1920.

Present: Schneider A.J.

SIRIWARDANA *v.* BANDA *et al.*

181—C. R. Kegalla, 16,526.

Lease—Vendor and purchaser—Action against lessee in ejectment—Failure of lessee to appeal against judgment—Subsequent action by lessee against lessor for damages for failure to warrant and defend.

The plaintiff, who was a lessee under the defendants, was sued in ejectment by a third party in C. R. Kegalla, 16,109. The defendants had notice of the action, was present in person at the trial, and was a party to the action. Judgment went against the plaintiff, and he was ejected. He did not appeal. He sued his lessors (defendants) in this action to recover damages for failure to warrant and defend.

Held, that in the circumstances the fact that plaintiff had not appealed in case No. 16,109 was not a bar to his present claim.

H. V. Perera, for defendants, appellants.—It was not sufficient for the lessee to have given his lessors notice to warrant and defend title, it was his duty to have defended the action with all his power (*Voet 21, 2, 20*). He should have appealed. *Voet* (*21, 2, 30*) says that the *actio de evictione* fails "when the purchase has not appealed when defeated in the suit, the vendor being absent; . . . . contrary to what obtains if the vendor had been present, for in that case the function of appealing lies on him if he thinks that this step should be taken." (*Berwick's Translation.*) The context shows that the word "absent" refers to non-participation in the action in the sense of not being a party to it. Although the present appellants gave evidence in the previous action, they were not parties to the action and could not have appealed.

Counsel cited *Jinadasa v. Duraya.*[1]

[1] (*1918*) *20 N. L. R. 158.*

J. S. Jayawardene, for plaintiff, respondent.—The words "present" and "absent" in the passage cited from *Voet* bear their ordinary meanings. Even otherwise the passage does not apply, as the appellants had given a proxy to a proctor and were, therefore, parties to the action. In any case it was not the duty of the lessee to have preferred a hopeless appeal. The judgment in that case is clearly right.

Counsel cited *Ahamadu Lebbe v. Maris Appu*[1] and *Menika v. Adakappa Chetty*.[2]

H. V. Perera, in reply.—We are not concerned with the merits of the previous action. It is not correct to say that the appellants were parties to that action; what the Commissioner finds is that "the defendants in this case had full knowledge of the proceedings in 16,109, and they were given an opportunity of warranting and defending their title, which, however, they failed to do in that case."

September 16, 1920. SCHNEIDER A.J.—

The plaintiff in the present action was in possession of a share in a chena under a lease by the defendants. He was sued in ejectment by a party claiming adversely to his lessors. Judgment went against the plaintiff and he was ejected. Plaintiff did not appeal. He sued his lessors in this action to recover damages for failure on their part to warrant and defend the title to possession under the lease. They resisted this claim by contending that the omission to appeal debarred the plaintiff from maintaining this action. The learned Commissioner held against this contention, and gave judgment for the plaintiff. The defendants have appealed. They have no right of appeal, except upon a matter of law. The matter of law was formulated in the issue upon which the action was tried: "Is plaintiff entitled to maintain this action in view of the fact that he failed to appeal from the decree in No. 16,109?"

The word "failed" is not the correct word. It implies that that duty lay upon him and he failed to discharge it. The true meaning of the issue would have been better expressed by the words "did not appeal." The learned Commissioner finds that the defendants were noticed and had intervened in C. R. No. 16,109. This finding is justified by the evidence. Even if it were not, I must take the findings of fact by the Commissioner as conclusive in this case. The Commissioner holds that as the defendants had notice of the action, and had failed to warrant and defend title, no duty lay on the plaintiff to appeal from the judgment.

[1] *(1903) 9 N. L. R. 289.*

[2] *(1913) 17 N. L. R. 93.*

1920.

SCHNEIDER A.J.

Siriwardana v. Banda

In support of the defendants' contention on appeal, a passage from the judgment of my brother De Sampayo in *Jinadasa v. Duraya*[1] was cited. That passage, in my opinion, does not support the contention. It is based upon what Voet states when speaking of cases in which there is no liability on the part of the *autor* for failure to warrant and defend title. (*Voet 21, 2, 30.*) From what Voet says it is clear that the duty to appeal in C. R. No. 16,109 was not upon the plaintiff, but upon the defendants. He says the action in damages against the *autor* fails "when the purchaser has not appealed when defeated in the suit, the vendor being absent, or has appealed indeed, but has abandoned the appeal; contrary to what obtains if the vendor had been present, for in that case the duty of appealing lies on him if he thinks that this step should be taken." (*Berwick's Translations 536, rev. ed.*).

The Commissioner finds that the vendor was present, not only in the sense of having received notice and being actually present in person at the trial, but also in that of being a party to the action. I would add that if it had been necessary to consider what Voet means by the vendor being "present" or "absent," I was prepared to hold that those words connote no more than their ordinary meaning.

The appeal is dismissed, with costs.

Appeal dismissed.

[1] *(1918) 20 N. L. R. 158.*