

1921.

*Present : Ennis A.C.J. and De Sampayo J.***FERNANDO v. APPUHAMY.***237—D. C. Negombo, 13,181.**Action for declaration of title and ejectment and damages by vendor after sale to third party against party in occupation.*

Plaintiff purchased a land subject to a lease in favour of the defendant and then sold it to L, and as defendant did not in due time deliver possession brought this action for declaration of title, ejectment, and damages, alleging that L would not pay under the contract of sale until possession was delivered.

Held, that after the sale to L plaintiff could not maintain the action for declaration of title, but that he could maintain the action for ejectment and damages.

THE plaintiff-respondent sued the defendant-appellant for declaration of title to a land called Moragahalanda for ejectment of defendant therefrom and for damages, alleging that the defendant was in occupation of the same on a lease from plaintiff's vendor, and that the defendant was overholding the said lease.

The defendant-appellant filed answer admitting plaintiff's claim to one block of the land claimed by plaintiff, but denying the alleged overholding and asserting title to one block which he alleged did not form part of the leased land.

In the course of the plaintiff's cross-examination, it was elicited that the plaintiff had executed a conveyance of the land claimed by him in favour of one Luvina, whereupon the appellant's counsel contended that the plaintiff could not maintain the action.

The appellant's counsel having stated his whole case on this point of law only, the learned District Judge held that the plaintiff-respondent could maintain the action, and gave judgment for plaintiff on the facts.

F. de Zoysa, for the appellant.

E. W. Jayawardene, for the respondent.

March 9, 1921. ENNIS A.C.J.—

This was an action for declaration of title for ejectment and damages. It appears that the plaintiff in 1912 purchased a land subject to a lease to the defendant which was to expire on November 30, 1918. Within a month of the plaintiff's purchase, he sold the land to one Luvina, who is not a party to this case. The plaintiff says that Luvina has not paid under this contract of sale, and refuses to do so until she could have the land. The defendant at first asserted that he had given up all the land he held under the

lease and had retained a portion which he held under an independent title. During the course of the case, when the plaintiff had disclosed his sale to Luvina, the defendant raised a new issue as to whether the plaintiff could maintain the action, and he abandoned the position he had previously taken up, and called no evidence, relying entirely upon the strength of this new issue. The learned Judge, on the authority of the case of *Wijesinghe v. Charles*,¹ decided that the plaintiff could not maintain the action for declaration of title, but could maintain it for ejectment and damages, and he found in favour of the plaintiff in that respect. I am unable to say that the substantial rights of the parties are in any way affected by the decree under appeal, and, further, the case of *Wijesinghe v. Charles (supra)* seems to be in point as showing that a purchaser of land under a lease has an election whether he will step into the place of the lessor or not. The plaintiff as purchaser appears to have exercised an election and taken the place of the lessor. Luvina, on the other hand, does not appear to have exercised an election in the same way. If then the plaintiff is in the position of a lessor, on the authority of the case of *Wijesinghe v. Charles (supra)* he could maintain an action for ejectment and damages. I would accordingly dismiss the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.

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ENNIS
A.C.J.

*Fernando v.
Appuhamy*