1918.

Present: De Sampayo J.

JINADASA *v.* DURAYA.

314—C. R. Matale, 12,325.

Vendor and purchaser—Action de evictione—*Notice by purchaser to vendor may be verbal—Purchaser agreeing to referring case to arbitration—Does action* de evictione *lie ?—Purchaser not appealing.*

A purchaser is not entitled to bring an action *de evictione* against his vendor if he has agreed to arbitration in the action brought against him by the third party.

"If the purchaser is defeated in an action and does not appeal, or having appealed does not press the appeal, in a case where the vendor has not intervened or undertaken the defence, he is likewise deprived of any remedy against the vendor."

The notice which a purchaser has to give a vendor to enable him to bring an action *de evictione* against his vendor may be verbal; it need not be in writing.

THE facts are set out in the judgment.

M. W. H. de Silva, for defendant, appellant.—The notice given in this case was insufficient. The evidence shows that the notice was not timous. It was given after the parties had agreed to refer the case to arbitration, too late to enable the vendor to undertake the defence. This case does not come within the principle of

[1] *(1911) 14 N. L. R. 397.* [2] *(1913) 16 N. L. R. 236.*

Tinanhamy v. Nonis,[1] as there was no clear demand that defendant should defend the title he had conveyed. *Adonis v. Arolis*,[2] *Babasinno v. Sasira*.[3]

Even if the notice be held to be sufficient, the plaintiff cannot recover, as he has referred the case to arbitration. *Voet 21, 2, 30 ; Berwick's Voet 586.* It is the duty of the purchaser to defend the title conveyed to him " with all his power. " If he refers the case to arbitration, or voluntarily surrenders the thing sold, or compromises the suit, he cannot be said to do all that lies in his power to maintain the possession he has received, and thus loses his rights against the vendor; similarly, if he fails to appeal, or having appealed abandons the appeal, he cannot recover. (*Voet 21, 2, 20, 30.*)

Sansoni, for plaintiff, respondent.—The notice given was quite sufficient. The circumstances are almost identical with those in *Tinanhamy v. Nonis*.[1] This is a question of fact, and the Commissioner has found for the plaintiff. It has been held that the compromise of a suit does not deprive the purchaser of his rights if the compromise was the best thing that could have been done under the circumstances. The law does not expect a vendee to fight a hopeless case.

Cur. adv. vult.

January 9, 1918. DE SAMPAYO J.—

An interesting point of law arises in this case. The defendant, by deed dated January 8, 1916, sold a certain land to the plaintiff for a sum of Rs. 150 and put him in possession thereof. Thereafter one Saranalis Silva sued the plaintiff for declaration of title to the land in action No. 11,808—C. R. Matale, and under the decree entered in that case the plaintiff was ejected. Thereupon he brought this action to recover from the defendant the price paid and the amount of legal expenses he incurred in defending the previous action.

In order to entitle a purchaser to bring an action *de evictione*, he must have given timely notice to the vendor of the action brought against him by any adverse claimant. It has been held that this notice need not be in writing, but may be verbal, provided it is brought home to the vendor that he is called upon to come in and defend his title. *Tinanhamy v. Nonis*[1] The plaintiff in this case did not give a written notice, but he stated in evidence that on the receipt of the summons he gave verbal notice. The facts stated may be taken as proving that due notice of the action was given to the defendant. There is, however, another point which needs consideration. The object of the notice is, of course, to enable the vendor to intervent in the action and undertake the defence, or otherwise to assist in the litigation (*ut lite assistat*) and establish his title. *Voet 21, 2, 20 ; 3 Maasdorp 162.* Whether or not the vendor

[1] *(1909) 1 Cur. L. R. 216.*
[2] *8 S. C. C. 197.*
[3] *5 N. L. R. 34.*

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in pursuance of the notice comes in and defends the title, the purchaser is bound to make a proper defence himself, and do his best in the case. A corollary of this rule is the further condition that the purchaser should not so conduct the case as to make it useless or impossible for the vendor to intervene and defend his title. Accordingly he will not be entitled to bring an action *de evictione* against his vendor if he has agreed to arbitration in the action brought against him by the third party. *Voet 21, 2, 30.* The same passage in *Voet* shows that if the purchaser is defeated in the action and does not appeal, or, having appealed, does not press the appeal, in a case where the vendor has not intervened or undertaken the defence (*absente venditore*), he is likewise deprived of any remedy against the vendor. Now, it appears that the action No. 11,808, in which the defendant did not intervene notwithstanding the notice, was by consent of the parties, and on their joint application, referred to arbitration, and judgment went against the plaintiff in accordance with the arbitrator's award, and, of course, there was no appeal, as none could indeed be taken from a judgment entered in terms of an award given on a voluntary reference. It may be mentioned that the defendant was subpœnaed to give evidence before the arbitrator, but that fact does not affect the question. I think that under the Roman-Dutch law, which applies to this case, the plaintiff is in the circumstances not entitled to make the present claim against the defendant.

The judgment is set aside and plaintiff's action dismissed, with costs in both Courts.

Set aside.