[FULL BENCH] June 30, 1910

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

ALAGIAWANNA GURUNNANSE *v.* DON HENDRICK *et al.*

D. C., Colombo, 28,365.

Action by lessee against trespassers and lessor—Misjoinder of parties—No cause of action against lessor till judicial eviction.

A lessee who has been given vacant possession of the property leased cannot, in the absence of any express covenant in the lease empowering him to do so, make the lessor a party defendant to an action brought by him against trespassers for declaration of title as lessee and claim in the alternative damages against the lessor; the lessee has no cause of action against the lessor unless and until he suffers eviction by due process of law.

THE facts of this case are fully set out in the judgment of the Chief Justice as follows:—

This is the plaintiff's appeal against the dismissal of his action. The action as it was constituted at the date of the trial was by a lessee against his lessor and against third parties (the added defendants), who had disputed his title; he alleged that the lessor had granted him a lease of certain land for four years, and had agreed that, should there be any dispute in respect of the demised premises by reason of any flaw in his title, he would pay all damages to the lessee; that he paid the rent in advance, and was in possession of the premises for seven months, when the first of the added defendants prevented him from possessing them, and the first and second added defendants granted a lease of an undivided half of the premises to the third added defendant, who is in possession of the land; that his lessor had title only to one-half of the premises, and he claimed a declaration of his right to possession for the term of his lease; and that the added defendant be ejected, but, in the event of the Court holding that his lessor had no right to lease more than half of the land, then his lessor should pay him damages.

The lessor in his answer said that the plaintiff is still in possession, alleged that his title was good, and that the action against him is not maintainable until the plaintiff has suffered eviction, and he also claimed from the plaintiff in reconvention damages for waste. The added defendants denied that the plaintiff had been prevented from possessing the land, and, while admitting the execution of the lease, the third added defendant denied that the defendant is or that they are in possession of the land.

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The Judge by consent decided first, two of the issues proposed, *i.e.*— (1) The plaintiff having been put in possession of the land, is this action maintainable without his suffering eviction? And (6) Is the plaint bad for misjoinder of causes of action as well as of defendants? He decided the first issue in the negative and the sixth in the affirmative, and he dismissed the action.

The plaintiff appealed.

H. A. Jayewardene (with him *B. F. de Silva*), for the plaintiff, appellant.—In an action against a trespasser for restoration of possession the lessee may join an alternative claim against the lessor for the return of the lease money. (*Dingiriya v. Payne*,[1] *Fernando v. Waas* [2]). It was held in *Silva v. Punchirala*,[3] *Juan Fernando v. Fernando*,[4] that in Courts of Requests the two causes of action could not be joined in one suit, in view of the special provisions of section 805 of the Civil Procedure Code. In District Courts the two causes of action might be joined in one suit with the leave of the Court. See *Silva v. Punchirala* [3] and *Appuhamy v. Dionis*.[5] Counsel also referred to *Appuhamy v. Guneris* [6] and *Menon v. Krishnan*.[7]

In any event the dismissal of the action against the added defendants (trespassers) is wrong.

Samarawickrama, for the respondent.—The plaintiff has no cause of action against the lessor until he has been legally evicted by a third party. See *Appuhamy v. Guneris;* [6] *Voet 21, 1, 10; 21, 2, 1.* At the date of the institution of this action the plaintiff had not suffered judicial eviction; he therefore had no cause of action against the lessor. The warranty which a lessor gives his lessee (vendor gives his vendee) is, really speaking, not so much one of title, but of possession. *Fernando v. Waas* [2] does not apply; the cause of action against the vendor in this case was the vendor's failure to put the vendee in possession.

Jayewardene, in reply.—Under the lease a cause of action arises against the lessor as soon as there is a dispute in respect of the leased premises owing to a flaw in the lessor's title. Parties to the lease have substituted an express warranty for the implied warranty. Counsel cited *3 Maasdorp's Institutes of Cape Law, p. 159.*

Cur. adv. vult.

[1] *(1908) 11 N. L. R. 105; 3 Bal. 299.*
[2] *(1891) 9. S. C. C. 189.*
[3] *(1908) 1 S. C. D. 32.*
[4] *(1904) 3 Bal. 211.*
[5] *(1909) 12 N. L. R. 382.*
[6] *(1904) 1 Bal. 8.*
[7] *(1901) 1 L. R. 25 Mad. 399.*

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After setting out the facts, His Lordship continued:—

The ruling on the first issue cannot mean that the action is not maintainable against the added defendants, and it was no ground for dismissing the action against them. And if it was right, and the action was therefore rightly dismissed as against the first defendant, the sixth issue did not arise; the claim against the other defendants remained, and ought to have been tried. If, however, the ruling on the first issue was wrong and the ruling on the sixth was right, still the whole action ought not to have been dismissed, for if there was, as the Judge held, a misjoinder of causes of action (because no leave had been obtained as required by section 35 of the Code), and also a misjoinder of defendants, the mistake could, and ought to have been, set right by striking out the first defendant and the claim against him.

The District Judge says that the law requires that a lessee placed in possession should first suffer eviction by due process of law before he is entitled to sue his lessor on the ground that he has been dispossessed. Where there is no express covenant, doubtless that is good law everywhere (unless the person dispossessing claims under the lessor), but that is not the ground on which this lessee sues his lessor. The rule is put in another way: that a purchaser (which term includes lessee) who has been put in possession has no cause of action against his vendor (or lessor) until he has been legally evicted by a third party by an action, of which he is bound to give notice to the vendor (*Appuhamy v. Guneris* [1]). But the words "no cause of action" are too wide; the rule cannot refer to all actions whatsoever, but only to actions on the express or implied covenant by the vendor on the sale of the land to the plaintiff; and in the case of an express covenant, you cannot say that there is no cause of action on it until you know what the covenant was. In an action such as the present one the cause of action is the alleged obligation under the contract, or the alleged breach of contract; the disturbance by a third party, or the ejectment by decree of the Court, is not the cause of action; and such a disturbance is no proof of a breach of a covenant by the vendor that he has a good title, although ejectment by decree would be evidence of it. And where the covenant is merely to defend the title, it is obviously implied that the purchaser must give notice to the vendor when the title is attacked, because without such notice he could not defend his title. It is said that the Roman-Dutch Law is not merely that a legal eviction is evidence of a breach of the vendor's covenant, but that it is the only evidence, and that the purchaser cannot sue on the covenant or for a breach of it until he has been lawfully evicted; that is to say,

[1] (*1904*) *1 Bal. 8.*

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that there has been no breach of covenant until he has been so evicted. But it is impossible to say whether there has been a breach of covenant until we know what the covenant was. If it was an implied " warranty of title," *i.e.*, a warranty by the vendor that his title is good, it is broken at once if his title is bad. But that is inconsistent with the rule that the purchaser cannot sue on the implied covenant till he has been legally evicted; if that rule is the law then the implied covenant must be, not that the vendor has title, but that the purchaser shall not be legally evicted. If, however, the covenant is an express undertaking to defend the title, then it is not broken until the vendor having been duly notified to do so, has failed to defend it; and in such a case, or where there is no express covenant, it is, I think, settled by many decisions of this Court that the purchaser cannot sue the vendor until that has happened. In *Appuhamy v. Dionis*,[1] where the purchaser sued the alleged trespasser to recover possession and joined the vendor as defendant, it was held by my brother Middleton and myself that the Court could give leave under section 35 to join the two causes of action; but I think that the objection that the vendor was improperly sued ought to have prevailed. It does not appear from the report that our attention was specially directed to that objection (if it was taken), but we rather assumed that there was a cause of action against the vendor and dealt only with the question of giving leave to join the two causes of action. I have already stated what is the covenant in the present case, and what is the plaintiff's claim under it against his lessor. It is in Sinhalese, and the translation made of it by our Mudaliyar is " that in the event of the dispute arising in respect of this lease owing to any flaw in my title, or any act committed by me, I have hereby promised and undertaken to be held responsible for any such dispute, and to make good to the lessee any losses incurred by him owing to such disputes." The plaintiff alleges that a dispute has arisen in respect of the lease owing to a flaw in the lessor's title. and that he has suffered loss owing to the dispute. It seems to me that there is here a good cause of action alleged against the lessor. In my opinion, therefore, there was a good cause of action alleged against both the lessor and the added defendants. And if so, the Court had power under section 35 to give leave to join the two causes of action, for this seems to be just the case contemplated by the example to section 35. My brothers, however, think that the express covenant in this case amounts to no more than the ordinary express or implied covenant to defend the title. If that view is correct I think that the action should be dismissed as against the first defendant with costs, but that it should go back for trial as against the added defendants, and that the costs of the appeal as regards them should be costs in the cause.

[1] *(1909) 12 N. L. R. 382.*

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This was an action by a lessee against his lessor for damages, and for a declaration that the lease is null and void on the ground that third parties, the added defendants, interfered with his possession on the plea of title after he had possession for about seven months. The action was originally brought against the lessor alone, but by leave of the Court the plaint was amended and the added defendants joined. The claim was for ejectment and damages against the added defendants, or, in the alternative, damages against the defendant. The District Judge dismissed the plaintiff's action, holding on the two issues, which it was agreed should be decided in the first instance: (1) that the action was not maintainable on the ground that the plaintiff having been put into possession of the entire land had not been evicted by due process of law before action brought; (2) that the action must fail in the absence of the permission of the Court under section 35 of the Civil Procedure Code to join the different causes of action.

As regards the second issue decided by the learned District Judge, I think now, and I expressed the same opinion in *Appuhamy v. Dionis*,[1] that the learned Judge might well have allowed the plaint to be amended at the time when he made his order, especially as he must have passed the plaint under section 46 of the Civil Procedure Code, both in its original form and as amended, provided that there is a cause of action existing against the vendor. The main argument used by the learned counsel for the respondent in support of the judgment was that, even if the joinder of the claims were permitted, there was no cause of action by the plaintiff against his lessor until the lessee had been duly evicted from the premises leased by judicial decree, and he founded this argument mainly on *Voet 21, 1, 10; 21, 2, 1;* and *21, 2, 20; 1 S. C. C. 54; 7 S. C. C. 141.* The implied covenant in a sale or lease it was argued was not that the vendor or lessor had a good title, but that he would warrant and defend the title which he purported to have in granting the conveyance or lease, and in granting vacant possession. Hence it was argued that no breach occurred to give a cause of action against the vendor or lessor until they had failed to defend the title, and that the mere act of a trespasser would not give such a cause of action.

Voet 19, 1, 10 (Berwick's translation 172) lays down that "the things sold are to be transferred along with their accessories to the purchaser; that he shall acquire vacant possession of them, whether it has been expressly so agreed or not." He goes on to say (*p. 173*): "But a vendor is understood to deliver vacant possession when he makes such delivery of the things sold that it cannot be reclaimed by another person, and when therefore the purchaser would be successful in a suit for possession."

[1] *(1909) 12 N. L. R. 382.*

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As the learned Judges said in *Mammadoe Lebbe v. Dingiralle Arachchi*,[1] though the deed contains no warranty, the vendor in every transaction, where the property of one is transferred to another for valuable consideration, incurs the implied obligation to warrant the purchaser against eviction (*2 Burge 554*; *Voet 21, 2, 1*; *Censura Forensis, book 4, ch. 19, s. 11*).

Eviction is defined by *Voet 21, 2, 1* as "the recovery by judicial process of our property which the opponent has acquired by a *justus titulus*," *i.e.*, purchase or gift. After much consideration of another view of the question which I was inclined to take, I think we are bound by the Full Court judgment in *Perera v. Amaris Appu*,[2] which has been the law followed since 1878, and which I think expresses the correct view of the question according to the Roman-Dutch Law.

Under that view of the law the action is not maintainable for damages against the defendant at the stage at which it was brought, unless the special covenant in the lease allows it. After careful consideration of the wording of it, as translated by the Mudaliyar of the Court in my brother Wood Renton's statement of the case, my opinion is that this covenant amounts to no more than the ordinary implied covenant to warrant and defend title. The lessor agrees to be responsible for any dispute, and to make good losses incurred by the lessee owing to such dispute, *i.e.*, he agrees to defend the title and pay damages on failure. The plaintiff here obtained vacant possession, which he held for seven months, and then alleged ouster as to part. He has no cause of action for damages against his vendor until he has been evicted by judicial process. His first remedy is by possessory action against the added defendants, giving timeous notice to his vendor or lessor to assist him, or he can summon them as witnesses to support his title to possession. If he succeeds in doing this, he has got the vacant possession the vendor was bound to give him. If he fails in this, and he still believes in his vendor's or lessor's title, he can induce his vendor or lessor to bring an action *rei vindicatio* against his opponents, or he may do so himself with their assistance as parties or witnesses, giving them timeous notice of his intention to do so. If he does not bring an action *rei vindicatio*, or they do not assist him and he fails, it may again be a question if there has been a recovery against him by judicial process which will entitle him to bring his action for damages against his vendor or lessor. He may, on the other hand, on failure of his possessory action, hold possession *vi et armis*, and stand the brunt of an action by his opponents giving his vendor timeous notice to warrant and defend, which he refuses to comply with. In the meantime there may have been much bloodshed, and even murder, as I fear often happens, but our duty is to administer the Roman-Dutch Law as we find it, regardless of the consequences it may have on a hot-blooded

[1] (*1857*) *2 Lor. 102.*

[2] (*1878*) *1 S. C. C.*

Eastern people. In the case of *Appuhamy v. Dionis* the question was not raised, so far as I remember, whether the action lay against the third defendant, but the point to which our attention was directed was whether the Court could give leave to join the causes of action under section 35 after the filing of the plaint, and I do not think our decision went beyond a ruling to that effect on the assumption that there was a cause of action. I think, therefore, here that no cause of action lay in the first instance against the original defendant here, and that it was not competent for the plaintiff to bring the original action against the first defendant, and therefore no power lay in the Court to amend the plaint by adding the added defendants. The added defendants, however, have not appealed against the order, and it would make the claim against them *res judicata* if the action be entirely dismissed by us. The question whether the Court can act under section 35, I think, depends on there being a cause of action against the vendor or lessor for damages. If there is no cause of action until eviction by judicial process, the example given under section 35 could never arise; as if the lessee had been duly evicted by judicial process, he could hardly bring an action against the persons who had succeeded against him, although he might sue his lessor alone for damages. The section, I think, clearly contemplates that the cause of action may be an ouster only on a claim of title, which the Roman-Dutch Law has been held to deny. The appeal must, therefore, in my opinion, be dismissed with costs so far as it affects the lessor, but the action should be allowed to proceed against the added defendants.

WOOD RENTON J.—

In my interlocutory judgment, concurred in by Grenier J., of June 9, 1910, in which we sent this case for argument before a Bench of three Judges, the facts have been fully stated. I do not propose to recapitulate them now, except in regard to any incidental points where it may be necessary to do so for the purpose of dealing with matters urged before us for the first time on the further argument. The problem that we have to solve may, I think, be compendiously stated thus. A lessor gives his lessee vacant possesion of the property leased. The lessee alleges that he has subsequently been ousted from possession by third parties not claiming or setting up title in any way under the lessor. The ouster has taken place without due process of law. The lessee, thereupon—I am taking the action as it is presented to us in the amended plaint—sues the alleged trespassers and his lessor in one and the same action, claiming a declaration of his title as lessee to the possession of the land in question for the full term of the lease, ejectment, and damages as against the trespassers, and, in the event of the Court holding against the lessor on the question of title, damages as against him.

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No notice of the action was given to the lessor. He was simply made a party defendant to the suit. The lease contains the following covenant: "In the event of any dispute arising in respect of this lease owing to any flaw in my title, or any act committed by me, I, the said lessor, have hereby promised and undertaken to be held responsible for any such dispute, and to make good to the lessee any loss incurred by him owing to such dispute."

On these facts the following questions arise for decision:—

(i) Apart from the covenant just quoted from the lease, and from the provisions of section 35 (1) of the Civil Procedure Code, is the lessee entitled under Roman-Dutch Law to maintain such an action as the present at this stage against his lessor at all ?

(ii) If that question be answered in the negative, does section 35 (1) of the Civil Procedure Code enable him to do so ?

(iii) Does the covenant in the lease impose upon the lessor any obligation wider than his obligation, whatever it may be, under the common law ?

Before attempting to answer these questions, I should perhaps dispose of at once several other incidental points involved in the case that appear to me to present no difficulty. If there is no legal objection under the common law of the Colony to the lessor being brought in as a defendant at this stage of the proceedings, I do not think that the provisions of section 35 (1) of the Code prevent his joinder.

In view of the acceptance of the amended plaint by the Court after notice to, and in the presence of, parties, I would hold on the facts that the joinder has taken place with the leave of the Court within the meaning of sub-section (1) of section 35. Moreover, even if such leave had not been given at the time of the acceptance of the plaint, the decision of the Supreme Court in *Appuhamy v. Dionis* [1] is an express authority which justifies us in holding that it can be given afterwards.

I agree, too, with Mr. Hector Jayewardene that the learned District Judge was in any event wrong in dismissing, as he has done, his action against the alleged trespassers. In my opinion it ought to be allowed to proceed as against them.

I proceed now to deal with the points of law involved in the three questions stated above. It appears to me that both the text of the Roman-Dutch Law itself and its interpretation in Ceylon in a long and practically unbroken series of decisions establish as a rule of law the proposition that under such circumstances as those with which we have here to deal, a lessee who has been put into vacant possession of the property demised cannot, in the absence of an express covenant by the lessor in the lease empowering him to do so,

[1] *(1909) 12 N. L. R. 382.*

bring his lessor into Court against the latter's will as a defendant to an action brought by him against third parties, not claiming title under the lessor, who have ousted him from possession, unless and until they have done so by virtue of the decree of a court of law. Moreover, even where the conditions making such an action maintainable are otherwise present, the lessee has under Roman-Dutch Law no remedy against his lessor, unless he has given him timely notice of the legal proceedings taken against him by the adverse third parties, in order that the lessor may at his own discretion have an opportunity of intervening in the suit.

Most of the authorities bearing on this point are derived from the law of purchase and sale, but inasmuch as under the law of the Colony a lease is a partial alienation of the property leased they are equally applicable, and this fact has not been contested by the appellant's counsel, as between lessor and lessee. Voet (*book 21, title 2, s. 1*) expressly states that the vendor's liability for warranty of title arises, *inter alia*, on the eviction of the vendee, and he defines eviction as follows: *evictio est rei nostrae, quam adversarius justo titulo acquisivit, per judicem facta recuperatio.*[1]

He proceeds to point out that the eviction against which this implied warranty exists is not tortious ouster by a stranger, or that which takes place by virtue of some right conferred by the law, inasmuch as in the latter case the purchaser either knew or ought to have known that the law conferred this right (see also *Burge, vol. II., p. 554*). Moreover, he clearly states that even after the eviction the remedy is not open to the vendee, unless he has given timely notice to the vendor of the proceedings taken against him with a view to secure his eviction, and supplied him with a copy of the plaint.

Illud præprimis monendum venit, non aliter eum cui res evicta, adversus auctorem reliquosque supra recensitos de evictione experiri posse, quam si auctori tempestive facta fuerit denunciatio, litem motam esset addito secundum mores exemplo libelli par. actorem editi.[2]

Voet explains that the object of this rule is not to transfer the suit to the vendor and to his forum, but to give the latter the opportunity of intervening in the litigation and of undertaking the defence of his title in the forum of the party sued. When, but only when, a purchaser has complied with these conditions, he has, after eviction, recourse against his vendor, provided always that the purchaser himself has not failed to defend, or if he has taken proceedings as plaintiff, to prosecute the suit, with all his power (*Si modo ipse emptor pro virili non defuerit defensioni*), lest otherwise the vendor should be considered to have been defeated rather on account of absence than because he had a bad case. It follows (i) that the warranty implied under Roman-Dutch Law on a sale or in a lease is a warranty against judicial eviction; (ii) that no action for breach

[1] *Page 750 (1878 ed.).* [2] *Ib. page 764 (1878 ed.) 21, 2. 520*

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of that implied warranty will lie unless and until there has been judicial eviction; and (iii) that even then the remedy is not open to the purchaser or lessee unless he has given his vendor or lessor formal notice of the eviction proceedings. That the action for breach of warranty depends upon the result of these proceedings and can be brought only after their termination is further shown by the fact that there are special pleas open to the vendor or lessor, which can arise only after these proceedings have been concluded; for example, the plea that the purchaser or lessee has failed to defend the suit against him with all his power, or (see section 30) that he has failed to give formal notice to his *auctor* of the *lis mota*. The law is laid down in equivalent terms in the *Censura Forensis*:[1] "The vendor in case of eviction is under an obligation to the purchaser, if the thing should be lawfully claimed by any one, to defend him, or see that he is defended, against the person coming and claiming his property."

"In order, however, that the vendor should be liable to the purchaser in case of eviction, whenever any one sues for the thing bought, the purchaser should give notice of the suit in time to his vendor, in order that the latter may defend and protect him. And if this notice is not given, no redress will be given him against his vendor, unless the right of the person claiming the thing is notorious; and it appears that the vendor had no right, or the purchaser undertakes to prove this, in which case, even if notice is given, redress is given the purchaser against the vendor."[2]

The trend of judicial decision in the Colony is practically unbroken in the same direction. I would refer simply to the decisions of Phear C.J., Clarence J., and Dias J. in *Perera v. Amaris Appu*,[3] and of Clarence A.C.J. and Dias J. in *Sinnar Sellappa v. Supermaniar Saravana Muttu*,[4] and there are numerous other cases, reported and unreported, to the same effect. Indeed, the appellant's counsel in his argument expressly admitted that under the pure Roman-Dutch Law, apart from the special points as to section 35 (1) of the Civil Procedure Code and the scope of the express covenant, he could not complain of the decision of the learned District Judge of Colombo on the point with which I am now dealing.

I proceed, therefore, to consider the question whether section 35 (1) of the Civil Procedure Code has made such an action as the present maintainable. For the purpose of this part of my observations I am still dealing only with the implied obligation of warranty against judicial eviction under the common law. In the case of *Pieris v. Dochyhamy*,[5] Sir Richard Morgan A.C.J. is reported to have said that the Dutch forms of proceeding are not now compulsory

[1] *Barber and Macfayden's translation, book 4, Ch. 19, s. 11*
[2] *Ib. s. 14.*
[3] *(1878) 1 S. C. C. 54.*
[4] *(1888) 7 S. C. C. 141.*
[5] *Ram. 72-76, 102.*

on the Supreme Court. Whatever may be the scope of this *obiter dictum*, it can have no application to the issue now before us, which is not whether section 35 (1) of the Civil Procedure Code has effected an alteration in procedure, but whether it has created a cause of action unknown to the common law. Apart from authority, the language of the sub-section itself does not support that view of its scope. It deals expressly with the joinder of causes of action, but for what constitutes a cause of action we are thrown back on the common law, and the definition of " cause of action " in section 5 of the Code itself. With the common law I have dealt already. In section 5 of the Code " cause of action " is defined as the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury. In spite of this definition, it seems to me that for the circumstances in which an action " may be brought," or under which an " obligation " arises, we must still look to the common law. It was suggested in the argument that the example appended to section 35 (1) of the Code shows that a change in the substantive law was effected by that section. I cannot accede to this suggestion. If the sub-section itself is not sufficient to introduce the change referred to, the example is, I think, equally inefficacious for that purpose. It throws no light on the all-important question whether the purchaser was ever put in possession of the land sold, and whether there was any, and if so, what, express convenant on the part of the lessor. It appears to me that the case of *Fernando v. Waas*[1] is clearly distinguishable, inasmuch as there the plaint distinctly alleged that the vendor had failed to deliver to the purchaser peaceable possession of the land in suit. If that fact were substantiated, there had already been, at the time of action brought, a breach of warranty of title on the part of the vendor, which gave the purchaser an immediate right of action against him. The case of *Ahamado Lebbe v. Maris Appu*,[2] to which Mr. Hector Jayewardene referred us, is really against him, for in that case Wendt J. clearly asserts the right of a vendor to formal notice of action. The case of *Dingiriya v. Payne*[3] is also distinguishable, in view of the fact that there the lessee had been dispossessed by a purchaser from the lessor, and therefore the lessor had himself, at the time of action brought, derogated from his own grant, and thereby committed a breach of his implied warranty of title. The decision of Mr. Justice Sampayo in *Appuhamy v. Guneris*[4] is a direct authority in favour of the view as to the scope of section 35 (1) of the Civil Procedure Code, which I am here endeavouring to support. It derives support also from the decision in *Fernando v. Fernando*,[5] where Layard C.J. and

[1] *(1891) 9 S. C. C. 189.*
[2] *(1903) 9 N. L. R. 289.*
[3] *(1908) 11 N. L. R. 105 ; 3 Bal. 299.*
[4] *(1904) 1 Bal, 8.*
[5] *(1904) 3 Bal 211.*

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Moncreiff J. held that such a claim against a lessor, as we are here concerned with, was not maintainable in the Court of Requests, and indicated that in their opinion it was doubtful whether it could be maintained in the District Court. In *De Silva v. Punchirala*,[1] Wendt J. followed that decision. He added, however, that even in the District Court an alternative claim against the lessor could only be preferred with the leave of the Court. "I agree," he said. "in the view expressed by Layard C.J. and Moncreiff J. in *Fernando v. Fernando*,[2] that the claim against the lessor does not affect the alleged trespasser, and cannot be put forward in the action against him." I may point out in passing that, in the case of *Mahamadoe Lebbe v. Dingiralle Arachchi*,[3] it was held that, although the vendor in every transaction where the property of one is transferred to another for valuable consideration is bound to warrant the title, this obligation only arises after eviction and after formal notice to warrant and defend, and that where a purchaser has compromised his suit with third parties claiming adversely to him, he cannot subsequently proceed against his vendor without showing that he acted *bona fide*, that the claimants had a right to the land, and that the vendor had not a shadow of title. In the case of *Abdul Ally v. Caderavaloe*,[4] Withers J. defined the law in similar terms as regards movables. "By Roman-Dutch Law every contract of goods sold and delivered implies a warranty from the vendor to the purchaser that he shall have the absolute and dominant enjoyment of the goods. Before, however, a purchaser can recover damages for a breach of such warranty, or for the recovery of the price paid with interest, he must be evicted therefrom by the judgment of a competent Court, in an action between him and a third party, that the goods belonged to that third party. Nor is a judgment of that kind binding against the vendor unless he is called upon to warrant and defend the purchaser's title." In *Saibo v. Appuhamy* [5] it was held by Lawrie A.C.J., Withers J., and Browne J. that the interruption of a tenancy by strangers after the tenant has been put in possession by the landlord is no answer to a claim for rent, unless such interruption was followed by eviction in due course of law. These decisions appear to me to be inconsistent with the view that any change in the Roman-Dutch Law as to the circumstances under which a lessee who has been put in possession can sue his lessor for breach of implied warranty of title has been effected by section 35 (1) of the Civil Procedure Code. Although the appellant in his amended plaint alleges that his lessor had title only to an undivided half of the property demised, I do not think that we are at liberty to consider that allegation as setting up my case against the lessor's title other than that arising out of the ouster by alleged trespassers. Mr. Hector Jayewardene did not take this point on behalf of the appellant. He admitted that the text of the pure Roman-Dutch Law was against him, and he argued his case on the grounds that

[1] (*1903*) *1 Weer. 32.*
[2] (*1904*) *3 Bal. 211.*
[3] (*1857*) *2 Lor. 120.*
[4] (*1893*) *2 C. L. R. 166.*
[5] (*1893*) *2 S. C. R. 126.*

an alteration had been effected in that law by section 35 (1) of the Civil Procedure Code, and that the covenant in the lease as to warranty of title was an express one, rendering the lessor liable under circumstances where no liability would have existed under the common law.

With regard to the covenant itself, I am unable to accept the view which Mr. Jayewardene pressed upon us. If he is right, the lessor impliedly contracted, not only to allow himself to be sued before his lessee had been judicially evicted, but also to dispense with his right to notice to warrant and defend title. In my opinion the language of the covenant will not bear any such meaning. I would construe it merely as an undertaking on the part of the lessor to make good any losses arising from disputes, which, when adjudicated upon by a competent court of law, should have disclosed a flaw in his title. As regards the lessor, I would affirm the decision of the learned District Judge, with costs here and below; the action to be allowed to proceed against the other parties.

Case sent back.