Present : De Sampayo J. and Schneider A.J.

1920.

WIRAWARDANE *et al. v.* RATNAIKE.

44—D. C. Colombo, 53,707.

Vendor and purchaser—Warrant and defend—Partition action—Notice by vendee to vendor—Action for damages for failure to warrant and defend—Defence that vendor cannot intervene in partition action—Object of notice.

The defendant sold a land to the plaintiff. Subsequently third parties instituted an action for the partition of a portion of the land. The plaintiff intervened, and gave notice to warrant and defend to the defendant. The defendant gave evidence for the plaintiff; plaintiff's claim was rejected. Subsequently, plaintiff instituted this action against defendant for damages for failure to warrant and defend title. The defendant resisted the claim on the ground that he was not at liberty to intervene in the action, as a partition action could be among co-owners only, and that, therefore, he was not liable under the Roman-Dutch law for eviction.

Held, that the defence was bad. There was nothing in the Partition Ordinance to prevent the vendor from intervening in the partition action.

The object of a notice to the vendor is simply to notify that the title is in dispute. It is left to the vendor either to make himself a party, or in any other manner assist the proof of the title conveyed by him. It is not essential that he should become a party.

1920.

Wirawardane v. Ratnaike

J. S. Jayawardene, for defendant, appellant.

E. W. Jayawardene, for plaintiff, respondent.

Cur. adv. vult.

October 5, 1920. DE SAMPAYO J.—

This is an action *ex evictione* for damages against the defendant for failing to warrant and defend the title to a land which the defendant had sold and conveyed to the plaintiff. An action for partition of the southern portion of the land among certain third parties was subsequently brought. The plaintiff intervened in that action, and gave notice to the defendant of that action, and called upon him to warrant and defend the title. The defendant did not make himself a party to the action, but only gave evidence as a witness for the plaintiff. He failed to establish his title, and the other parties to the action was declared entitled to the land. The defendant resists the plaintiff's present claim on the ground that he was not at liberty to intervene in the action, as a partition action could be among co-owners only, and that, therefore, he is not liable under the Roman-Dutch law for eviction. His counsel relies on *Murugan v. Murugupillai*.[1] That judgment was my own, and I expressed an opinion, which was not necessary to the decision of the case, that the object of the notice under the Roman-Dutch law was to enable the vendor to intervene in the action where the vendee's title was disputed and to take up the cause of the vendee, and that was not possible in a case where the action in which the dispute arose was a partition action. I wish to say that I there appear to have taken too narrow a view of the law. The expression used in *Voet 21, 2, 20* is *ut litie assistat*, which does not necessarily mean that the vendor should make himself a party to the action. The object of his doing so, if he so chooses, is, as explained by Voet, to prevent collusion, and not to convert the litigation into one against himself. At the same time, Voet points out other ways of fulfilling the vendor's obligation, such as by becoming the purchaser's *procurator in rem suam*, or by supplying the purchaser, whose title is attacked, with assistance and proof for establishing the title (*adminicula ac probationes ad jus afferendum suppedidet*). In accordance with these principles, Pereira J. observed in *Menika v. Adakappa Chetty*,[2] that it was the duty of the vendor to have himself added as a party to the action " or otherwise render to the defendants in that case (that is to say, his vendees) all the help that it was in his power to render, and defend the title of his vendees against the attack made on it by the plaintiffs," and I myself in the later case, *Jinadasa v. Duraya*,[3] remarked that the object of the notice was to enable the vendor to intervene in the action and undertake the defence " or otherwise to

[1] *(1914) 3 Bal. N. C. 14.* [2] *(1913) 17 N. L. R. 93.*
[3] *(1918) 20 N. L. R. 168.*

assist in the litigation." Moreover, there is nothing in the Partition Ordinance to prevent the vendor from intervening in a partition action, and the learned District Judge observes that the practice is to allow him to do so. *Silva v. Daniel* [1] is a case of that kind, the Court only holding that the vendee was not entitled in the partition action itself to a decree for refund of the purchase money in the event of the vendor failing to warrant and defend the title. See also *Suse Appoo v. Don Adrian de Silva.*[2]

In my opinion, the District Judge's decision on the issue of law raised is right, and the appeal should be dismissed, with costs.

SCHNEIDER A.J.—

The defendant (appellant) sold a land to the plaintiffs. A portion of that land was subsequently included in a land sought to be partitioned by some third parties, who claimed adversely to the plaintiffs and the defendant. The plaintiffs intervened, and gave due notice to the defendant to warrant and defend their title. The defendant assisted the plaintiffs by giving evidence in the action for partition in support of the title he had conveyed to the plaintiffs. Decree went against the plaintiffs' claim and they suffered eviction. The defendant made no application to be made a party to the partition action. He is sued in this action by the plaintiffs for damages consequent on his failure to warrant and defend title. His defence is that the action does not lie against him, because the object of the notice is to enable a vendor to intervene in the action in which the title is disputed, and the defendant was not entitled to intervene in an action for partition. The learned District Judge over-ruled this defence and gave judgment for the plaintiff.

In my opinion, too, the defence is unsustainable. In practice a vendor of any of the parties to an action is allowed to intervene in a partition action for the purpose of warranting and defending the title he has conveyed. There is nothing I can see against the practice. Such intervention cannot create confusion or complexity The intervenient's interests are identical with those of the purchaser who is already a party. His intervention would not, therefore, bring into the action any new element or interest. On the other hand, it seems to me expedient that such intervention should be allowed. A vendor has the right on receiving notice to make himself a party to the action, in order, as *Voet 21, 2, 20* puts it, "to prevent collusion." It is desirable, therefore, that no impediment, unless it is absolutely necessary, should be allowed to stand in the way of his intervening. The practice received sanction in the provision of section 18 of the Civil Procedure Code, and it has been recognized by this Court since 1872. In this connection I might mention the cases of *Silva v. Daniel* [1] and *Suse Appu v. Atapattu Kankanama.*[3]

[1] *Ram. (1872-1876) 62.*

[2] *(1883) 5 S. C. C. 213.*

[3] *5 S. C. C. 213.*

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But it was argued that the contrary view was taken in 1915 in the case of *Murugan v. Murugupillai*.[1] That case was not decided upon the ground that a vendor had no right to intervene in a partition action, but upon an entirely different reason. It is no authority upon the question involved in this appeal. It is only a *obiter dictum* in that case which refers to the question involved in this appeal.

Moreover, there is no lawful justification for the assertion that the object of the notice to a vendor is to enable him to intervene in the action in which the title is disputed. *Voet 21, 2, 20* states that no action would lie to a person from whom a thing has been evicted on account of eviction unless he has given timeous notice to his "autor" that the action has been commenced, and also a copy of the plaint. It is noteworthy that the terms of the notice are simply to convey information without any request as to what the autor should do. He proceeds to say that the notice is given, not for the purpose of transferring the suit to him and to his forum, but rather in order that he may render assistance (*ut lite assistat*) in the action and undertake the defence in the forum of the party sued and establish his title. He adds: "This notice having been given whether the autor takes part in the suit in order to prevent collusion or suffers that the purchase constitute him procurator *in rem suam*, whether he does not openly associate himself with the suit, but supplies the defendant with assistance and proof for the assertion of the right, or whether he does none of these after being cited, but altogether neglects the suit, the purchaser has recourse against his autor after eviction, provided the purchaser himself has not failed to defend it with all his power." (*Berwick's Translation.*)

Voet says again (*21, 2, 22*): "There are two objects in giving notice, the one that vendor may be made more certain, and the other that being informed he may do something or undertake the defence." (*Berwick's Translation.*)

Voet also says (*21, 2, 25*): "For although the law has imposed the defence on the vendor in so far as, according to what has been shown further up, he is bound to assist in the suit (*lite assistere*) and furnish the purchaser's case with proof, it does not however thence follow that an unjust defence should be carried on." (*Berwick's Translation.*)

These passages in Voet amply indicate that the object of the notice is simply to notify that the title is in dispute. It is left to the vendor either to make himself a party, or in any other manner assist the proof of the title conveyed by him. It is not essential he should become a party.

For these reasons I would dismiss the appeal, with costs.

Appeal dismissed.

[1] (*1914*) *3 Bal. N. C. 14.*