

1916.

*Present* : Ennis J. and Schneider A.J.

HADJIAR *et al.* v. DON *et al.*

194—D. C. Colombo, 39,771.

*Vendor and purchaser—Land sold passing through a number of hands—  
Action by last purchaser against all previous vendors for damages  
for eviction.*

A sold a land to B and entered into a covenant to warrant and defend the title to B and his assigns. B sold it to C with a similar covenant. C sold it to D. D brought this action against A, B, and C for damages consequent on eviction.

*Held*, that the action was maintainable against all the defendants, as there was privity of contract between the plaintiff and all the defendants.

*Held*, further, that there was no misjoinder of defendants.

**T**HE facts are set out in the judgment of Schneider A.J.

*Samarawickreme and Bartholomeusz*, for plaintiffs appellants.

*Driberg* (with him *Koch*), for 2nd defendant, respondent.

*Cur. adv. vult.*

June 12, 1916, ENNIS J.—

This was an action for damages for judicial eviction. The plaintiffs joined as defendant with their own vendor (third defendant), the vendor to the third defendant (second defendant), and the vendor to the second defendant (first defendant). The learned District

Judge gave judgment for the plaintiffs against the third defendant, but not as against the second and first defendants. The plaintiffs appeal against the dismissal of his action as against the second defendant.

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The learned District Judge based his decision on a passage in *Voet*, 21, 2, 17 (*Berwick* 524):—"Not only purchasers and those like them who . . . . have lost by judicial decree a thing they have acquired, but also their heirs, may sue the vendors and others commonly called *auctores* and their heirs when the obligation has arisen from convention . . . . . but the particular successors of purchasers, &c., for instance, cession of action has been made to them by the first purchasers," from which he inferred that by Roman-Dutch law a purchaser who has been judicially evicted could sue only his immediate vendor unless cession of action has been made to him. There is, however, another passage in *Voet*, 21, 2, 21, which explains the first passage:—"For no contract took place between them unless cessions of action against the first vendor had been made by the first to the last purchaser."

In the present case the second defendant entered into a covenant with the third defendant to warrant and defend the title to the third defendant's assigns. This covenant gives privity of contract between the second defendant and the plaintiff-appellant, and on this ground alone the appellant is entitled to succeed.

Apart from this, however, I am of opinion the matter is one of procedure, and is governed by the Civil Procedure Code, sections 14 and 18, which are designed to prevent multiplicity of actions and to diminish the cost of litigation as much as possible. Under these sections such numbers of persons may be made defendants as may be necessary to enable the court effectually and completely to adjudicate the question involved in the action, and the procedure supersedes the Roman-Dutch procedure.

I would allow the appeal, with costs.

SCHNEIDER A.J.—

The appellants sue the second defendant-respondent and two others for the recovery of a sum of Rs. 5,405.09 as damages consequent on eviction from certain premises, which had been the subject-matter of a sale. By deed in 1905 the first defendant sold and transferred the premises in question to the second defendant, who in 1907 sold and transferred to the third defendant, who in 1909 sold and transferred to the first and second plaintiffs. These plaintiffs had purchased as trustees, and had transferred the premises to themselves and the other plaintiffs in their capacity of trustees. The first defendant filed no answer, and was in default. The second and third defendants in their answer pleaded (1) a

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misjoinder in respect of the first and second defendants on the ground that there was no privity of contract between them or either of them and the plaintiffs; (2) a misjoinder of defendants and causes of action:

The parties proceeded to trial on three issues. As regards the misjoinder, the only issue was formulated thus: "Is this action not maintainable against the second and third defendants on the ground that there has been a misjoinder of defendants?"

The learned District Judge dismissed the plaintiffs' action against the first and second defendants, and gave judgment against the third defendant alone for the sum claimed. The plaintiffs' appeal is only as regards the dismissal of the action against the second defendant.

I think the appeal is entitled to succeed, with costs. The learned District Judge appears to have been of opinion (1) that there should have been a cession of action from the second and third defendants to the plaintiffs before the plaintiffs could sue; and (2) that there was no privity of contract between the plaintiffs and the first and second defendants. Two passages from Voet, viz., *lib. 21, tit. 2, s. 17*, and *lib. 21, tit. 2, s. 21*, were cited in support of the contention that there should have been a cession of action, and the learned District Judge appears to have accepted them as supporting this contention. I do not agree with this view. What Voet does say in those passages is that, where a thing sold has passed through a number of hands and the last holder is evicted, that the latter has no right of action without cession, because "no contract took place between them." I therefore think that, where there is privity of contract, the passages cited have no application. Here the deeds D 5 and D 6, by which the first and second defendants respectively sold and transferred the premises in question, contain an express covenant that they would warrant and defend the title conveyed by them, not only in the case of their immediate vendees, but also of their assigns. Hence there was privity of contract as regards the covenant to warrant title between the first and second plaintiffs and all the defendants. Even if the facts had been otherwise, I am doubtful that the passages cited would have any application in the present day.

But it is clear that the issue as formulated is only concerned with a misjoinder of defendants, and not of the right to sue successive transferees, the contention being that there were several contracts of sale. This contention reduces itself to the same point, that the action cannot be maintained unless there was privity of contract between the first and second plaintiffs and all the defendants. The observations I have already made show that this privity is introduced by the covenant expressly embracing the assigns of the parties.

*Appeal allowed.*