FERNANDO *v.* JAYAWARDENA.

1896.
September 25.

D. C., Chilaw, 723.

Implied covenant of title—Prescription—Notice to warrant and defend title —Roman-Dutch Law.

A purchaser who has been evicted from property purchased by him may sue his vendor for breach of warranty of title, although he had not given his vendor notice of the proceedings terminating in his eviction, if he could prove that his vendor had no shadow of a title to the property sold.

THE facts are set forth in the judgment.

Chitty, for appellant. The District Judge is wrong in upholding the plea of prescription. The case falls under section 7 of Ordinance No. 22 of 1871 ; this action arises from a written contract of sale and is prescribed in six years. Notice to the vendor to warrant and defend title is not necessary in every case. Where the vendor had no title whatever to the property sold such notice is unnecessary. He cited *Perera v. Amaris Appu* (*1 S. C. C. 54*).

Jayawardena, for respondent. The action is not based on any express warranty contained in the conveyance ; it is based on an implied warranty which arises out of every contract of sale. Hence the action can only be regarded as one for damages and not as one founded on a written contract, and so falls under section 10 and not under section 7 of Ordinance No. 22 of 1871.

25th September, 1896. BONSER, C.J.—

The appellant purchased some years ago from the ancestor of the defendants a piece of land. Subsequently, in 1889, the appellant was evicted by certain persons who claimed title superior to that of the vendor. More than three years after this eviction he commenced an action, which is founded upon the implied contract to warrant title which arises out of every contract of sale and purchase.

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The District Judge dismissed the action, amongst other grounds on the ground that it was prescribed. He held that it came under section 10 of Ordinance No. 22 of 1871 as being an action for damages, and that it ought to have been brought within two years of the cause of action arising. Mr. Chitty, who argued for the appellant, contended that the action ought to be regarded as an action falling under section 7 of the Ordinance, being an action upon a written promise, and that the action would be in time if brought within six years—as in this case it was. I am unable to agree with that contention. Section 7 appears to me clearly to relate to a case where the agreement or promise or contract or bargain, the breach of which is complained of, was reduced to writing. Now, in this case, the contract to warrant the property sold was not reduced to writing: it is implied from the fact of there being a contract of sale. Therefore, in my opinion, this action was rightly held to be prescribed. It may be an interesting question, which may some day arise for decision, whether an action of this kind falls within section 8 or section 10 of the Ordinance. In the present case, it is immaterial under which section it falls: in either case the action is prescribed, and therefore it is quite unnecessary to decide this question.

The District Judge also dismissed the action on another ground, and that is this: that the plaintiff did not give notice to the vendor of the legal proceedings which resulted in the eviction. No doubt the authorities state that this is in general necessary to enable a purchaser to maintain his action, but it appears that there are exceptions to this general rule. If the purchaser alleges in his plaint and declares his readiness to prove that his vendor had no shadow of a title to the property, he is allowed, if he proves this, to have recourse against his vendor, even though he had omitted to give him formal notice of the proceedings. The authorities for that proposition will be found in *Van Leeuwen's Cens. For. 4, 19*, at the end; *Grotius Inst. 3, 15, 17; and Voet, 21, 2, 22.*

WITHERS, J.—I agree.