1954 *Present :* **Swan J. and Fernando A.J.**

M. D. THEOBALD *et al.*, Appellants, *and* H. M. ARAMBEPOLA *et al.*, Respondents

S. C. 174—D. C. Kurunegala, 5,303 L

Vendor and purchaser—Sale of immovable property—Doubt as to whether it was ad quantitatem *or* ad corpus—*Construction of deeds.*

Defendants executed an agreement undertaking to sell to the plaintiffs fifty-five acres and thirty-eight perches of land the boundaries of which were specified in the schedule to the agreement. Shortly afterwards a surveyor was requested by the plaintiffs to prepare a plan of the land in question. Despite the fact that the Plan disclosed the extent as forty-four odd acres only, the defendants executed a conveyance in favour of the plaintiffs and the description of the land conveyed was identical with that contained in the schedule to the agreement to sell, with the only difference that the extent was referred to as being " of about 55 acres ". Plaintiffs took this conveyance although they were fully aware, from the plan that had been prepared, that the defendants were in no position to deliver possession of an estate of 55 acres. Subsequently the plaintiffs were actually able to obtain possession of only 38 acres 2 roods and 12 perches and, thereupon, sued the defendants in the present action to have themselves placed in possession of an extent of 16 odd acres to make up the 55 acres conveyed to them or, in the alternative, to recover the sum of Rs. 10,000 as damages.

Held, that in regard to the issue whether the sale was *ad corpus* or *ad quantitatem* the correct answer was that the sale was *ad quantitatem*, but in respect only of 44 odd acres. As the defendants were able to place the plaintiffs in possession only of 38 odd acres, the defendants were liable to compensate the plaintiffs for the value of the shortfall of 5 odd acres.

APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiffs appellants.

Cyril E. S. Perera, Q.C., with *O. S. M. Seneviratne*, for the defendants respondents.

Cur. adv. vult.

November 24, 1954. FERNANDO A.J.—

The plaintiffs sued the defendants to have themselves quieted and placed in possession of an extent of fifty-five acres and thirty-eight perches of land alleged to have been sold to them by the defendants or in the alternative to recover the sum of Rs. 10,000 as damages being the value of the extent of land possession of which is alleged not to have been delivered to the plaintiffs, and they have appealed against the decree of the District Judge dismissing their action.

On July 22, 1948, the defendants executed an agreement (P 3) undertaking to sell to the 1st plaintiff the land described in the schedule to the agreement. The schedule enumerates four lots, mentioning in each case the extent of the lot, describes the whole as one property called and known as Diwalgollewatta " containing in extent fifty-five acres and thirty-eight perches ", and further specifies the boundaries of the whole property.

On July 27, 1948, there was a further agreement (P 4) by the defendants which recites that the land in question is subject to a conditional transfer and acknowledges the receipt of Rs. 15,000 paid by the 1st plaintiff in order to enable the defendants to obtain a retransfer and thus presumably to carry out the agreement P 3.

The learned Judge has found that very shortly after the execution of P 3 a Surveyor Fernando was requested by the plaintiff to prepare a plan of the land claimed by the defendants. The extent of the land claimed by the defendants as shown in his plan of July 31, 1948 (D 1) is A. 44 R. 1 P. 32. The learned Judge has also accepted the evidence that the plaintiffs saw that plan and became aware early in August, 1948, that the claim covered only 44 odd acres. On August 11, 1948, the defendants executed a conveyance (P 5) in favour of the plaintiffs and the description of the land conveyed is identical with that contained in the schedule to P 3 with the only difference that the extent is referred to as being " of about 55 acres ". At the trial the plaintiffs produced a plan P 1 of the extent of land of which they were actually able to obtain possession, namely, A. 38 R. 2 P. 12, and their action is based on the failure of the defendants to deliver the 16 odd acres necessary to make up the 55 acres conveyed on P 5. The position taken up by the plaintiffs was that P 5 was a conveyance *ad quantitatem* and that the defendants were accordingly liable either to deliver the extent of the shortfall or to compensate the plaintiffs for the value of that extent. The defendants maintained that the sale was *ad corpus* and that they were not liable to deliver anything more than the extent to which they were actually entitled.

The 1st plaintiff in his evidence denied that he even saw the plan D 1 before the conveyance P 5 was executed, but he was contradicted on this point both by the attesting Proctor-Notary and by the Surveyor Fernando. He also stated that his offer for the land was on an acreage basis at the rate of Rs. 650 per acre, but had to admit that on his first inspection of the land he realised that only about 25 acres were fully planted, and that, of the remainder, about 12 acres were completely in jungle and the other portions planted with coconut trees here and there. The learned Judge has disbelieved the plaintiff on both these matters and was then led to conclude " that the plaintiffs were aware of the land they were purchasing and satisfied themselves before the purchase ". He accordingly held that the sale was *ad corpus* and hence dismissed the action.

If the agreement P 3 and the conveyance P 5 had stood alone without extrinsic evidence as to the ciscumstances in which the sale took place it would have been impossible to resist the conclusion that the transaction was *ad quantitatem* ; the description of the lots by reference to a Final Village Plan and to the exact extent of each lot, and the absence of anything in the documents to indicate a sale *ad corpus* would have strongly supported the plaintiffs' case. Accepting however the correctness of the finding of fact that the plan D 1 was prepared at the request of the 1st plaintiff and that he was aware that the extent claimed was only 44 odd acres, there seems little doubt that when the plaintiffs subsequently took the conveyance they must have been fully aware that the defendants were in no position to deliver possession of an estate of 55 acres. The Notary's evidence (also accepted by the learned Judge) was that he wished to draft a conveyance by reference to the plan D 1, but that the 1st plaintiff instructed him to retain the description (of 55 acres) given in the original agreements ; he also said that the defendants reluctantly agreed to this course and at the last minute the 1st defendant insisted that the description be altered to " about fifty-five acres ".

The somewhat difficult question which arises upon these findings of evidence is whether on August 11, 1948, the parties intended the sale to be *ad corpus*, and not *ad quantitatem* as would appear from the face of the conveyance. Mr. Jayawardene urges that the proper inference to be drawn is that the parties deliberately decided to ignore the plan D 1 and to go through with the original agreement to convey 55 acres, and that the defendants cannot be heard to say that there was any change from the original intention. The learned Judge has drawn the inference that the plaintiffs were not at the date of P 5 concerned with the actual extent and were willing to take a conveyance of the defendants' rights whatever those rights may be. I think however that the answer lies somewhere between these two extremes. Both parties were aware before P 5 was executed that the land consisted of only 44 odd acres but despite this they were willing to complete the transaction without any reduction in the figure of Rs. 37,500 already stipulated in the original agreement. But that does not mean that the conveyance must be held to have been *ad corpus*. Since D 1 fixed the probable extent as 44 odd acres, it is only reasonable to suppose that the plaintiffs were agreeable to accepting and the defendants to delivering only 44 acres. Nor is it

at all likely that the plaintiffs, knowing that the defendants claimed only 44 acres and not 55 as was thought originally, would have agreed to take the further risk that their purchase would cover an extent even smaller than 44 acres. The 1st defendant stated in evidence that she requested that the figure of 44 acres should be mentioned in the conveyance. In these circumstances the correct answer to the issue whether the sale was *ad corpus* or *ad quantitatem* should have been that it was *ad quantitatem*, but in respect only of 44 acres. If D 1 is to avail the defendants as indicating an alteration of the original intention, it must equally be accepted by them as evidence of the new intention which existed at the time of the execution of the conveyance. We have then the result that, although the parties intended a conveyance of 44 odd acres, the defendants were able to place the plaintiffs in possession only of 38 odd acres. An extent of A. 5 R. 3 P. 20 is outstanding, and the defendants are liable to compensate the plaintiffs for the value of that extent.

For the reasons mentioned, I would allow the appeal and set aside the decree dismissing the action. Decree must be entered ordering the defendants to place the plaintiffs in possession of the outstanding extent of A. 5 R. 3 P. 20 or in the alternative that they pay to the plaintiffs as damages the value of that extent. The case is remitted to the District Court for the assessment of the amount actually to be paid as damages, which will be calculated at a rate not higher than Rs. 650 per acre.

The claim made in the plaint was much larger than that which the plaintiffs have been able to substantiate, and the identical claim was pressed at the argument in appeal. Moreover, they did not directly put in issue the question which has now proved decisive. I therefore direct that each party bear his own costs both of trial and of appeal. The costs, if any, to be awarded in respect of further proceedings for assessment of damages will be in the discretion of the District Judge.

SWAN J.—I agree.

Appeal allowed.