1914.

Present: Lascelles C.J. and Pereira J.

BALASURIYA *v.* APPUHAMI.

160—D. C. Matara, 5,768.

Vendor and purchaser—Purchaser not placed in possession—Action by purchaser against trespassers for ejectment—Notice to vendor—Subsequent action against vendor for damages—Measure of damages—Costs of action against trespassers—Prayer for judgment against several defendants jointly—May judgment be entered for the full amount claimed against one defendant only ?

It is competent to a purchaser of land, although he has not been placed in possession of the land sold by the vendor, to sue a trespasser in ejectment calling upon the vendor to warrant and defend title, and if defeated in the action, to sue the vendor for damage. The damage might in such a case include the costs of the abortive action.

Where a defaulting debtor or obligor is not guilty of fraud, but his failure to perform his obligation is due to lack of caution or to imprudence, moderation should be exercised in the assessment of damages.

Where a certain sum is claimed as damage against a certain number of defendants jointly, and as against some of them the claim is dismissed, the whole amount claimed cannot be recovered from the rest without at least an amendment of the claim.

THE facts are set out in the judgment.

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

Drieberg, for respondents.

Cur. adv. vult.

July 21, 1914. PEREIRA J.—

In this case the contract sued upon is a contract between the plaintiff on the one side and the first, second, and third defendants on the other. The fourth defendant has been made a party to the case as the husband of the third. By their deed No. 8,492, dated the 10th April, 1909, the first, second, and third defendants sold and conveyed to the plaintiff, *inter alia*, the land called Depagodawatta, undertaking expressly to warrant and defend the title conveyed by them to the plaintiff. Admittedly, he failed to put the plaintiff in physical possession of a portion of the land of the extent of eleven acres, and the plaintiff was resisted by certain persons in his attempt to take possession of that portion. He thereupon instituted against them action No. 10,310 of the District Court of Matara, and in that action the plaintiff, by notice, called upon the present defendants to warrant and defend his title as against the defendants in that case. They failed to do so, and hence the present

action for the recovery of the loss sustained by the plaintiff by reason of the failure on the part of the defendants to warrant and defend his title to the eleven-acre lot referred to above. Numerous cases were cited and relied on as showing that the plaintiff had mistaken his remedy. It was contended that the plaintiff should have sued his vendors, the defendants, in the first instance, and not incurred the expense of suing the so-called trespassers. Now, the cases cited were mainly those of lessee against lessor or vendee against vendor, where the lessor in the one case or the vendor in the other had placed his lessee or vendee in full physical possession of the land leased or sold by him. These cases can have no application whatever to the present, because in this case, admittedly, the plaintiff was not put in possession of the land sold to him by the defendants. As I have endeavoured to explain in my judgment in the case of *Fernando v. Perera*,[1] under our law the contract of sale of land is complete on the execution of a notarial conveyance followed by the delivery of the conveyance by the vendor to the purchaser, and it is now well-settled law (see *Appuhamy v. Appuhamy* [2]) that it is not necessary that the purchaser should be placed in physical possession of the land sold to enable him to sue a third party in ejectment. That being so, it was quite competent to the plaintiff in the present case to sue, as he did, the defendants in case No. 10,310, and call upon the present defendants to warrant and defend his title. In some of the cases cited there are no doubt *dicta* showing that in a case like the present the vendee might, in the first instance, sue the vendor, requiring him to give him physical possession of the land sold, but there is nothing in those cases to show that that is the vendee's only remedy, or that the vendee might not sue the so-called trespasser in ejectment calling upon the vendor to warrant and defend his title, and that, having failed in the action, he might not sue the vendor for the loss sustained by him. On the other hand, in the case of *Ratwatte v. Dullewe*[3] Middleton J. says: "I have no doubt that if the plaintiff had accepted the conveynace tendered by the defendant he might maintain his action against Dullewe (that is, the alleged trespasser) for declaration of title, and might have called upon his vendor to warrant and defend the title conferred." That is exactly what, in effect, happened in the present case, and I have no hesitation in saying that the plaintiff's claim is well founded.

Then, it has been argued that the damage awarded is excessive I do not think so. If, as shown above, the plaintiff was entitled to bring action No. 10,310 calling upon the defendants to warrant and defend his title, it follows that he was equally entitled to recover from the defendants the costs of that action in the event of failure in it. The rule of law is that when a debtor or obligor cannot be charged

[1] *(1914) 17 N. L. R. 161.*
[2] *3 S. C. C. 61.*
[3] *(1907) 10 N. L. R. 304 : 2 A. C. R. 99.*

1914.

PEREIRA J.

Balasuriya v. Appuhami

with fraud, and is merely in fault for not performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagement, moderation should be exercised in the assessment of the damages. As a rule, the creditor or obligee would be allowed only what might be termed his out-of-pocket expenses. (*Pothier 1, 2, 3.*) In the present case the plaintiff appears to have claimed no more than a proportionate share of what he had paid for the whole land and his costs of action No. 10,310.

A more substantial objection to the decree in the mouth of the first defendant is that, while in his plaint the plaintiff prayed that he (the first defendant) be condemned with the second and third defendants to pay the plaintiff the damages claimed, the decree absolves the second and third defendants from liability, and condemns the first defendant to pay the whole amount claimed. The District Judge discusses the facts and circumstances attendant upon the execution of deed No. 8,492, and arrives at the conclusion that the only party liable in damage is the first defendant; but the question is, whether by his decree he could have placed the first defendant in a worse position than he would have been if the prayer in the plaint was simply allowed to its fullest extent. I need not pause here to inquire whether in the case of joint judgment-debtors the full amount of the decree can, in the first instance, be recovered from any one of them. It is sufficient to take into account the fact that, either, one of several joint judgment-debtors is liable to pay only a proportionate share of the debt, or, if he is obliged to pay the whole debt, he is entitled to contribution from his co-debtors. So that, when the plaintiff's claim against the second and third defendants was dismissed and the first defendant was condemned to pay the whole amount claimed by the plaintiff, a liability was imposed on him larger than that which the plaintiff claimed a right to impose. That could not, in my opinion, be done without a proper amendment of the plaint sufficiently indicating to the first defendant the full extent of the claim as against him. Before judgment when the plaintiff found that his claim against the second and third defendants was one of doubtful validity, he should have amended the plaint by either striking out their names from the plaint, or claiming alternatively from only the first defendant the full amount of the damage mentioned in the plaint. The plaintiff's counsel has moved to be allowed to amend the plaint accordingly at the present stage of the case, submitting that the omission to amend it at the proper time was due to inadvertence. The amendment, in my opinion, should not be made in this Court, and in the circumstances, I see no objection to the case being remitted to the District Court to enable the plaintiff to make the necessary amendment. I would set aside the judgment appealed from, and remit the case to

the District Court for further trial after such amendment of the plaint as the plaintiff might desire to make, and judgment anew thereafter.

The costs so far in the Court below should, I think, abide the event, and I would let each party bear his own costs of this appeal.

LASCELLES C.J.—I agree.

Sent back.