. Don Hendrick* [1] and *Babaihamy v. Danchihamy* [2].) No authority has been cited to show that the purchaser can be deprived of either of these alternative remedies. It is argued, however, that in the circumstances the plaintiffs must be taken to have given vacant possession to the purchaser and thus to have fulfilled their legal obligation, inasmuch as the defendant, who is a mere tenant, cannot dispute the purchaser's title. This I think involves a misconception of what vacant possession means. So far as I know, the law does not say that for the purpose of fulfilling his obligation the vendor need not deliver actual possession, provided that no other person has better title than himself. Vacant possession means possession in any case but such that no other person can lawfully keep the purchaser out. *Voet 19, 1, 10* defines it thus: "*Vacuam vero possessionem tradere venditor intelligitur, cum ita tradit ut res possessori ab alio avocari nequeat, adeoque emptor in lite de possessione potior futurus sit.*"

[1] (1910) 13 N. L. R. 225.   [2] (1913) 16 N. L. R. 245.

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law, since the very argument for the defendant is that he is entitled to be in possession as tenant, and that the purchaser is bound to accept him as his tenant, it follows, if the argument is sound, that the purchaser has not had vacant possession within the meaning of the law. I find that in South Africa the Courts have taken a similar view. In *Schultz Bros. v. Roodepoort Venture Syndicate,* [1] a note of which is given in Delany's *Leading Cases on Vanderlinden 104,* the defendants sold certain lands to the plaintiffs, but it was subsequently discovered that the owner of an adjoining land had *bona fide* built a cottage which encroached on the land sold. The defendants relied on this very passage in *Voet,* and argued that, as the adjoining proprietor could not successfully claim the property from the plaintiffs, the defendants had given them vacant possession, but the Court held that the defendants were bound to eject the adjoining proprietor, Mason J. observing: "The authorities lay down clearly that a seller must give the purchaser free and exclusive possession." It is plain that such "free and exclusive" possession would not be given if the purchaser were forced to allow the vendor's tenant to remain in occupation. It was, of course, said that the purchaser might terminate such continued tenancy by giving the tenant notice to quit, but that does not affect the principle involved. Bayne's *Landlord and Tenant 37,* which was also cited on behalf of the defendant, does not carry the case further, and, I think, rather assists the plaintiff's position. For there the author, after referring to the maxim "hire goes before sale," and stating that purchasers are bound by the lease previously made by the vendors, says, "from this arises the privilege of the tenant either to remain the tenant of the new landlord or to cancel the lease." *Voet 19, 2, 19* above cited is practically to the same effect, for what is there said is that a purchaser must bear with the tenants "if they (the tenants) are willing to pay him rent." If, then, the tenant has the privilege of choice, I do not see any reason why the purchaser should not have the corresponding privilege. The purchaser having, then, the two courses above mentioned open to him, it would be a question of fact in a particular case whether he has elected to take the property with the vendor's tenant in occupation. If he has not adopted that course, and insists on the vendor giving him free and exclusive possession (*plena et vacua possessio*), it seems to me to follow that the contract of tenancy as between the vendor and the tenant continues, and that the vendor may take the ordinary steps to eject him and recover damages. In this case counsel for the plaintiffs in the Court below offered to call the purchaser Y. D. David to prove that he insisted on the plaintiffs getting rid of the defendant and giving him vacant possession, and that in the meantime he refused to pay the plaintiffs the balance purchase money which was still due, but the District Judge considered this evidence would be

[1] *T. H. 1905, 356.*

irrelevant. In my opinion the burden of proof was, as a matter of fact, on the defendant, and as the defendant in appeal takes up the same attitude as regards his legal rights as in the District Court, and makes no suggestion as to the necessity of evidence, I am not disposed to send the case back on this point, and would hold on the question of law that the plaintiffs' action was maintainable.

I think the judgment appealed against is right, and I would dismiss the appeal with costs.

Wood Renton C.J.—I agree.

Appeal dismissed.