Present : Dalton J. and Jayewardene A.J. 1926.

SILVA HAMINE *v.* WIJEKOON.

279—D. C. Badulla, 4,072.

Prescription—Claim by purchaser of property for damages for legal eviction—Cause of action—Date of eviction.

Where a purchaser of property who has suffered legal eviction sued his vendor for recovery of purchase price and damages.

Held, that prescription began to run against such a claim from the date of eviction, and not from the date of sale.

James Appu v. Don Cornelis de Silva[1] distinguished.

THE plaintiffs purchased a certain property from the defendant in 1915. They were not given vacant possession. In 1924 they instituted an action No. 3,943 in the District Court of Badulla against certain persons in possession for the recovery of the property, and summoned the defendant to warrant and defend the title. The defendant gave evidence but judgment went against the plaintiffs. On February 4, 1925, they commenced the present

[1] *(1885) 7 S. C. C. 129.*

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action to recover the purchase money, and the costs incurred in the previous suit; the defendant pleaded *inter alia* that the plaintiffs' claim was prescribed, and the learned District Judge upheld the plea.

H. V. Perera, for plaintiff, appellants.

E. G. P. Jayatilleke (with him *R. C. Fonseka*), for defendant, respondent.

March 18, 1926. JAYEWARDENE A.J.—

This case raises a question regarding the prescription of an action brought by a purchaser who has suffered legal eviction to recover from his vendor the purchase price with interest and the costs of the action in which he suffered eviction. The appellants purchased certain property on a deed of sale in the year 1915. They were not given vacant possession. About the year 1924 they commenced an action, No. 3,943, D. C., Badulla, against certain persons in possession for the recovery of the property sold to them. They summoned the defendant, their vendor, to warrant and defend the title he had conveyed. The vendor gave evidence, but judgment was entered against the appellants on June 27, 1924, and they thereby lost their title to the property sold to them and suffered "eviction."

On February 4, 1925, they commenced this action to recover the purchase price with interest up to the date of action, the costs they had themselves incurred in action No. 3,943, and the costs they had to pay their opponent, all amounting to Rs. 1,628. The defendant pleaded *inter alia* that the plaintiffs' action was not maintainable as their claim was prescribed as it was not commenced within three years of the date of the sale, and as the plaintiffs did not appeal against the judgment in No. 3,943. On certain admissions these two defences which formed the fifth and sixth issues framed were taken up for decision first. The learned District Judge held that the plaintiff's claim was prescribed, and dismissed the action. In his opinion the cause of action arose in 1915, when the defendant failed to give plaintiffs vacant possession, and not when they suffered eviction in June, 1924. He did not decide the sixth issue. In the present action the plaintiffs claim not only a repetition of the price paid by them, but also the costs incurred and paid by them in D. C., No. 3,943. Now their claim for these costs cannot be said to be prescribed as they were incurred and paid not in 1915, but in 1924.

Whatever might have been the rights of a purchaser who had not obtained vacant possession under the Roman-Dutch law, under our law as settled by the decisions of this Court, such a purchaser can either rescind the sale and obtain a refund of the purchase money or accept delivery of the deed as sufficient delivery of possession

of the property, for the delivery of a duly excecuted deed confers *dominium* on the purchaser, and sue the persons in possession in an action *rei vindicatio*. If he adopts the latter course he can call upon his vendor to warrant and defend the title transferred: *Ratwatte v. Dullewe*,[1] a Full Bench decision, and *Balasuriya v. Appuhami*.[2] The latter is on all fours with the present case, and in identical circumstances a purchaser who had been defeated in an action he had brought against the party in possession was held entitled to sue the vendor, who had failed to warrant and defend title, for damage, which might include the costs of the abortive action.

The plaintiffs in the present case adopted the second of the alternatives and did exactly what the plaintiff in *Balasuriya v. Appuhami* (*supra*) had done, and was held entitled to do. After they were defeated in the action and lost title to the land, owing to the vendor's failure to warrant and defend, they have brought this action to recover the purchase price, and the costs incurred and paid. Their right to do so accrued on their suffering eviction which was the result of the dismissal of their action. That is their cause of action. Voet clearly lays down in his title *De Evictione* (*Book XXI. 2.29*) that in such cases prescription begins to run not from the time of the sale, but from the date of eviction (*Berwick's Trans. p. 523*). This would appear to conclude the matter. In fact, it seems difficult to understand how it could be otherwise, if the ground or cause of action for the recovery of the price is the legal eviction of the purchaser. But learned Counsel for the respondent contends on the authority of *James Appu v. Don Cornelis de Silva* (*supra*) that time begins to run from the date of sale. The facts of that case appear to be similar to those of the present case, and it was there held, that a purchaser who had unsuccessfully sued a party in possession of property sold to him in an action in which his vendor was an intervenient could not recover the purchase money, as the action was not brought within three years of the date of the deed, which is the date on which the purchaser ought to have obtained possession. The action, there, was in form an action for money had and received by the defendant for the use of the plaintiff—an action *condictio indebiti*. The cause of action was the failure of consideration. It was not framed as an action for the return of the price on the ground of eviction as it might have been. There was no appearance of Counsel for either side, and the view that the claim might be treated as one arising from eviction was not presented to the Court. The *ratio decidendi* of that case has, therefore, no application to the present case, and it cannot be regarded as an authority which ought to govern the decision of this case. An argument was also based on the hardship to a vendor

[1] *(1907) 10 N. L. R. 304.*

[2] *(1914) 17 N. L. R. 404.*

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who is sued many years after the sale, as he has to return the purchase price with interest. In the present case the interest claimed is equal to the principal. That is a contingency which the vendor can avoid by giving the purchaser vacant possession, one of the primary obligations arising on a sale. If he fails to do so, he would be having the use of the purchaser's money—the price—but the purchaser would have obtained nothing for the consideration he has paid. If it is subsequently proved that he has sold property to which he has no title, it is but just and fair that he should return the price with interest.

In my opinion, therefore, prescription begins to run in cases like the present, not from the date of sale, but from the date of eviction. As this action was instituted before the expiry of three years from the date of eviction, the plaintiffs' claim is not prescribed.

The decree dismissing the action will be set aside, and the case will go back for the trial of the other issues including the sixth. The appellants are entitled to the costs of this appeal and of the argument in the Court below.

DALTON J.—I agree.

Set aside, and case remitted.