

1942

Present : Soertsz and Keuneman JJ.

SILVA *v.* JAYAWARDENA.

56—D. C. Balapitiya, B482.

Action Rei-vindicatio—Transfer of title pending action—Claim for damages.

Where, after the institution of an action for declaration of title to five blocks of land, plaintiff transferred three blocks, no decree for title can be entered in respect of the blocks sold. The right to claim damage up to the date of transfer is not affected by the sale.

Eliashamy v. Punchibanda (14 N. L. R. 113) followed.

A PPEAL from a judgment of the District Judge of Balapitiya.

N. E. Weerasooria, K.C. (with him S. W. Jayasuriya and D. M. Weerasinghe), for defendant, appellant.

N. Nadarajah, K.C. (with him H. A. Chandrasena), for plaintiff, respondent.

Cur. adv. vult.

October 16, 1942. KEUNEMAN J.—

Plaintiff brought this action for declaration of title to five blocks of land, and has been declared entitled to them, and has obtained damages and ejectment against the defendant.

The findings of the District Judge cannot be assailed, except in one respect. It has been admitted by the plaintiff that since the institution of the action, she has transferred three of these blocks, viz., the 1st, 2nd and 4th blocks, mentioned in the decree. It is contended for the defendant that no decree can be entered for declaration of title or ejectment in respect of these three blocks. It is, however, conceded that the plaintiff is entitled to claim damages up to the date of the transfer, viz., May 19, 1941.

I think this argument is sound. *Voet* has set out this principle. (*Voet* 6 : 1 : 4).

“But again, if he who brought this action was the *dominus* at the time of the institution of the suit, but *lite pendente* has lost the *dominium*, reason dictates that the defendant should be absolved . . . both

because the suit has then fallen into that case, from which an action could not have a beginning, and in which it could not continue and because the interest of the plaintiff in the subject of the suit has ceased to exist, and in short because that (right of *dominium*) has been removed and become extinct, which was the only foundation of this real action." *Voet's Title on Vindications and interdicta by Casie Chitty*).

It is clear that the action contemplated by Voet was the action *rei vindicatio*, and I think it follows that all rights *in rem* against the property are lost, when the *dominium* has been transferred pending the action to another person. It is clear, however, that the right to claim damages up to the date of the transfer is not affected. This was held by a Divisional Court in *Eliashamy v. Punchi Banda* (*supra*).

It follows, therefore, that the District Judge was not entitled to enter a decree for declaration of title and for ejectment in respect of the 1st, 2nd and 4th blocks referred to in the decree. The judgment and decree are affirmed as regards the 3rd and 5th blocks in the decree, but the decree for declaration of title and ejectment are set aside in respect of the 1st, 2nd and 4th blocks in the decree. The order for damages is varied as follows:—viz., that the defendant do pay to the plaintiff the sum of Rs. 250 as damages, and a further damage of Rs. 20 from April 18, 1941, to May 18, 1941, and further damages at the rate of Rs. 8 per month from May 19, 1941, until the plaintiff is restored to possession of the 3rd and 5th blocks mentioned in the decree.

The plaintiff will retain the order for costs in the Court below, but there will be no order for costs in this appeal.

Judgment Varied.

SOERTSZ J.—I agree.

