1907.
August 29.

[Full Bench.]

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

RATWATTE *v.* DULLEWE.

D. C., Kandy, 17,701.

Vendor and vendee—Liability of vendor to put vendee in vacant possession —Delivery of deed—Insufficiency—Failure to deliver possession—Cancellation of sale—Refund of puchase money.

Apart from any express agreement, a vendor of immovable property is bound to deliver vacant possession (*i.e.*, possession unmolested by the claim of any other person in possession) of the property sold to the vendee; on his failure to do so, the vendee is entitled to a rescission of the sale and a refund of the purchase money.

The vendee is not obliged, in such circumstances, to sue the party in possession before proceeding against his vendor. A vendee of immovable property is not bound to accept delivery of the deed of transfer as sufficient delivery of possession of the property; he is entitled to ask his vendor to place him in actual possession.

Where the question is between a purchaser and a third party, the delivery of the deed of transfer is sufficient to entitle the purchaser to maintain an action, as owner, against such third party.

Judgments in *Perera v. Amaris Appu*[1] and *Appuhamy v. Appuhamy*[2] referred to and distinguished.

APPEAL from a judgment of the District Judge of Kandy (J. H. Templer, Esq.).

The defendant, who was the administrator of the estate of the estate of the late W. A. Dullewe, Adigar, put up for sale by public auction on September 9, 1905, certain premises belonging to the said estate. One of the conditions of sale was that the purchaser should be placed in possession of the said premises on payment of the full purchase money. At the sale the plaintiff became the purchaser of the premises, and he paid to the defendant the whole of the purchase money, and also the auctioneer's and notary's charges. One David Walter Dullewe, a nephew of the deceased, was in possession of the premises, claiming title under a verbal gift from the deceased, and the defendant was unable to put the plaintiff in possession of the premises. The plaintiff on March 20, 1906, instituted this action for a rescission of the sale, and for refund of the purchase money and other charges paid by him. The defendant executed a conveyance in favour of the defendant after the institution of this action.

[1] (1878) 1 *S. C. C.* 54. [2] (1880) 3 *S. C. C.* 61.

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The defendant alleged that the plaint disclosed no cause of action against him for the rescission of the sale or the refund of the purchase money.

The following issues were framed:

(1) Does the plaint disclose a cause of action ?
(2) Whether the defendant was bound by the conditions of sale or otherwise to put the plaintiff in possession of the property sold ?
(3) Whether plaintiff is entitled to the relief claimed by him ?

The District Judge held in favour of the plaintiff on all the issues, and entered judgment for him as claimed.

The defendant appealed.

Bawa (with him *Van Langenberg*), for the defendant, appellant.—This is an action which is not recognized by the Roman-Dutch Law. The plaintiff was vested with full title as soon as the conveyance was executed and delivered to him. Delivery of the conveyance has been held to be a sufficient delivery of possession: *Appuhamy v. Appuhamy;*[1] *Don Andris v. Illangakoon.*[2] The purchaser should first sue the party in possession; and it is only if he fails in that action that he has a cause of action (*de evictione*) against his vendor. The Roman-Dutch Law does not allow a sale to be rescinded on the ground of failure to deliver possession. In this case the Judge expressly holds that the person claiming to be in possession of the house has no title to it, so that the purchaser will have no difficulty in asserting title against him. The defendant having already executed a deed in favour of the plaintiff has divested himself of all title, and can no longer maintain an action *rei vindicatio* against the trespasser. [HUTCHINSON C.J.—The mere execution of a conveyance by a person does not divest him of title ; the conveyance must be delivered.] The plaintiff brought the action before the conveyance could be delivered; and it is not the defendant's fault that it has not been delivered.

H. Jayewardene (with him *H. J. C. Pereira*), for the plaintiff, respondent.—The present action is quite different from the action *de evictione*. This is an action to rescind the sale on the ground that the vendor is not in a position to implement the contract by delivering possession. It may be that, if the vendee chooses, he may take symbolical delivery by accepting the deeds, and where he does so, a third cannot attack his title on the ground of want of delivery of possession. That is the only extent to which *Appuhamy v. Appuhamy*[1] goes. In the present case the conveyance had not been executed when the action was brought; it has since been executed, but not delivered. So that *Appuhamy v. Appuhamy*[1] has no application to the facts of this case. The vendee can insist on getting

[1] (1880) 3 *S. C. C.* 61.
[2] (1857) 2 *Lor.* 49.

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effective possession, and if the vendor is unable to give such possession, an action lies against the vendor for rescission of the contract and for damages. The *actio de evictione* only arises where the vendee is put in possession and he has been " evicted " by a third party. In such a case the " eviction " is the cause of action against the vendor. The law on this point was fully stated by Sir John Phear, C.J., in *Perera v. Amaris Appu*,[1] which was cited and followed by Middleton J. in *Charles Appuhamy v. Getchohamy et al.*[2]

29th August, 1907. HUTCHINSON C.J.—

This is an appeal by the defendant against the judgment of the District Court of Kandy.

The claim is for rescission of a sale of a house, and for return of the purchase money paid by the plaintiff to the defendant. The house was sold by public auction by the defendant as administrator of the estate of an intestate, subject to certain conditions of sale ; the plaintiff was the highest bidder at the sale and paid the deposit, and afterwards the balance of the purchase money in accordance with the conditions. He complained that the defendant had failed to put him in possession.

After paying his deposit the plaintiff found that a man called Felsinger was in occupation of the house as tenant under one David Dullewe, and that Dullewe disputed the vendor's title and claimed to be the owner. The plaintiff delayed paying the balance for a few days in consequence of this adverse claim, and only paid it when told that, if he did not, the deposit would be forfeited.

The defendant contended that the purchase was complete when the purchase money was paid, and that the plaintiff's only remedy was to sue Felsinger or Dullewe; and he offered to give to the plaintiff, and, after this action was brought, he did actually execute a conveyance of the house to the plaintiff, which, however, the plaintiff refused to accept. The plaintiff claimed that the defendant was bound to deliver to him quiet possession. He claimed to be entitled to this under the conditions of sale; the conditions, however, do not contain anything express on the point.

At the trial the main issue was whether the defendant was bound by the conditions of sale, or otherwise, to put the plaintiff in possession; both Felsinger and Dullewe were called as witnesses by the plaintiff and gave evidence, and Dullewe stated the ground of his claim, which was that the intestate had gifted the house to him in 1893, and that he had taken the rents for his own use ever since that date. The District Judge disbelieved this statement of Dullewe ; but he held that the purchaser was entitled to demand that the vendor should put him in possession, and the decree was that the defendant should put the plaintiff in possession, or in the alternative, that the

[1] (1878) 1 *S. C. C.* 54. [2] (1907) 1 *App. Court Rep.* 97.

sale be declared void, and the defendant should pay to the plaintiff a sum representing the purchase money and certain expenses which the plaintiff had paid, with interest and costs.

The appellant's contention is that the purchaser is bound to accept a conveyance, even though he cannot get actual physical possession of the property; that the vendor's only obligation is to deliver the *dominium*; and that the Roman-Dutch Law in case of non-delivery does not give an action to set aside the contract, but only an action for damages. He also argued that delivery of a deed of transfer is delivery of possession. Where the question is between the purchaser and a third person, delivery of a deed of transfer may be enough to entitle the purchaser to sue as owner; that was the point in the case of *Appuhamy v. Appuhamy*[1]. And physical possession, as distinct from a mere right to it, may by agreement of the parties be effected in any way to which they both assent; and where there is no one actually in possession, or no one disputing the title, the deed of transfer is usually accepted as delivery of both title and possession. But that does not touch the present question, which is between the vendor and the purchaser, viz., whether the vendor is bound to place the purchaser in actual possession.

Van Leeuwen 4, *chapter* 19, *section* 10, says that the vendor is bound to give possession of the property free from all *bona fide* possessors. That seems to me to be right, whether the thing sold be movable or immovable. It is not enough for the seller to say to the buyer. "It is true that I have not got the thing in my own possession or power; it is in the hands of A. B., who claims it as his own; but now you have a right to sue A. B. for it, and that was all that I contracted to sell you." The defendant, on the appeal, has alleged that Dullewe's claim is not made in good faith, and is indeed set up at the instance of the plaintiff in order to enable him to get out of his contract. No such allegation was made in the District Court, and there is no evidence to support it. Finally, the appellant contends that the plaintiff can, at most, only claim damages; that the Roman-Dutch Law does not allow an action to set the contract aside in case of non-delivery of possession. We were referred to *Voet, bk.* 18, *tit.* 5, *sec.* 3, where, however, I do not find any such rule laid down, and to the case of *Perera v. Amaris Appu.*[2].

In that case the plaintiff alleged that he had bought certain land from A, and had been placed in quiet possession of it, and had been afterwards forcibly ejected by B; he sued A and B, claiming a declaration of his title, and possession, and damages, and that A should warrant and defend his title. The District Judge found that neither the plaintiff nor A had any title, but that the land belonged to B; and he ordered that the contract of sale by A to the plaintiff should be cancelled, and that A should pay all the costs of both the plaintiff and B. On appeal by A the Supreme Court set aside the

[1] (1880) 3 *S. C. C.* 61.

[2] (1878) 1 *S. C. C.* 54.

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order made against A, on the ground, which was no doubt technically right, that although A was liable to the plaintiff in damages if he had not placed him in possession, yet as " no question on the contract of sale or issue as to damages or indeed any other issue had been raised " between the plaintiff and A, no order could be made against A in that action. That is no authority for the proposition that no action would lie against A, but only that the Court should not in that action give the plaintiff something which he had not asked, and as to which there had been no issue. The Court said: " If he (the vendor) fails to afford such (quiet) possession, the purchaser's only remedy is by action *against the vendor himself*, on the contract, for specific performance thereof or for damages. Until delivery, although the contract is complete, the property in the subject of sale does not pass so as to enable the purchaser on that right alone to sue a third person for the possession. " The object of the first part of the above sentence seems to have been to point out that the plaintiff, never having had possession, had no right to sue B, and that it was wrong therefore to make A pay B's costs. The Court does not expressly say, and I am not sure that it meant that the plaintiff could not claim against A a decree that the contract should be rescinded; it merely said that in that action he had not claimed either rescission or damages.

The defendant in this case was, in my judgment, bound to deliver quiet possession to the plaintiff; he refused to do so, that is, he refused to carry out the contract. He is therefore liable to return the purchase money and to pay damages. The right to a declaration that the sale is rescinded is consequential on the right to return of the purchase money; for the return of the money could only be ordered on the ground that the sale was no longer in force.

The appeal should be dismissed with costs.

MIDDLETON J.—

The question here is whether the District Judge was right in holding that the plaintiff vendee was entitled to judgment for rescission of a contract of sale of immovable property and the return of the purchase money when the defendant vendor had in fact notarially conveyed to him, but the conveyance had not been accepted nor actual vacant possession by the plaintiff been obtained.

The contention of the defendant-appellant was that having executed a conveyance the title to the land was thereby vested in the plaintiff, who had thus acquired all he had bargained for, *i.e.*, the *dominium*, which would enable him to obtain the actual possession by ouster of the claiming occupant.

It was thus argued that the plaintiff's only remedy was to sue the claiming occupant for declaration of title, making the vendor a defendant in the action to warrant and defend his title.

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The facts in the case are that the plaintiff bought the property at a public auction on conditions of sale by which on the payment of the purchase money the defendant agreed to execute a conveyance, and that on payment of the full purchase money the purchaser should enter into possession of the property.

The plaintiff paid the entire purchase money, but found a tenant in possession of the property, who paid rent to a third person, Dullewe, up to the date of the plaintiff's purchase in September, 1905. This tenant has apparently declined to pay rent until it can be ascertained who is capable of giving a legal receipt, although he admits he tendered the rent to Dullewe on one occasion, who refused it.

A conveyance appears to have been executed by the defendant and has been tendered to the plaintiff by letter but refused or ignored, and plaintiff says he knows there was a title deed for the land in the name of defendant's intestate.

Dullewe was examined, and asserted that the property was his by gift from defendant's intestate, and that he was not prepared to give possession either to the plaintiff or defendant. He also admits that he had prepared a list of defendant's intestate's property with a view to obtain letters of administration, and that the property in question was put in that list.

It seems to be good and settled law (*Appuhamy v. Appuhamy*,[1] following *Don Andris v. Illangakoon*[2]) that the execution and delivery of a conveyance of land in conformity with the Statute of Frauds confers the *dominium* on the purchaser, and so gives him a title to maintain an action against a third party in possession without or under a weaker title.

I have no doubt therefore that if the plaintiff here and accepted the conveyance tendered by the defendant, he might maintain his action against Dullewe for declaration of title, and might have called upon his vendor to warrant and defend the title conferred.

In fact, I think it would be his proper and only remedy; but here the purchaser has not accepted the conveyance.

The question is also whether a purchaser is bound to accept such a conveyance when he knows that the result of doing so will necessitate the bringing of an action in order to acquire that physical possession which any person of sense would desire to acquire on a purchase.

The law holds he is entitled to vacant possession on his purchase (*Voet, bk.* 19, *tit.* 1, *s.* 10; *Berwick, p.* 173), and Voet quotes from the Digest to show that a vendor is understood to deliver vacant possession when he makes such delivery of the thing sold that it cannot be reclaimed by another person, and where therefore the purchaser would be successful in a suit of possession.

[1] (1880) 3 *S. C. C.* 61. [2] (1857) 2 *Lor.* 49.

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Vacant possession according to Voet may possibly (*Berwick, p.* 174) be distinguished from actual physical detention, and it would seem that the Roman-Dutch Law does not require an actual physical delivery of possession of immovable property, but merely a delivery of a clear title to have such possession.

Vacant possession might, therefore, be given if a notarial conveyance were accepted by the purchaser. All the facts connected with the assertion of possession by Dullewe are of such a character that the plaintiff would be justified in refusing acceptance of the conveyance and asking for a rescission of the contract and the return of the purchase money.

It may be said, on the one hand, that Dullewe has not and knows he has not a title to the property; that the tenant Felsinger is aware of the transfer by the defendant to the plaintiff and of Dullewe's want of title; and that all plaintiff would have to do would be to give notice to the tenant either to quit or pay rent to him, and he could obtain physical possession he contends he is entitled to.

There is, however, on the other hand, the fact that Dullewe claims the property; that there is a possibility that he may maintain and succeed in an action against the administrator-defendant on the ground of prescription, or, in other words, an uncertainty whether defendant has a good title.

If the plaintiff accepts the conveyance, he will, I think, be almost inevitably obliged to take legal proceedings to establish a clear title to the premises he has bought.

It was incumbent, I think, on the defendant to have cleared the title before asking the plaintiff to accept the conveyance, and no man ought on equitable grounds to be compelled to accept a strong probability of a law suit in the place of that quiet possession which a purchaser is entitled to.

Under the contract also here the purchaser was entitled to enter into possession on payment of the purchase money, which I take to mean actual detentive possession, and not symbolical possession by means of a title deed.

This he has been unable to obtain, and I think, therefore, that on both grounds I have indicated he is entitled to succeed in this action, and that this appeal should be dismissed with costs.

WOOD RENTON J.—

I have considered this case with all the care which Mr. Bawa's able and most strenuous argument on behalf of the appellant demanded. But, in view of the facts, I think that the judgment appealed against is right.

It is clearly the duty of the vendor of immovable property to give the purchaser vacant possession. The Roman-Dutch writers affirm this proposition in no uncertain terms:—

Tradere hic non est simpliciter de manu in manum conferre, aut in nudam detentionem emptorem deducere, sed vacuam possessionem præstare, id est, liberam ab omnibus possessoribus et detentoribus justis. (*Cens. For. IV., c.* 19, *s.* 10.)

In *bk.* 19, *tit.* 1, *ss.* 10 and 11, Voet expresses himself to the same effect (and *cf.* also the definition of vacant possession by *Berwick*, *p.* 173, as "possession unmolested by the claims of any other person in possession;" and *Burge, II.*, 358). Now what do we find in the present case? Mr. Felsinger is in possession of the property sold as the tenant of David Dullewe. David Dullewe is called as a witness, and he declares that the property belongs to him, and that he will not give it up to the respondent. There is no finding on the evidence of collusion between the respondent and Dullewe. It is true that the learned District Judge takes an adverse view of Dullewe's claim. But that claim cannot be set aside without independent legal proceedings. I think that a vendor who has merely put or offered to put (for the deed of conveyance has not been delivered to the respondent) his purchaser in a position to sue a third party, who, without any collusion with the purchaser, is setting up and really means to try to enforce, an adverse title, is not giving, whatever his view may be of the ultimate prospect of success, the kind of vacant possession that the law requires.

What, then, is the respondent's position? He has paid the entire purchase money, and, in exchange, has been furnished with title, or the promise of a title, to bring a law suit. We are asked to say that, under these circumstances, he has no right to cry off the bargain and reclaim his money. I do not think that any of the authorities cited by Mr. Bawa oblige us to affirm this startling proposition. It has been held (*Appuhamy v. Appuhamy*[1]) that the execution and delivery of a conveyance transfers title to a purchaser so as to enable him to sue a third party in possession without title or under a weaker title, even (*Don Andris v. Illangakoon*[2]) although he never had possession of the property himself; and there are other decisions to the same effect (*Wijanaika v. de Silva*,[3] *Allis v. Sigera*,[4] *Perera v. Baba Appu*,[5] *Fernando v. Jayawardena*[6]). But none of these cases decides that a purchaser is bound to adopt the remedy which they say is open to him; and *Appuhamy v. Getchohamy*,[7] decided by my brother Middleton, is a direct authority to the contrary. I think that we should follow that decision here. I

[1] (1880) 3 *S. C. C.* 61.
[2] (1857) 2 *Lor.* 49.
[3] (1906) 9 *N. L. R.* 366.
[4] (1897) 3 *N. L. R.* 5.
[5] (1897) 3 *N. L. R.* 48.
[6] (1896) 2 *N. L. R.* 309.
[7] (1907) *A. C. R.* 97.

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have been unable to find any passage in Voet or in the *Censura Forensis* which decides that where a vendor fails to discharge the initial obligation of giving vacant possession it is not competent to the purchaser to claim cancellation of the contract.

I would dismiss this appeal with costs.

Appeal dismissed.