1901.
February 28 and March 1.

BABA SINNO *v.* SASIRA.

D.C., Kegalla, 1,071.

Action de evictione—*Necessity of formal notice to defendant—Liability of vendors of land, upon eviction of vendor, to pay to him damages as for improved value—Liability for damages* pro rata—*Extent of liability of executor* de son tort.

An action *de evictione* is an action by a purchaser of land against his vendors to recover damages in respect of an eviction by the true owners of a part of the land purchased by him.

To support an action *de evictione* it is necessary to allege and prove that formal notice of action was served on the defendant accompanied by a copy of the libel or plaint of the action in ejectment, so that the vendors may know what it is that is alleged in the action, and what the case is which has to be met.

In such an action the plaintiff is not entitled to recover by way of damages the increased value of the land, in consequence of improvements made by him. He should have claimed in the action in ejectment to retain possession until he had been recouped for his improvements. If he neglected to adduce this plea, it was his own fault.

The vendors of the land should not be made liable for the whole of the damages *in solidum*, but only for the share payable by each.

An executor *de son tort*, who was sued as one of the vendors, cannot be made liable for more than the assets of the deceased which came into his hands.

THE facts of the case are fully set forth in the judgment of the Chief Justice.

H. Jayawardena, for appellant.—Plaintiff's action is bad, in that he did not notice his vendors to warrant and defend his title. All the parties joined in the deed must be parties in this suit; that is not so here. [BONSER, C.J.—You might have taken that objection at the trial, and then they would have been joined.] But notice should have been given. *Voet, 21, 2, 21 (Berwick's translation, p. 515)*. [BONSER, C.J.—They had notice from other sources.] That is not sufficient. Voet says so in section 22.

Bawa, for respondent.—The question of notice was not raised at the trial; if raised then, notice might have been proved. No form of the notice required is given (*Civil Minutes, D. C.*, Galle, 1,355, 8th August, 1893; *Fernando v. Jayawardene, 2 N. L. R. 309; Perera v. Amaris Appu, 1 S. C. C. 54; Voet, 21, 3, 18*). Each of the defendants noticed is bound to warrant purchaser's title (*Digest 45, 1, 85*).

1st March, 1901. BONSER, C.J.—

This is an action *de evictione*; that is to say, it is an action by a purchaser of land against his vendors to recover damages in respect of an eviction by the true owners of a part of the land purchased by him.

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Now, it appears that on the 28th August, 1891, five Sinhalese villagers, living in a village in the Kegalla District, sold and conveyed by a notarial deed to the plaintiff in this action, who appears to be a low-country Sinhalese, a *hena*, which is described as being of two *pelas'* paddy sowing extent. The consideration for the deed is expressed to be Rs. 25, but the notary in his statement appended to the conveyance states that the sum of Rs. 15 was paid in his presence, and that the balance of Rs. 10 was admitted to have been received previously. Whether that was the true consideration or not, is not quite clear. One of the defendants swore that all that they got was Rs. 12, and that statement has not been contradicted. The plaintiff went into possession, and alleges that he built a *gala* and a hut, and made various improvements on the land.

Subsequently some Moormen, who were adjoining landowners, claimed a portion of the land which had been sold to the plaintiff, and brought two separate actions in the Avisawella Court to assert their title. In both these actions they were successful, and the plaintiff incurred certain costs in defending the actions.

He then commenced the present action claiming against two of his vendors and the son of a third vendor who had died, and whose son was alleged to have alienated his inheritance. He claimed against these three persons, alleging that the value of these two small pieces of land from which he had been ejected by the decree of the Court was Rs. 260, and that the costs of the actions amounted to Rs. 240, and in his plaint he alleged that the first defendant Sasira had due notice of the said action, in that he appeared as witness in the said case. There is no such statement as regards either of the other defendants.

The District Judge gave judgment *in solidum* against two of these three defendants, condemning them to pay Rs. 360 and costs made up of two sums, Rs. 200 and Rs. 160; Rs. 200 being the amount allowed by the District Judge as the value of the land and buildings, and Rs. 160 which he allowed for the costs of defending the two actions.

The defendants have appealed. Now it is quite clear that, to support an action *de evictione*, it is necessary to allege and prove that formal notice was served on the defendant of the suit for eviction, and Voet states that the practice was in his day—and to my mind it is a reasonable practice—that a notice should be accompanied by a copy of the libel or plaint of the action in ejectment, so that the vendors may know what it is that is alleged in the action, and what the case is which has to be met. Voet clearly lays down that it is not sufficient that the vendor should

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know about this suit from some other source. He says that it is necessary that formal notice should be given by the purchaser. In the present case, as I said before, he did not allege that any such formal notice was given to any of these defendants. All that is alleged as regards the first defendant is that he had due notice of the action, in that he appeared as a witness. I should also say that in the course of the trial the third defendant stated, in answer to a question put, not by the plaintiff's counsel, but by his own counsel: "I was noticed to warrant and defend plaintiff's title. I gave evidence". What the nature of that notice was does not appear. Mr. Bawa says that, if the case goes back, he may be able to show that due and formal notice, in accordance with the requirements of the law, was given in each case, and I think it is not unreasonable that in the circumstances of the case an opportunity should be given him of proving this, if it is really the case.

Then, as regards the amount of the damages, it will be observed that for a small portion of this land, which was sold by the vendors for not more than Rs. 25—and it may be considerably less—the damages have been given to the extent of Rs. 200, because it is said that the property has increased in value owing to the buildings and improvements which have been made by the purchaser—the plaintiff in this action—since his purchase. But it seems to me unfair that the vendor should be mulcted in these heavy damages. The purchaser might have claimed in the action in ejectment to retain possession until he had been recouped for his improvements, and, if he neglected to advance this plea, it is his own fault, and it will be unfair that the vendors should suffer by reason of the default of the purchaser.

Then, to come to the form of the decree. There were five vendors, and there are only three of these vendors who have been sued, or rather two vendors and a person who is said to have constituted himself the executor *de son tort* of another vendor. These three defendants are made liable for the whole of the damages alleged to have been sustained by the purchaser, and judgment is given against them *in solidum*. Now, Voet clearly lays down that where there are more vendors than one, a purchaser cannot sue any individual in an action *de evictione* for more than his share. Therefore the form of the decree is wrong. Whatever is found to be the amount of the damages sustained by the purchaser should have been divided by five and a decree entered up against each of the defendants for a fifth.

Again, as regards the second defendant who is sued as executor *de son tort* of this deceased partner, who was one of the vendors,

he is made liable by this decree as though he were a vendor himself, whereas it is quite clear that the only form of decree against him must be a decree to the extent only of the assets which he has received.

The case must go back on the question whether due and formal notice of the action of both or either of these actions was given to all or any of these defendants. In any case where such notice was not given the plaintiff's action will fail.

BROWNE, A.J.—I agree.