1942 *Present :* **Soertsz and Keuneman JJ.**

PUNCHI APPUHAMY *v.* RAMBUKPOTHA.

85—D. C. Badulla, 6,425.

Warranty—Notice to vendor—Undertaking to warrant and defend—Evidence by vendor—Failure to appeal—Claim for damages.

Where a purchaser of property who was sued in eviction called upon his vendor to warrant and defend his title and the latter, undertaking to do so, gave evidence in support of his title,—

Held, that the failure of the vendee to appeal from a judgment evicting him does not debar him from claiming damages from his vendor.

THIS was an action brought by the plaintiff, claiming damages from the defendant for failure to warrant and defend title to land sold by the latter to plaintiff.

In the action in which the plaintiff was sued on eviction the defendant was given notice to warrant and defend the title conveyed by him. At the trial of that action the defendant gave evidence but his evidence was not accepted and judgment went against plaintiff. In this action the learned District Judge gave judgment for plaintiff.

H. V. Perera, K.C. (with him *N. Kumarasingham*), for defendant, appellant.—It is the duty of the plaintiff to have made the defendant a party to the action, so that he may assist in the defence. Whether that is done or not the plaintiff is bound to make a proper defence. If he is defeated in the action he *must* appeal. If he does not appeal or having appealed abandons it, the defendant is not liable.—*Voet 21.2.30 ; Berwick, p. 536 ; Jinadasa v. Duraya.*

Unless the defendant has been added as a party he has no control over the litigation. He certainly has no right to appeal.

In respect of the third land the plaintiff did not contest the action at all, and allowed judgment to be entered *ex parte.* He cannot therefore claim any damages.

L. A. Rajapakse (with him *Percy de Silva*), for plaintiff, respondent.—The notice may be verbal and need not be in writing—*Krishnasamy v. Awaddyapen.*[1]

Once timeous notice of the suit is given, it is the *vendor's duty* to intervene or assist in the defence.—*Voet 21.2.20 ; 3 Maasdorp 184 ; Menika v. Adacappa Chetty*[2], *Wirawardene v. Ratnayake*[3]. The words "vendor being absent" in *Voet 21.2.30* refers to cases where no notice has been given in time or he is otherwise justifiably absent. See *Voet 21.2.21 ; Berwick, p. 527.*

Here the vendor failed to intervene in the action. He was a witness and his evidence of title after a full trial was rejected. He vendee is not obliged to incur further expenditure by pursuing an appeal. If the vendor wanted the matter carried further, he should have financed the plaintiff to appeal.

[1] *20 N. L. R. 158.*
[2] *1 Bal. N. C. 73.*
[3] *17 N. L. R. 93.*
[4] *22 N. L. R. 219.*

Regarding the third land, the defendant requested the plaintiff not to contest it. It has been held that if the vendor fails to assist in the action by absenting himself on the trial date, the vendee is not bound even to contest the case—*Kandiah v. Visualingam*[1].

H. V. Perera, K.C., in reply.

Cur. adv. vult.

February 25, 1942. KEUNEMAN J.—

In this case the defendant by deed P 3 of March 18, 1930, transferred to the plaintiff and three others three contiguous allotments of land for the consideration of Rs. 2,000. As regards one of these allotments one Kandasamy sued the vendee, and was awarded certain damages and costs, but the vendee did not suffer eviction, and the plaintiff and the heirs of Banda subsequently transferred their interests. No question arises in this case with regard to this allotment.

As regards a second allotment, one Ramasamy sued the vendees in Court of Requests, Badulla, No. 5,769, and on November 8, 1932 (see P 3/b) the following journal entry appears :—" Defdt's vendor—J. A. Rambukpotha (*i.e.*, the present defendant) present and undertakes to warrant and defend." In the trial the present defendant gave evidence, which was not accepted, and judgment went against his vendees. The present defendant was not formally made a party to the Court of Requests case. No appeal was preferred against the judgment—which was dated September 11, 1934. In the present action the purchase price was claimed, in respect of this allotment, and also certain costs incurred in respect of the conveyance and the Court of Requests case.

A similar claim is made in respect of the third allotment of land. In this connection Kaliamma in whose place certain other plaintiffs were substituted sued the vendees for declaration of title in District Court of Badulla, No. 5,119 (see P 5). This case was pending at the time of the decision of the Court of Requests No. 5,769. The vendees did not defend this case in the end, and decree *nisi* was entered against them on March 18, 1935.

Counsel for defendant-appellant argued that the plaintiff could not succeed in respect of the second allotment of land, because he had failed to appeal against the judgment of the Commissioner of Requests, and in respect of the third allotment of land, because he had failed to offer any defence at all. Counsel depended on *Voet's Commentary of the Pandects 21.2.30* in which Voet set out the grounds on which an action like the present fails : " Also 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 this step should be taken. " *(Berwick's Voet, p. 536).*

It is clear in this case that notice to warrant and defend had been served on the defendant in respect of both actions, viz., C. R. No. 5,769 and D. C. No. 5,119. The duty of the defendant as vendor has been

[1] *15 C. L. Rec. 25.*

laid down by our Courts, *vide* Pereira J. in *Menika v. Adakappa Chetty* [1], "On the receipt of that notice it was clearly the duty of the present defendant to apply to the Court to have himself added as a party to the case, or otherwise render to the defendants in that case all the help that it was within his power to render, and defend the title of his vendees against the attack made on it by the plaintiffs." See also de Sampayo J. in *Wirawardene v. Ratnaike* [2] in which he expressed the opinion that he had taken too narrow a view of the law in *Murugan v. Murugupillai* [3], and continued: "The expression used in *Voet 21.2.20* is *ut lite 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." De Sampayo J. approved of the language of Pereira J. in *Menika v. Adakappa Chetty (vide supra)*. Schneider J., who was associated with de Sampayo J., examined the language of Voet and summed up his opinion as follows, "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."

Mr. H. V. Perera, for the appellant, however, contended that when the vendor does not become a party to the litigation, he must be treated as "absent", and in that case a heavy burden lies on the vendee to fight out the case to the best of his ability, and if defeated, to appeal and press his appeal. Counsel argued that a vendor who is not a party has no control of the litigation and cannot himself prefer an appeal, or compel the vendee to appeal. I do not, however, think that the language of Voet, already cited, should be given so restricted a meaning. Voet does not say that vendor should be present as a party to the litigation. It is possible that, where the vendor is passive, and takes no steps whatever to assist the vendee in the litigation, the burden which Voet described is imposed upon the vendee.

This case is far removed from that. The defendant was not only physically present at the litigation in his capacity as witness, but had also given a solemn undertaking, which was recorded, to warrant and defend. I think we cannot regard the defendant as an absent vendor, but as one who was present, and actively assisting in the litigation. The technical point that the vendor could not himself appeal is, I think, of little substance, for he should have taken all steps to make an appeal effective. I may add that the dictum of Schneider J. in *Siriwardena v. Banda* [4] supports the view I have adopted. The appeal therefore fails as regards the second allotment of land.

As regards the third allotment, the position is different. The vendee failed to put forward any defence, and the action was decided *ex parte*. But the vendee in his evidence stated, "I did not contest this case.

[1] *17 N. L. R. 93.*
[2] *22 N. L. R. 219.*
[3] *3 Bal. N. C. 14.*
[4] *22 N. L. R. 254.*

The defendant told me not to fight the case, and asked me to settle. He refused to come and give evidence as a witness. That was after C. R. No. 5,769 was decided." This evidence bears the impress of truth. For it is clear by the defendant's letter P 2 dated November 22, 1934, that at that stage the defendant had agreed to refund the purchase price, and to get a retransfer of the allotments. Eventually defendant did not implement this agreement. The failure on the part of the vendee to defend was based on the direct request of the vendor, and was, therefore, justified.

The appeal is dismissed with costs.

Appeal dismissed.

SOERTSZ J.—I agree.