1912.

Present: Grenier J.

APPUHAMY *v.* SINGHO *et al.*

454—C. R. Matara, 11,645.

Vendor and purchaser—Notice to warrant and defend—May be written or verbal—Mere knowledge of action not enough notice—Merely summoning vendor as a witness not enough.

A vendee should call upon his vendor to warrant and defend his title to enable him to recover the puchase money from his vendor in case he should suffer eviction. The demand to warrant and defend title need not necessarily be in writing, although, perhaps, it is the most convenient form of making the demand. The demand may be verbal—where the vendor is asked by the vendee to intervene in the action and to stablish the title that has been conveyed. Merely summoning the vendor as a witness does not constitute a demand to warrant and defend, unless at the time the summons is served the vendor is informed, either verbally or in writing, that the object of the summons is to enable him to intervene in the action in support of the title that has been conveyed to the vendee.

The consequence of not giving notice to the vendor is not obviated by his knowledge of the pendency of the suit.

THE facts are set out in the judgment.

Balasingham, for the defendants, appellants.—The defendants were admittedly not formally noticed to warrant and defend their title in the former action. One of the defendants was merely summoned to give evidence in the former case. That does not constitute a notice to warrant and defend title. The mere fact that the defendants were aware of the pendency of the former case is not enough to enable the plaintiff to call upon them to refund the purchase money. Counsel cited *Adonis v. Akolis*[1] and *Baba Sinno v. Sasira*.[2]

Tinahamy v. Nonis,[3] on which the Judge relies, does not govern this case. That case merely decided that notice to warrant and defend need not necessarily be in writing. Here there was no notice at all.

Bartholomeusz, for the plaintiff, respondent.—The defendants were aware of the pendency of the action on their own admission. They were summoned to give evidence. The Judge says that defendants' title was easily demolished.

[1] *(1889) 8 S. C. C. 197.* [2] *(1901) 5 N. L. R. 34.*
[3] *(909) 1 Cur. L. R. 216.*

1912.

Appuhamy v. Singho

Moreover, in this case the defendants have expressly covenanted to " answer regarding the disputes that may be raised by any person whomsoever in respect of the said property, as well as pay compensation to the vendee. " This is not an action on an implied warranty, and no notice to warrant and defend is necessary.

February 14, 1912. GRENIER J.—

The appeal in this case involves a pure question of law. The plaintiff alleged that the defendants sold to him a one-fifth share of a certain land, and that he paid the sum of Rs. 30 and spent a sum of Rs. 4 for executing the deed of transfer and registering the same. The plaintiff also alleged that he instituted case No. 5,910, C. R. Matara, for a partition of the land, and that at the trial the defendants failed to warrant and defend the title to the property they sold, and the plaintiff lost the rights acquired by him by his deed. The defendants raised a question of law in their answer to the effect that no notice was issued on them in case No. 5,910, C. R. Matara, to warrant and defend the sale by them. The defendants raised some points on the merits, but we need not trouble ourselves about them on this appeal. When the case came on for trial there was one issue of law which was agreed to by counsel on both sides. The issue was framed in these terms: " Is the action maintainable, as the defendants were not noticed to warrant and defend title in C. R. 5,910? "

After some argument the Commissioner held that the defendants were admittedly not formally noticed to warrant and defend title, but were aware of the partition action No. 5,910, and that first defendant was summoned as a witness. The Commissioner relied upon a judgment of Wood Renton J., reported in the first volume of the *Current Law Reports*, pages 216 and 217, and he was of opinion that it was held in that case that it was sufficient that the notice to the vendor constituted an implied demand to warrant and defend title, and therefore the action was maintainable. The Commissioner also added that he could not possibly say if the defendants had no shadow of title, but at any rate it appeared to have been easily demolished. Now, I think, it is good Roman-Dutch law that before a vendee can recover the purchase money from his vendor, in case he has suffered eviction, he should call upon his vendor to warrant and defend his title. The demand to warrant and defend title need not necessarily be in writing, although, perhaps, it is the most convenient form of making the demand. The demand may be verbal where the vendor is asked by the vendee to intervene in the action and to establish the title that has been conveyed. I can find no authority for the proposition that a mere service of summons on the vendor constitutes a demand to warrant

and defend, unless at the time summons is served the vendor is informed, either verbally or in writing, that the object of the summons is to enable him to intervene in the action in support of the title that has been conveyed to the vendee. In the case relied upon by the learned Commissioner in his judgment, reported in volume 1. of the *Current Law Reports*, I do not understand Wood Renton J. to have gone further than what the headnote to the judgment shows. The headnote is in these terms:—

> The formal notice to warrant and defend title, to which the lessor of an evicted lessee, or the vendor of an evicted vendee, is entitled, need not be in writing. It is sufficient if the lessor or vendor receives actual verbal notice of the litigation, coupled with a demand, express or necessarily implied, that he should defend the title.

That, I think, is a correct exposition of the law, and is not a departure from well-established rules which regulate the giving of notice by the vendee to the vendor to warrant and defend title. Nowhere in the judgment is it laid down that the mere service of summons constitutes by itself a demand to warrant and defend. In the case of *Adonis v. Akolis*,[1] Burnside C.J, has very clearly interpreted the law on the subject. He says: "Merely summoning him"—that is, the vendor—"as a witness in a suit is certainly not a sufficient notice. Burge says (*vol. II., p. 561*): 'The consequence of not giving notice to the vendor was not obviated by his knowledge of the pendency of the suit.'" And in another part of his judgment he says: "I dissent from the proposition at the Bar that a vendee in an action like this has only to show that the vendor knew of the proceedings being taken, to fix him with liability, and that the vendee himself might remain quiescent, and allow judgment to pass against him. That is not the law." Further on in his judgment he says: "As I have already pointed out, it is absolutely necessary that the vendor should have full notice of the action against the vendee and of the vendee's claim to be warranted in it; and if, in an action against him, the vendee fail to urge such exceptions as were competent to him, and which would have prevented his adversary from recovering against him, the vendor would not be liable; or if the vendee has afforded his adversary the means of recovering by any imprudence on his part, he ceases to have any right to indemnity from the vendor." It is only reasonable that before you can call upon the vendor to pay back the value of the land he has conveyed, you must give him the opportunity of warranting the title that he has conveyed.

For these reasons, I think that the decree of the Court below must be set aside, and plaintiff's action dismissed with costs in both Courts.

Set aside.

[1] *(1889) 8 S. C. C. 197.*