replying affidavits. But, in the circumstances, it is not surprising that there was no response by the respondents. Mr. *Lloyd* rested his case on the principle of election. The doctrine of election was explained by LORD BLACKBURN in the case of *Scarf* v. *Jardine*, (1882) 7 A.C. 345, thus:

"The principle . . . running through all the cases as to what is an election, is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned, is an election."

As was pointed out by ROPER, J., in *Solomon* v. *Magistrate, Pretoria*, 1950 (3) S.A. 603 (T) at p. 615:

"It" (the Act relied on) "must in other words be not only consistent with the retention of one remedy but inconsistent with the retention of the other."

In the letter of 22nd April the attorneys for the respondents record a number of complaints against Jones. That numbered "(7)" reads:

"That notwithstanding that the said executors withdrew the general power of attorney granted by them to Mr. E. P. Jones, and without their confirmation of the sale, and in fact against their instructions, Mr. Jones caused transfer to be passed to the purchaser of the said Dumbarton farm."

Later the letter continued:

"Mr. Brnic further contends that if the sale of the property had not been confirmed by Mr. Jones, Mr. Brnic would have been able to pay his wife's indebtedness out of the money raised on bond, or out of the proceeds of the sale of the property at a fair price.

In consequence of the unauthorised sale by Mr. Jones, Mr. Brnic was unable to pay the creditors and his wife's estate was sequestrated.

We are now instructed to inform you that our client holds your company liable in damages for the position Mrs. Brnic has been put, by being made insolvent and also for the loss sustained in the low price at which Dumbarton farm was sold.

Unless we hear from you within ten days, further action will be taken herein."

I am unable to agree with Mr. *Lloyd* that this letter constituted an election. Their threatened action against the Board does not in my view justify the inference that the respondents had abandoned the alternative line against the applicant. As far as the Board is concerned, the respondents were under no obligation to elect. I cannot imagine that they can be penalised for taking the precaution of advising the Board of possible action against it. The Board was not the executor nor the transferee. The *onus* is on the applicant to establish election —*Solomon's* case, *supra* at p. 616—and to my mind it has not discharged that *onus*. My judgment on this third point must also be for the respondents.

That means that the present application must be dismissed; and it is dismissed with costs.

Applicant's Attorneys: *Cecil Roberts & Letts.*

YORK & CO. (PVT.) LTD. v. JONES, N.O. (1).

(SOUTHERN RHODESIA, BULAWAYO.)

1960. *August* 19, 26. MURRAY, C.J.

Sale.—Of immovable property.—Seller's duty to guarantee against eviction.—Nature and scope of.—Purchaser given transfer.—Himself taking proceedings for ejectment of third party.—Due notice to seller.—Seller not intervening.—Judgment going against purchaser. —Purchaser having put up a virilis defensio.*—Purchaser entitled to recourse against seller.—Administration of estates.—Immovable property in joint estate.—Sale necessary to pay debts.—Rights and duties of executor in joint estate.—Surviving wife's interest in her half of the community must give way thereto.*

The seller's duty to guarantee against eviction is such that if the purchaser has given the seller due notice of the claim of a third party, and the seller does not intervene to resist the adverse claim, then, provided the purchaser has put up a *virilis defensio*, i.e. a proper and competent defence, and despite that, judgment has gone against him, he is entitled to have recourse against the seller and is not obliged to appeal against such judgment. He can rely on the judgment as conclusive proof that the seller has breached his obligation to give him possession and to maintain him in possession. It is not sufficient for the seller to give transfer.

The executor of the joint estate of a deceased husband and a surviving wife, where the marriage is in community of property, has the power, if it is necessary to pay the debts of the joint estate, to sell and transfer fixed property of that estate, and the surviving wife's interest in her half of the community must give way thereto.

Exception to a declaration. The nature of the pleadings appears from the reasons for judgment.

P. Charles, Q.C. (with him *J. Gasson*), for the excipient (defendant).

A. D. H. Lloyd (with him *W. Newham*), for the respondent (plaintiff).

Cur. adv. vult.

Postea (August 20th).

MURRAY, C.J.: Exception is taken by the defendant to each of the main and three alternative claims made in the plaintiff's declaration.

(A) The main claim in the declaration is set out in paras. 1-9 as follows. On 12th November, 1958, the defendant, in his capacity as executor dative in the joint estate of the late P. C. E. Carinus and the latter's subsequently deceased wife, Hester Beatrice Carinus (who survived her husband), sold a certain farm to the plaintiff for the sum of £4,942 13s. 6d., this price was duly paid by the plaintiff, and transfer was passed to it on 17th February, 1959. It was a condition of the sale that possession and occupation of the property should be given and taken at latest on registration of transfer, and it is also alleged that on three different occasions the defendant as seller warranted that the plaintiff as purchaser of the farm would be given undisturbed possession thereof. At the time of this sale certain Ivan Brnic and Hester

Brnic were in occupation of the farm, and are still occupying it. The plaintiff was unable to obtain possession of the farm from them, and was thereby "evicted" by them from possession of the farm. The plaintiff in consequence instituted action against them in this Court, claiming possession of the farm, after having notified the defendant of such intended action. Judgment with costs was given against the plaintiff on the ground that these two persons were entitled to remain in possession of the farm.*

These are the essential averments of the main claim. Subsequently the plaintiff was asked (1) to furnish particulars as to whether it alleged the Brnics to have a good legal title to remain in possession of the farm as against the plaintiff, and if so (2) to specify the nature and origin of such title. To this the plaintiff replied as to (1) in the affirmative, and as to (2) that

"it was a personal right to remain on the farm until it was lawfully sold and arose from the action of defendant in exceeding his powers in selling the farm without the consent of the executors in the estate of the late Hester Carinus" (who, it must be assumed, died prior to transfer to the plaintiff of the farm in question and left a separate estate).

On the above allegations the plaintiff asks for rescission of the contract of sale, refund of the purchase price, and payment of damages in an amount of £1,389 10s. 1d.; tendering, of course, retransfer of the farm. The basis of the defendant's exception to the plaintiff's main claim is that there is no allegation of any breach of the warranty of undisturbed possession; such warranty, it is said, can be breached only where the person disturbing or encroaching on a purchaser's possession has a legal right to do so and is not merely an unauthorised squatter or trespasser. And it was argued by counsel for the excipient that, *ex facie* the particulars supplied (viz., that the Brnic's rights were personal arising from the defendant's exceeding his powers in selling the farm without the consent of the executor in the late Hester Carinus' estate), the Brnics had no title valid against a *bona fide* transferee for value, such as the plaintiff, to possession of the farm; it was therefore for the plaintiff itself, and not for the defendant, to evict the Brnics. Consequently there was no valid claim for rescission of the contract.

I have come to the conclusion that there are two grounds on which the exception to the main claim fails.

(1) A seller of immovable property is under at least three duties to the purchaser in regard to the delivery of the property. He is firstly bound to effect transfer in the Deeds Office into the purchaser's name. Secondly he is obliged to give physical possession of the property to the purchaser on or before the stipulated date. Thirdly he is under duty, even after transfer and giving of possession, to guarantee the purchaser against eviction, i.e., subsequent dispossession, total or partial, by third parties claiming a title superior to that which the purchaser has obtained from the seller. There is a clear distinction between the second and the third of these duties, though they appear to have been confused in certain of the textbooks. The distinction is indicated by WESSELS, J.A., in *Kleynhans Bros.* v. *Wessels' Trustee*, 1927 A.D. 271 at p. 282, where he says:

*See *ante* p. 56.

"A contract of sale with us does not have the effect of a *translatio dominii*: it is simply an obligation to give *vacua possessio* coupled with the further legal consequences of a guarantee against eviction."

See Lee & Honore *Obligations*, sec. 307, and authorities cited in note 3 thereto, and in particular *per* MASON, J., in *Schultz Brothers* v. *Roodepoort Venture Syndicate*, 1905 T.H. 356 at p. 359.

Mr. *Charles*, for the excipient, i.e., the seller, contended that a seller of land performs all that is required of him in regard to the giving of possession if he passes transfer of the land; if there are unauthorised persons in occupation when the purchaser wishes to go into possession it is then the function of the new *dominus*, the purchaser, himself to take the necessary steps to have these trespassers ejected. This contention is based on the argument (which was apparently raised by counsel, but not decided, in *Schultz Brothers* v. *Roodepoort Venture Syndicate, supra*) that there is a distinction between movable and immovable property. The seller of movables does not guarantee ownership, but merely undisturbed possession, and therefore must give the necessary *vacua possessio* at the stipulated time. On the other hand (so it was argued), even if under the olden Roman-Dutch law the position was the same in regard to immovable property, that position was altered as a consequence of the introduction of our system of land registration, where registration of transfer is normally conclusive of ownership. No authority definitely establishing this distinction was quoted to this Court. On principle it does not seem sound. The right to enjoy possession and use of the *res vendita*, whether movable or immovable, is one of the rights of ownership, and the seller, when he contracts to sell and pass ownership, contracts to give the purchaser that possession. It seems anomalous that a purchaser of a farm who takes transfer in ignorance of the presence on the farm of squatters in number sufficient to constitute a serious impairment of the enjoyment of possession of his farm should be forced at his own initial expense (even with a right of ultimate recourse against the seller) to incur the trouble and expense of eviction proceedings. The declaration in para. 6 alleges that, due to occupation by the Brnics, the plaintiff was unable to obtain possession; and it is common cause that it is still unable to obtain possession for the same reason. When the duty to give possession is to be considered, it appears to me that it is entirely irrelevant whether the so-called trespassers are there under colour of right or not. The mere fact of their physical presence, if it results in a deprivation of the purchaser's right to secure the enjoyment in possession of his purchase (provided, of course, that the deprivation is to an extent and for a time sufficient to make it material) is enough to justify the purchaser in claiming that the seller has failed to carry out his obligation. What the purchaser is entitled to is full *vacua possessio*. As pointed out by LORD GREENE, M.R., in the Court of Appeal in *Cumberland Consolidated Holdings, Ltd.* v. *Ireland*, 1946 (1) A.E.R. 284 at p. 287, quoting the cases of *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Ch. D. 398, and *Engell* v. *Fitch*, 1869 L.R. 4 Q.B. 659, there is no distinction between the deprivation of possession caused by inanimate physical impediment to the enjoyment of possession and the same deprivation due to the presence of trespassers with no claim of

right. In the latter instance it is the vendor's duty to eject such trespassers, just as in the former it is his duty to remove all the movable articles the presence of which substantially negatives *vacua possessio.*

The defendant's counsel stressed, as his main contention, that it is only as against a claimant who maintains the ownership of a real right superior to the purchaser, and not as against a mere trespasser, that the seller has to warrant the purchaser against eviction. That may well be the position where the purchaser has once obtained his *vacua possessio.* In my view, however, it is not the position where the seller has never performed his duty to effect delivery by affording the purchaser such possession.

(2) In regard to the position as after the date of transfer, it is, of course, obvious that the present plaintiff's case differs somewhat from the normal one where a purchaser is in actual possession and is in the position of a defendant resisting a claim by a third party to exercise rights in regard to the property. But it was not suggested, and I am unable to see, that the general principles to be applied are different when the purchaser, unable to secure *vacua possessio* owing to the premises being occupied by the third party, himself initiates the proceedings to establish his rights.

With regard to the seller's duty to guarantee against eviction, the principles will be found in *Voet,* 21.2.20 to 25 (see Mackeurtan on *Sale,* p. 189 onwards). It is sufficient to say that if (as here) the purchaser has given the seller due notice of the claim by the third party, and the seller does not intervene to resist the adverse claim, then, provided that the purchaser has put up a *virilis defensio,* that is to say, a proper and competent defence, and, despite that, judgment has gone against him, he is entitled to have recourse against the seller and is not obliged to appeal against such judgment. He can rely on the judgment as conclusive proof that the seller has breached his obligation to give him possession and to maintain him in possession.

In the instant case the plaintiff in para. 6 has made the necessary allegations to show that it did not receive *vacua possessio* originally; that it gave the defendant notice of the Brnics' claim to retain occupation in resistance to the plaintiff's action for ejectment; that the defendant declined to intervene, and that, despite the plaintiff's endeavour to secure possession, the Brnics' claim was upheld by the Court, and that the plaintiff is now deprived of such possession. The difficulty which has arisen is due in part to the particulars which on request the plaintiff supplied to this paragraph. I am at a loss to understand why these particulars were supplied at all. Para. 6 by itself showed that the plaintiff took its stand on the denial to it, by an order of Court, of possession which it claimed should have been afforded it. If it had failed to notify the defendant of the Brnics' claim, the plaintiff would now have had to take upon itself the burden of proving that the Brnics' right to occupy was effective in law (Mackeurtan on *Sale,* 3rd ed., p. 192). As, however, it did give the defendant the requisite notice, it can now stand on the position that a judgment of a competent Court has held that it is not entitled as against the Brnics to secure the full possession which the plaintiff contracted to give it. In asking the plaintiff for these particulars, the defendant has in effect asked the plaintiff

to state an irrelevant matter, viz., did it agree that the Brnics have a valid claim to remain in possession, and if so its nature; in other words, does the plaintiff agree that the judgment of the Court is correct. Whether the plaintiff does approve of the judgment or not does not alter the position that it uses this judgment as the basis of its claim against the defendant for rescission. I cannot agree that by supplying these particulars the plaintiff has abandoned the security of relying on the judgment itself and has voluntarily chosen the awkward position in which it would have been if it had not given the defendant notice of its action, i.e., under obligation to prove the validity of Brnic's title as disentitling the plaintiff to possession and therefore entitling it to rescission of its bargain.

The argument for the defendant is this. *Ex facie* the particulars, the Brnics have only a personal, and not a real, right; and what the guarantee against eviction requires the seller to do is not to protect the purchaser against personal claims by third parties, but only against claims which would be valid against a purchaser for value. Now, the earlier High Court judgment has held that the plaintiff is not entitled to eject the Brnics. One of the reasons for that judgment, as I read it, is that the learned Judge was not satisfied that the plaintiff, despite being a purchaser for value, was a purchaser without notice of the Brnics' claim. The defendant may possibly wish to contest rescission on the ground that the plaintiff was in fact a purchaser for value without notice of the Brnics' claim; that the Brnics' personal right is ineffective as against the plaintiff; that the plaintiff is entitled to treat the Brnics as trespassers and consequently that there is no failure by the defendant to protect the defedant's possession. I have the greatest difficulty in seeing how, with the present judgment against it (obtained, I repeat, after the defendant's refusal to intervene), the plaintiff can possibly hope to get actual occupation from the Brnics by process of law. It may be pointed out that the plaintiff has not alleged, *in its main claim,* that when it purchased it had no notice of the Brnics' personal rights.

The declaration, in my view, sets out a main claim which discloses a good cause of action and is not vague. I am not prepared to hold at this stage that the facts alleged do not justify a claim for the special damage claimed in para. 8 as additional to the claim for refund of purchase price. In any event, this is not a matter for exception.

The exception to this main claim must fail.

(B) The three alternative claims start at para. 10, and it must be emphasised that para. 10 is "alternatively to paras. 5, 6 and 7", and para. 6 is of importance. These claims rest, not on a warranty or condition of a contract, but on representations intended to induce, and in fact inducing, the plaintiff to enter into a contract of purchase. The representations alleged are to the effect that the defendant was in his said capacity entitled to sell the farm and give good title and undisturbed possession to the purchaser. It is alleged in para. 11 that the defendant knew at the time of such representations that the Brnics had rights either of ownership of part of the farm or of possession of the whole or part of the farm, and the defendant further knew that the plaintiff was ignorant of the existence or validity of those rights. The

representations were untrue and either (i) knowingly false or (ii) in negligent breach of a duty towards the plaintiff or (iii) innocent, but always material. In consequence of acting thereon the plaintiff has lost its purchase price which it is now entitled to recover. In addition it was claimed that special consequential damages amount to £1,389 10s. and was recoverable from the defendant if he knew of the falsity of his representations, as alleged in the first of these alternative claims.

In response to a request for particulars regarding paras. 10 and 11 of the declaration, the plaintiff supplied certain information. The plaintiff disclaimed (as I shall endeavour to show later) any intention to allege that the Brnics had any rights of ownership or possession after the date of the passing of transfer; it was merely a case of the defendant misrepresenting his title or power to sell the farm; and his defect in title lay in the fact that he had failed to consult the executors of Mrs. Carinus' separate estate as to the advertising and confirmation of the sale to the plaintiff and to secure their agreement thereto. It was also stated that the Brnics were entitled under the will of the late Mrs. Carinus to the ownership of one-half of the said farm and also to "the right to occupy" an undivided half-share of the farm, this arising from the defendant's wrongful sale in excess of his powers, and conferring on the Brnics the right to remain on the farm until it was lawfully sold.

At the outset it is clear that this is not a case where a plaintiff alleges the same effect on his mind and the same consequential damages on two alternative bases, (*a*) that a warranty or term of a contract has been breached, or, alternately, (*b*) that representations, not forming part of a contract, but merely inducing him to enter into a contract, were made to him. It must also be pointed out that these three alternative claims are made independently of the allegations in para. 6 regarding the occupation of the Brnics and the unsuccessful ejectment proceedings.

The particulars to para. 11, supplied on request as above indicated, make it clear that these alternative claims are not in respect of the plaintiff's deprivation, due to the presence of the Brnics, of the possession of the farm after the date of transfer. These alternative claims rest on an allegation of damage to the plaintiff, suffered by misrepresentation or negligence in September, 1958, prior to the sale and inducing the plaintiff's purchase. The basis is misrepresentation of the defendant's title to sell the farm: this title (it is particularised) was defective merely because the defendant had failed to consult with the executors of the surviving widow regarding the advertisement and confirmation of the sale. And further the Brnics were alleged to be entitled to remain on the farm only "until it was lawfully sold".

I am unable to see how these facts, if proved, give the plaintiff a good cause of action for any of the alternative claims. The executor of the joint estate of a deceased husband and a surviving wife, where the marriage is in community of property, has the power, if it is necessary to pay the debts of the joint estate, to sell and transfer fixed property of that estate, and the surviving wife's interest in her half of the community must give way thereto. It may well be that before the Master confirms such a sale he will wish to be satisfied that either the surviving wife or the executors of her separate estate (assuming she dies before the administration of the joint estate has been completed) has no objection of substance to the proposed sale. But on the present facts the sale must have been confirmed as transfer has been passed. No ground was suggested upon which this failure to consult with, or to secure the consent of, the executor in Mrs. Carinus' separate estate vitiates the sale of the joint estate asset to a purchaser for value. Equally there is no suggested ground upon which an heir under her separate will can obtain any right, even a personal one, enforceable against a purchaser for value from the executor in the joint estate.

To set out a valid cause of action the plaintiff must aver a causal connection between the misrepresentations and the damage alleged to have been sustained by it. As regards ownership there is no causal connection; the defendant has, in fact, transferred ownership to the plaintiff under title which *prima facie* cannot be attacked. Even if the defendant did not have authority in September, 1958, to sell the farm, he had actually sold it and validly transferred it later, and that concludes the matter. As regards possession, the following is the position: (*a*) in para. 11 of the declaration it is alleged that the Brnics had, to the defendant's knowledge, rights of ownership and/or occupation in the farm; (*b*) the defendant asked, in his request for particulars, (i) whether the ownership rights are alleged to have continued after transfer to the plaintiff, and, if so, on what grounds is this allegation made; and (ii) whether the occupation right was good against the plaintiff after transfer, and, if so, on what grounds is this allegation made; (*c*) in reply the plaintiff said that this first request was irrelevant, because the allegation in para. 11 was that the rights existed at the time of making the representations, and also said, in reply to the second request, that there was no allegation made by the plaintiff that the occupation right was good against the plaintiff after transfer; the allegation was only that the defendant had misrepresented his title to sell the farm. I can only construe this as meaning that the plaintiff disavows any intention to allege that its complaint is based on any alleged rights of the Brnics after transfer was passed in February, 1959. The rights (whatever they are) are rights existing in September, 1958, but not after February, 1959. And I am entirely unable to see what those pre-transfer rights can be which the plaintiff says have caused it prejudice. They cannot in any way vitiate the plaintiff's title as owner. If they did exist before transfer they did not prejudice the plaintiff, seeing that it was not entitled to possession then. And it in express terms says that it does not rely on their persistence after transfer to it as a ground for claiming rescission.

The plaintiff, in my opinion, has not disclosed valid causes of action for its three alternative claims, and the exception to those claims must be upheld.

The question of costs remains for consideration. To my mind, the main claim raised the real dispute between the parties, and the alternative claims, though three in number, are really only subsidiary thereto. The plaintiff has succeeded in respect of the main claim. The exceptions were only taken in regard to the position created by the par-

ticulars supplied by the plaintiff. The argument at the hearing was mainly, in fact almost entirely, concerned with the main claim. On the other hand, the alternative claims raised matters which, if allowed to stand on the pleadings, would have protracted the hearing of the case on trial: in addition, the particulars supplied by the plaintiff created, *prima facie*, confusion as to whether it proposed to go independently of its judgment and positively establish the correctness of that judgment.

In all the circumstances, I propose to exercise my discretion by directing that the costs of these exception proceedings shall follow the result of the action, i.e. be costs in the cause.

The order of the Court is that the defendant's exception fails in regard to the plaintiff's main claim, and is dismissed. It succeeds in regard to the plaintiff's alternative claims, which in consequence are set aside. The plaintiff is granted leave to amend its declaration within one month from date, if so advised. The costs of these exception proceedings are made costs in the cause.

Excipient's Attorneys: *Leo S. Baron & Hewitt.* Respondent's Attorneys: *Coghlan & Welsh.*

YORK & CO. (PVT.) LTD. v. JONES, N.O. (2).

(SOUTHERN RHODESIA, BULAWAYO.)

1961. *June* 12-14, 16, 29, 30; *July* 1. BEADLE, C.J.

Sale.—Of immovable property.—Failure by seller to give occupation. —Purchaser given transfer.—Purchaser himself unsuccessfully suing occupant for ejectment.—Notice to vendor.—Adequacy of.—Conducting of a virilis defensio.*—What amounts to.—Purchaser claiming rescission and damages.—Special defences set up by vendor.—Failure of.*

Where the purchaser of immovable property himself sues the occupier for ejectment, it is not necessary for the purchaser, in giving notice to the vendor, formally to state in the notice that the purchaser requires the vendor to join as a party to the proceedings, provided the vendor is given full information of what is taking place and an adequate opportunity to take any action in the matter which he considers it advisable to take, for which purpose the notice must be timeously given.

The plaintiff had by public auction purchased a farm from the defendant in his capacity as the executor dative of the joint estates of a deceased couple, and had obtained transfer of the farm from him. One B, the executor of the deceased wife's (the survivor's) estate, had objected to the sale as being improperly advertised and because it was to take place on the day of an election. The defendant had given plaintiff the assurance that he had the right to sell and that B's objection was invalid. Plaintiff had thereafter unsuccessfully applied to Court for the ejectment of B and his wife, the sole heiress in the survivor's estate, from the farm. Defendant had been duly notified of these proceedings and had filed an affidavit in support of plaintiff's application, though he had refused to be joined as a party. Plaintiff now sued the defendant for rescission of the agreement of sale, repayment of the purchase price and damages. Defendant had unsuccessfully excepted

to this declaration, and leave to appeal to the Federal Supreme Court had been refused. The question whether B was an illegal trespasser and the extent to which that affected the plaintiff's claim had thus already been decided in favour of the plaintiff, and was now *res judicata*. Defendant, however, disputed the allegations on which the declaration was based and also sought to raise certain special defences.

Held, that the notice given to the defendant by the plaintiff was a proper notice in law, and that it was entirely of his own volition that the defendant had declined to intervene in the proceedings.

Held, further, that the judgment in the ejectment proceedings had not been shown to be manifestly incorrect, that there was no obligation on the plaintiff to have appealed, defendant not having tendered to pay the costs, that the plaintiff had conducted its case as a reasonable litigant, and thus that it had put up a *virilis defensio*.

Held, accordingly, that the plaintiff had established the facts set out in its declaration and, as the special defences also failed, he was entitled to judgment as prayed.

Action for an order rescinding a sale and for the repayment of the purchase price and other relief. Facts not material to this report have been omitted.

A. D. H. Lloyd (with him *W. H. G. Newham*), for the plaintiff: In the exception proceedings MURRAY, C.J., held that the duty of the seller was (*a*) to give transfer, (*b*) to give physical possession, (*c*) to guarantee the purchaser from ejection.* This is *res judicata*. MURRAY, C.J., held also that the guarantee against eviction extended to protect the purchaser from interference by trespassers who are on the land at the time of transfer. The first issue is whether the plaintiff is entitled to rely on the judgment of the Court in the motion proceedings as eviction. For the purpose of the exception proceedings the defendant conceded that notice had been given and MURRAY, C.J., held that the plaintiff was entitled to rely on the judgment in the motion proceedings as eviction because (i) notice had been given; (ii) defendant did not intervene to resist the adverse claim; (iii) the plaintiff put up a *virilis defensio*; (iv) judgment went against the plaintiff; (v) these principles apply when the purchaser, as defendant, resists a claim by a third party but the principles are the same when the purchaser makes claims. MURRAY, C.J., held that in such circumstances the unsuccessful party is not obliged to appeal and may regard the judgment as final. The question is now whether, having heard the evidence, the Court considers the facts to be the same as those on which MURRAY, C.J., based his judgment in the exception proceedings. The matters that arise are: (i) what is notice and was it given? Notice is not a term of art or a technical term. See *Voet*, 21.2.20; *Paarl Pretoria Gold Mining Co.* v. *Donavan and Wolff, N.O.*, 3 S.A.R. 93 at pp. 96-98; *Wessels*, vol. 2 p. 1129 para. 4616. (ii) Defendant did not intervene. Provided defendant had notice it is irrelevant whether he intervened or not. It was up to defendant to decide what to do. See *Lammers & Lammers* v. *Giovannoni*, 1955 (3) S.A. 385. (iii) On the facts there was a *virilis defensio*. (iv) It is common cause that judgment in the motion proceedings went against the plaintiff. (v) As to the position when the purchaser initiates the ejectment proceedings, see Mackeurtan *Sale*, 3rd ed. p. 189. On the issue of whether or not the plaintiff should have appealed against the decision in the motion proceedings, see *Mackeur-*

*See *ante* p. 65.

tan, supra at p. 193, and the judgment of MURRAY, C.J. As to plaintiff's alternative claim on the grounds of negligent misrepresentation, see *Herschel* v. *Mrupe*, 1953 (4) S.A. 464. As regards damages, the costs of the action for eviction are claimable as damages. See *Scheibe* v. *Heroldt and Louw*, 5 S. 257 and *Mackeurtan, supra* at p. 361.

P. Charles, Q.C. (with him *J. Gasson*), for the defendant: Plaintiff's main claim is that defendant has breached a term of the contract that the purchaser would be given vacant possession of the farm. Plaintiff accepted transfer on the basis that the Brnics and their property would be removed after transfer. Thereafter plaintiff allowed the Brnics to remain in occupation of the farm until 30th June, 1959. Plaintiff could only cancel the contract if plaintiff thereafter called on defendant to give possession by ejecting the Brnics and defendant refused or if plaintiff put defendant *in mora* by fixing a reasonable time demanding possession within that time and if defendant had then failed to comply. *Breytenbach* v. *van Wyk*, 1923 A.D. 541 at p. 549. Plaintiff by taking proceedings for ejectment itself made it impossible for defendant to fulfil its obligation to deliver vacant possession of the farm. The Brnics have a judgment against the plaintiff that they are entitled to possession. This is *res judicata* against the plaintiff and also against the defendant. See *Voet*, 44.8.5; *Du Toit* v. *Malherbe*, (1847) 2 M. 299 at p. 326. In regard to eviction, plaintiff has not proved the allegation in para. 6 of the declaration (which was relied on by MURRAY, C.J.), that the defendant refused to intervene in the proceedings despite notice from the plaintiff. There was no proper notice from the plaintiff and accordingly there could be no refusal. It is clear that notice must be given by the purchaser. Notice is necessary even if the vendor knows of the suit from another source. *Voet*, 21.2.22. There are two objects of notice: (i) to inform the vendor: (ii) to call on the vendor to take up the suit, *ibid.* It is clearly implied from this that the notice must convey that the vendor is required by the purchaser to intervene in the suit. Where the purchaser has elected to take proceedings on his own account without calling on the vendor to do so the notice to be a good notice should convey a clear indication that the seller is required to intervene. At any rate notice cannot be good when the purchaser has told the vendor expressly that he is not required to intervene. On the facts the plaintiff in effect told the defendant he was not required to intervene. Action can be based on eviction only where this is due to a defect existing at the time of sale, or where it is brought about by vendor's subsequent default—see Mackeurtan *Sale*, p. 190. The defendant is bound by the decision in the ejectment proceedings only if the plaintiff conducted a *virilis defensio*. Huber *Jurisprudence*, vol. 1, 3.5.70; *Voet*, 21.2.20: Wassenaar *Manier van Procederen*, 8.5: *Lammers and Lammers* v. *Giovannoni*, 1955 (3) S.A. 385 at p. 392 G. A *virilis defensio* involves putting forward proper legal contentions and in a proper case would involve the prosecution of an appeal, e.g. a judgment was given by a Court which had no jurisdiction. See *Voet*, 21.2.20; *Wassenaar*, 8.22.8.44; *Huber*, 355.71. The statement of MURRAY, C.J., that the purchaser is not obliged to appeal is *obiter*. The judgment in the ejectment proceedings was incorrect. The learned Judge was correct in his first view that the executor was a necessary party to the proceedings if the validity of the transfer to the present plaintiff was to be investigated but he acted incorrectly in proceeding thereafter to decide upon the validity of the sale and transfer in proceedings to which the executor was not a party. The only proper question before the Court was whether the respondents had established any right as against the registered owner to remain in occupation. What the learned Judge in effect allowed the Brnics to do was to make a counterclaim for an order setting aside the sale and transfer without joining the necessary parties. In any event the finding that there was no *justa causa* for transfer and therefore presumably the applicant did not have the rights of a registered owner cannot be supported because (*a*) the learned Judge erred in putting the *onus* on the applicant (plaintiff); (*b*) As the Brnics admittedly were agreeable to the farm being sold and the only dispute was about the method of sale, it cannot be said that the sale was a breach of rights in the property comparable to the rights of a legatee or fideicommissary in respect of the property itself which were considered in *Lange* v. *Liesching*, 1880 Foord 55; *Williams* v. *Williams*, 13 S.C. 203. After they had taken no steps to prevent the transfer of the property, the only rights the legatees of the property would have would be an action for damages against the executor responsible. The defendant did not put up a *virilis defensio* in that it allowed the issues to be enlarged and it failed to appeal. Also the affidavits contained statements which were shown in the proceedings to be false. Consequently the plaintiff cannot rely on the judgment as conclusive evidence of eviction and it has by its own default put it out of the defendant's power to give vacant possession. As to the claim for misrepresentation, the damages do not flow from the alleged misrepresentation. On the question of remoteness of damages, see *Victoria Falls and Transvaal Power Co., Ltd.* v. *Consolidated Langlaagte Mines Ltd.*, 1915 A.D. 1 at p. 22; Norman on *Sale*, 2nd ed. pp. 544 and 545; *Granelli* v. *Gollach*, 1959 (1) S.A. at pp. 816, 819. If damages are claimed as being in the contemplation of the parties it must be shown that defendant contracted with knowledge of and on the basis of the facts giving rise to the special damages. *Lavery* v. *Jungheinrich* 1931 A.D. 156 at p. 175; *Mackeurtan, supra* at p. 381; *Whitfield* v. *Phillips and Another*, 1957 (3) S.A. 318 (A.D.); *Bhayla* v. *Cassim* 1945 N.P.D. 327. See also *Liesboch Dredger* v. *Edison s.s.* (owner), 1933 A.C. 449; *Charles* v. *Malherbe Bosch and Co. (Pty.) Ltd.*, 1949 (3) S.A. 381 at p. 389. If a delictual claim is put forward on the basis of negligent misstatement the measure of damages for delict is such amount as will put the plaintiff in the position he would have been in if the delict had not been committed. Where as a consequence of a misrepresentation he was induced to enter into a contract he should be put in the same position as if the contract had not been made, so far as damages can do so, i.e .the actual diminution of his patrimony must be made good. He is not entitled to be placed in the same position as if the representation had been made good. *Steyn* v. *Davis and Darlow*, 1927 T.P.D.

651; *Trotman* v. *Edwick*, 1951 (1) S.A. 443 at pp. 449-450; *Caxton Printing Works* v. *Transvaal Advertising Contractors*, 1936 T.P.D. 209.

Lloyd, in reply. As to the requirement of notice, see Maasdorp's *Institutes of South African Law*, 6th ed. vol. 3 p. 133.

Cur. adv. vult.

Postea (July 1st).

BEADLE, C.J.: This is an action in which the plaintiff sues the defendant for (1) an order rescinding an agreement of sale; (2) repayment of the purchase price of £4,935.4s.0d; (3) payment of the sum of £2,041.15s.5d. as and for damages; (4) costs of suit.

An outline of the facts of the case, which are not seriously in dispute, or which I find abundantly proved, is this:

The farm "Dumbarton" was owned by Ponty Carinus, married in community of property to Hester Carinus. Ponty and Hester are both dead, and their estates have not yet been finally wound up. The defendant, Jones, is the executor dative of the estate of Ponty, and, as such, the executor dative of the joint estates of Ponty and Hester. The farm "Dumbarton" is, and was at all material times, occupied by Ivan Brnic and his wife, Hester Brnic, who is the sole heiress to the estate of Hester Carinus. Brnic is also the executor of the estate of Hester Carinus. Hester Carinus, before her death, acquired, by cession from Ponty's heirs, Ponty's undivided half-share of the farm "Dumbarton", and the other undivided half-share she owned by virtue of her marriage in community of property to Ponty. The joint estate of Ponty and Hester Carinus had no assets other than the farm "Dumbarton" when the defendant took over its administration, and it owed some debts, mostly incurred in the administration of the estate. The defendant was anxious to sell "Dumbarton" in order to wind up the joint estate, and Brnic, as the executor of the estate of Hester Carinus, and as the representative of his wife, Hester Brnic, authorised the defendant to sell the farm. The plaintiff company, acting at all material times through its representative, one Honour, wished to buy the farm, as it was contiguous to land already owned by it. The defendant duly advertised the farm for sale by public auction, the sale date being fixed for November 12, 1958, the day of the Federal General Election. Brnic objected to the sale on this day, chiefly on the ground that the day chosen was inappropriate or/and that the sale had been inadequately advertised; he withdrew his authority to the defendant to sell the farm, and said if the farm were sold he would not recognise the sale. The defendant, however, was of the opinion that, as executor of the joint estate, he was entitled to sell in face of the opposition of the executor of Hester Carinus' estate, and he decided to persist in the sale. Honour heard about Brnic's objection to the sale, and Brnic's statement that he would not recognise it, and the day before the sale he asked the defendant for assurances that Brnic's objections were without legal foundation. These assurances the defendant gave him. On the day of the sale the auctioneer read out the conditions of the sale, which included the condition:

"Possession and occupation of the property shall be given and taken subject to and upon compliance by the purchaser with the provisions of clause 4 hereof, and upon registration of transfer—whichever date is the later."

The defendant, in order to allay the fears of prospective purchasers, addressed them before the sale started, and told them that the rumours that they may have heard—that he had no authority to sell and that the sale would be invalid—were groundless. The farm was then sold to the plaintiff company for £4,935.4s.0d. and transfer was effected into the name of the plaintiff company on February 17, 1959. Brnic, who appears to be an unusually agressive personality, somewhat feared in the neighbourhood, refused to recognise the sale and refused to leave the farm. After much correspondence and threats of legal proceedings, matters came to a head in May, 1959, when the plaintiff company instituted ejectment proceedings against Brnic. The Court joined the defendant, Jones, as a co-applicant, but the defendant, although he filed an affidavit in support of the plaintiff's claim, refused to be joined, and the order joining him was cancelled at his request. The High Court dismissed the application for ejectment,* and the Brnics are still occupying the farm.

It appears from the correspondence (letter of October 2, 1959, (exh. 42)) that the plaintiff company's counsel advised that an appeal against the High Court judgment would be unlikely to succeed. The plaintiff company thereupon called upon the defendant to have the sale declared valid, stating that, if this were not done, it would bring these proceedings. The defendant has not done so, and these proceedings have, accordingly, now been brought.

The pertinent paragraphs of the plaintiff company's declaration read as follows:

"5. The defendant as seller warranted that the plaintiff as purchaser of the said farm would be given undisturbed possession thereof.

6. Subsequent to the date of transfer of the said farm plaintiff was evicted from possession of the said farm in that plaintiff was unable to obtain possession thereof from one Ivan Brnic and one Hester Beatrix Brnic (who were residing on the farm at the time of the said sale) and instituted action in this Honourable Court against the said Ivan Brnic and the said Hester Beatrix Brnic claiming possession of the farm, an action in which despite notice from the plaintiff to the defendant thereof defendant refused to intervene as a party thereto, judgment was given against the plaintiff with costs on the ground that the said Hester Beatrix Brnic and the said Ivan Brnic were entitled to remain in possession of the farm.

7. In the premises defendant has breached the aforesaid agreement of sale entitling the plaintiff to rescission thereof and to repayment of the said purchase price of £4,935 4s."

To this declaration the defendant excepted. The basis of the defendant's exception is set out in the judgment of MURRAY, C.J.,† before whom these proceedings came. At p. 2 of the cyclostyled copy of that judgment, the learned CHIEF JUSTICE states:

"The basis of the defendant's exception to the plaintiff's main claim is that there is no allegation of any breach of the warranty of undisturbed possession; such warranty, it is said, can be breached only where the person disturbing or encroaching on a purchaser's possession has a legal right to do so and is not merely an unauthorised squatter or trespasser. And it was argued by counsel for the excipient that, *ex facie* the particulars supplied (viz., that the Brnics' rights were personal arising from the defendant's exceeding his powers in selling the farm without the consent of the executor in the late Hester Carinus' estate), the Brnics had no title valid against a *bona fide* transferee for value, such as the plaintiff, to possession of the farm; it was therefore for the plaintiff itself, and

* See *ante* p. 56. † See *ante* p. 65.

not for the defendant, to evict the Brnics. Consequently there was no valid claim for rescission of the contract."

The exception to the main claim set out above was dismissed, and leave to appeal to the Federal Supreme Court against this judgment was refused by CLAYDEN, A.C.J., (as he then was).

A The two principal witnesses in the case were Honour and the defendant, Jones. Both impressed me favourably, and I do not think that either ever deliberately attempted to mislead the Court. But much of the evidence given concerned interviews and conversations which took place a long time ago, and at times it was apparent from the manner B in which they gave their evidence that their recollections on certain matters were not as clear as the substance of their evidence might indicate. There were also individual passages in the evidence of both of them where I think they wished themselves into believing that statements were made to them by others, which, in fact, had not been made. Honour's credibility was particularly attacked in relation to an incor- C rect statement which he made in his first affidavit in the ejectment proceedings. But I accept his explanation as to how this came about, and this inaccuracy does not affect my view of him as a witness. All the other witnesses impressed me as honest witnesses.

I return now to examine the facts in more detail, and to determine D some of the more controversial issues of fact, before proceeding to deal with the law.

[The learned Judge then dealt with certain of the evidence and proceeded.]

On this aspect of the case, therefore, I find the allegations set out in para. 5 of the declaration to be proved.

E [The learned Judge then analysed certain other evidence and proceeded.]

Para. 6 of the declaration is the vital one, and I now propose to examine the allegations in that paragraph. On the facts that I have already detailed, I find this proved: subsequent to the date of F transfer of the farm the defendant failed to give the plaintiff vacant possession thereof from Ivan Brnic and Hester Brnic (who were residing on the farm at the time of sale) and the plaintiff instituted proceedings against the Brnics to obtain possession, in which judgment was given against the plaintiff with costs.*

The next pertinent fact, which is alleged in para. 6 of the declaration, G is that "notice" was given by the plaintiff to the defendant.

I now propose to examine whether that allegation has been substantiated. This represents the first real issue between the parties, which is largely an issue of law. The defendant's contention is that the plaintiff never gave the defendant the formal notice which the law requires. H Mr. *Charles*, who appeared for the defendant, contends that the notice should (*a*) inform the vendor of the action to be taken, and (*b*) call upon the vendor to take up the suit. In this he relies on a section in *Voet*, 21.2.22 (*Gane's* translation vol. 3, p. 678), which reads:

"Notice to be given to vendor who knows of eviction suit.

Nor does this need for notice fall away, because the vendor has already learnt from other sources that a suit has been set in motion against the purchaser. It is true that he who was not ignorant was not bound to be informed.

*See *ante* p. 56.

Yet since there are two objects for employing notice—one that the vendor shall be informed, and the other that when he has already been informed he shall do something, that is, take up the defence—it follows that the vendor, though not ignorant of the suit having been set in motion, and even being perhaps on the spot, should none the less be summoned to shoulder the defence." A

The words Mr. *Charles* relies on are those I have underlined.

The defendant states that he was never asked to join in the suit, and, therefore, he was never summonsed to shoulder the defence, as is suggested should be done in the passage of *Voet* just quoted. I might, however, point out here that the words in the letter of notice, exh. 30: "I trust you have had a good holiday, and have returned in thinking and B fighting trim", (the underlining is my own) in their context clearly indicate the plaintiff company expected the defendant to assist in the proceedings, which in fact he did do by making an affidavit.

This "summonsing" of a defendant to take up the defence mentioned C by *Voet* seems to me to be a procedural requirement, similar to the one requiring a copy of the summons to be attached to the letter of notice, mentioned by *Voet* in 20.2.20 (see *Gane, supra* at p. 676). This requirement is referred to in *Paarl Pretoria Gold Mining Company* v. *Donovan & Wolff, N.O.*, 3 S.A.R. 93. At p. 98 of the case, KOTZE, C.J., points out that these purely procedural requirements referred to D by *Voet* have not necessarily been incorporated into South African Law. He says:

"It is true that *Voet* says that by custom or practice (*secundum mores*) the notice is accompanied by a copy of the summons, but it is clear that this was merely an instruction or rule of practice in the Courts of Holland. It is only a local provision of the *jus adiectivum* or practice in the Netherlands, observed in the days of *Voet*, and forms no portion of the real substantive E law, which is that by which alone we are bound, for we have our own rules and procedure in this country. If this were not so, we would still be bound by all the provisions of the Instructions of the Courts of Holland which were passed and altered from time to time . . ."

He goes on to say:

"The letter by which the Paarl Pretoria Co. was summoned to defend the action brought by Donovan was so clear that there can be no doubt that it F knew what was the nature of the action which Donovan had instituted against the Central Langlaagte Co. . . ."

In the circumstances it was held in that case that the failure to attach a copy of the summons to the letter of notice was immaterial.

Modern text books on this subject make no mention whatsoever of the need for this notice to include a request or demand that the de- G fendant take up the suit. For example, Wessels *Law of Contract in South Africa* 2nd. ed., para. 4616, reads:

"If the purchaser has informed the vendor of the claims made by a third party to the thing sold or of any action brought against him in respect of it, he has done all that he need do and it is then the duty of the vendor to take the action upon himself. There is no obligation on the part of the purchaser H to defend the action or to appeal if judgment is given against him. . . ."

(The underlining is my own).

Norman *Purchase and Sale in South Africa*, 3rd ed., p. 238, states that notice must be given timeously in order to give the vendor time to intervene. Maasdorp *Institutes of South African Law*, vol. III. *Law of Contracts*—6th ed., p. 133, simply states that it is essential that the vendor be given timely notice. and Mackeurtan *Law of Sale of Goods in South Africa*, 3rd ed., p. 192, is to the same effect. What

that notice involved came up for consideration in the case of *Lammers and Lammers* v. *Giovannoni*, 1955 (3) S.A. 385 (A.D.). At p. 391, SCHREINER, J. A., deals with this question of notice as follows:

"The object of giving notice to the seller is no longer simply to lay a formally necessary foundation for an action against him; a principal object is, it seems, to convert his general obligation to protect the buyer's possession into something more specific. So *Voet* 21.2.22. (*Berwick's* translation) says:

'there are two objects in giving notice, the one that the vendor may be made more certain'.

I suppose that this means that he may be informed:

'and the other that, being now informed, he may do something, or undertake the defence'.

What form the 'something' may take is suggested in sec. 20, where *Voet* says—I quote again from *Berwick*:

'This notice having been given, whether the '*auctor*' takes part in the suit in order to prevent collusion, or suffers that the purchaser constitute him '*procurator in rem suam*' or 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 once or oftener according to the usages of the place, but altogether neglects the suit, he (the purchaser) has recourse against his '*auctor*' after eviction, provided the purchaser himself has not failed to defend it with all his power; lest otherwise the '*auctor*' should be considered to have been defeated rather on account of absence than because he had a bad cause."

I think it appears clearly from these modern authorities, to which I referred, that the object of notice is twofold; (1) to give the defendant full information of what is taking place; and (2) to give him an adequate opportunity to take any action in the matter which he considers it advisable to take, and for that purpose the notice must be given timeously. I cannot see that in our practice there is need for the notice to give the defendant anything more than this, because, once he has been given timeous notice, it is open to him, entirely of his own volition, to decide whether he wishes to intervene as a party or not. It is not a requirement of our practice that, before he can intervene as a party to the proceedings, he must be invited or asked to do so by the plaintiff, (he may do so on his own motion (Rule 9, Order 12, High Court Rules)), for, if the notice contained the words, "We ask you to join in the action", those words would be a bare formality, and, whether the notice contained those words or not, he would still have a perfect right to intervene if he wished. Therefore, I cannot see that any useful purpose will be served by putting those words in the notice under our practice. A somewhat parallel situation arises in the case of a surety. A creditor, wishing to sue a debtor and wishing to hold the surety liable for any costs should the proceedings prove to be abortive, need only give to the surety simple notice that he intends to proceed against the debtor. The better opinion is that it is not necessary for him to add to that notice a formal statement that, in the event of the proceedings being abortive, he intends to hold the surety to be liable for these costs. The surety can still be held liable for these costs even in the absence of a specific intimation to that effect. (See judgment of TINDALL, J., in *Barnard* v. *Laas*, 1929 T.P.D. 349 at p. 356). I am of the opinion, therefore, that, in our practice, it is not necessary, in giving notice in a matter such as this, formally to state in the notice that the purchaser requires the vendor to join as a party to the proceedings, provided the other requirements of a valid notice already mentioned are fulfilled.

On that view of the law, I now examine the facts. I am quite satisfied that the defendant in this case was placed in possession of all the information which he required. He knew exactly what the proceedings were about; he had been kept informed all along, and he was furthermore given Brnic's affidavit to read, which he did read, and the fact that he fully appreciated what the proceedings were all about is indicated again by his note, exh. 43. It seems clear also from the letter, exh. 16, that he knew assistance was expected of him, and he did, in fact, give that assistance by making an affidavit.

When it comes to the next requirement—was the notice given timeously, so that he had adequate opportunity of taking any action he saw fit to take?—I find that this requirement was also complied with. In actual fact, he was joined. He was joined in the proceedings by the Court itself, and it was purely of his own volition that the joinder was set aside, so that he cannot say now that he never had adequate opportunity to join in the proceedings had he wished to do so. The defendant could quite clearly have intervened if he had wished, and, as I have found as a fact, the reason that he did not intervene was because he accepted the position that, as a matter of tactics, it was best for him not to intervene.

If, however, I am wrong on this interpretation of the law, and there is some old rule of procedure which requires some formal notice of this sort to be given, I examine the facts of this case to see whether that rule could logically be interpreted as applying to the facts now before me. The rule must obviously be there for some purpose, and if it is quite clear, as I think it is in this case, that even if these formal words had been put in the letter of notice to the defendant, it would not have made the slightest difference to the manner in which he acted, and the defendant would still not have joined in the proceedings, then the object of putting these words in the notice immediately disappears. The facts of this case indicate quite clearly that the defendant did not want to be joined, and he resisted any attempt to join him, so that the application of this rule to the facts of this case would be the most blatant procedural technicality, and I cannot think that it was ever intended—if there is such a rule—that the rule should be interpreted to defeat a plaintiff's claim in a matter such as this, where it is quite clear that no possible prejudice has been suffered by the defendant by a failure to observe the rule. Mr. *Charles* did suggest, when I put this point to him, that the defendant has suffered some prejudice by this rule not being observed—if there is such a rule. He suggested that the prejudice was that, by virtue of the fact that this request was not made in the letter, the defendant might have been lulled ino a false sense of security in thinking that he would not be held responsible for not getting the Brnics off the property if the case went against the plaintiff company. I do not think for a moment that he could ever have thought that. He must have known all along from the whole background of the case that the plaintiff was standing on its rights to insist that it was his obligation to get the Brnics off the property. Furthermore, I think it is in the highest degree improbable that the defendant ever knew of the existence of this technical rule of procedure referred to by *Voet*. The rule does not occur in any of the leading

South African textbooks on the subject. It is not mentioned in the leading South African case on the subject, and I think, therefore, as a matter of fact, that the defendant had never heard of this rule. He never said he had. If he never knew of the rule, I fail to see how, in the circumstances of this case, his position could have been prejudiced by the fact that the letter of June 16 did not contain formal words of this description, "We hereby formally ask you to join in the proceedings should you see fit to do so", because he never knew that their omission would have the implication suggested by Mr. *Charles*. I hold, therefore, on this aspect of the case that the notice given by the plaintiff company to the defendant was a proper notice in law, and that it was entirely of his own volition that the defendant declined to intervene in the proceedings.

The next major issue that has been raised in the matter, and which relates also to the allegation in para. 6 of the declaration, is that the plaintiff company in the ejectment proceedings did not put up what is known as a *virilis defensio*. Put positively, it amounts, in the language of *Voet*, to this, that he did not put a powerful case before the Court. Mr. *Charles* has suggested that the law applicable to this aspect of the case is this (and I accept his submission without deciding whether this is the law, because the law certainly cannot be put any higher for the defendant). He submits that the law to-day is that if a defendant has had due notice of the proceedings—which I hold the defendant in this case has had—and a *virilis defensio* is put up, then the vendor cannot complain if the proceedings go against the purchaser, because he is bound by those proceedings just as much as is the purchaser. It is essential, however, that he put up a *virilis defensio*. There is no clear authority as to what is meant by the words *virilis defensio* in this context. Huber *Jurisprudence of my Time* (*Gane's* translation, vol. 1 at p. 425), states:

"Similarly the buyer has no claim for eviction if he has deliberately or negligently allowed himself to be overcome . . ."

Voet, in the passage to which I have already referred—21.2.20—states:

". . . provided the purchaser himself has not failed to defend it with all his power; lest otherwise the '*auctor*' should be considered to have been defeated rather on account of absence than because he had a bad cause".

Pothier on *Sale*, 2.127, quoted with approval by SCHREINER, J.A., in *Lammers'* case, *supra* at p. 392, reads:

"Yet, if the Judge condemns me, by an error in point of law, though a buyer in good faith, to account for degradations committed upon an estate, which I am condemned to abandon, the seller, if he is summoned in warranty, ought to be condemned to acquit me; for, being obliged to take my act and cause, he ought to defend it at his own risk, and consequently to acquit me from all condemnations, whether just or unjust. But if I suffer myself to be condemned, without summoning him in warranty, the seller may defend himself against my claim for an acquittal from this condemnation, by objecting that it is through my own fault, and by means of my bad defence, that I am condemned, and that if I had put him into the cause, he would have defended me better and have prevented the sentence."

Maasdorp, vol. III, p. 133, states:

"Notice having been duly given, and provided the purchaser does not fail to make a proper defence, the seller is liable whether he intervenes or takes any part in the action of eviction or not."

(The underlining is my own).

MURRAY, C.J., in the judgment in the ejectment proceedings in this case, says:

". . . and then, provided that the purchaser has put up a *virilis defensio*, that is to say, a proper and competent defence . . ."

It seems to me, on reading these authorities, that nothing more is expected of a purchaser than that he should conduct his case as a reasonable litigant. If he does do that, I think it is clear from the authorities that he would be held to have put up a *virilis defensio*. Mr. *Charles* opened his argument on this aspect of the case by saying that the judgment of the learned Judge in the ejectment proceedings was manifestly and clearly wrong, because he had gone behind the fact that the plaintiff actually had a registered title and had considered the validity of the plaintiff's title while the plaintiff still remained the registered owner. It is clear, therefore, that the suggestion of Mr. *Charles* is that the Court in the ejectment proceedings erred on a matter of law and not on a matter of fact. It is not suggested that the plaintiff did not argue this particular point on which Mr. *Charles* suggested the Court went wrong. It would be difficult to contend this, because, quite obviously, it was the main point on which the plaintiff relied in presenting its case to the Court. That it did this is apparent from the view that both Jones, the defendant, and Whales took of the case, and also from this note of Jones, exh. 43. The Judge, however, quite obviously, did not accept this argument and the case was decided on different lines. Now, I am not prepared to express any opinion as to whether I think the judgment of the Court in the ejectment proceedings was right or wrong. For the purposes of this case, I do not find it necessary to do that, but, in my opinion, it was certainly not manifestly and clearly wrong. The three points that have been suggested by the defendant on which the plaintiff fell down in the ejectment proceedings are these: The first one is that he allowed the issues to be unjustifiably enlarged by allowing the Brnics to bring in the question of the ownership of the farm. I cannot see how the plaintiff could have prevented the Brnics doing this. There is no procedure in our practice which allows an exception to be taken to points being raised in motion proceedings, and simply to ignore what Brnic said in his affidavit might have been extremely dangerous. The mere fact that the plaintiff replied to Brnic's allegations does not seem to me to be a serious error in the conduct of those proceedings. There was a danger that the matter might almost have gone by default if the plaintiff had not met Brnic's allegations. The second point raised by the defendant is that, having had judgment given against it, which was manifestly incorrect, the plaintiff company failed to appeal. In the first place, I find as a fact that the judgment was not manifestly incorrect, and there is authority that, in those circumstances, the plaintiff has no obligation to appeal at all. (See *Wessels*, para. 4161 (to which I have already referred) and the judgment of MURRAY, C.J. in the exception proceedings in this case). Here it is apparent that the plaintiff company asked the advice of its counsel as to whether it should appeal or not, and the advice was against appealing. That appears from the letter, exh. 42, and I do not think that it can be held to have acted negligently in any way in not deciding to go any fur-

ther, and throw possibly good money after bad. The defendant, I reaffirm, could, had he wished, have suggested that he would finance the appeal, but there is no evidence at all that he ever offered to do this. He knew of the judgment the day after it was given. See the letter of 5th September, exh. 37. He had been making investigations into the whole matter, as appears from his letter of 30th September (exh. 41). He was informed by exh. 42 that the plaintiff was not going to appeal, and there was still time for him to offer to finance the appeal, had he been clearly of the opinion that an appeal would succeed. I do not think, therefore, that he can now blame the plaintiff for not taking the matter any further. The final ground on which Mr. *Charles* attacks the manner in which these proceedings were conducted is the fact that Honour in his original affidavit made a statement which was clearly wrong, and which he had to correct in a later affidavit. The Judge in the ejectment proceedings, in setting out the facts of the case, did state that Honour had been informed by Brnic that Brnic was opposing the sale, although Honour had specifically denied this in his later affidavit, but I do not think that this statement of fact appearing in the outline of the facts at the opening of the judgment can be regarded as a finding of fact by the Court nor was it necessarily part of the *ratio decidendi* at all. The *ratio decidendi* on this aspect of the case turned on the fact that Honour knew that Brnic was making an adverse claim. It did not turn on how he knew. I cannot conceive that the question of whether or not Honour heard from sources other than Brnic, or heard from Brnic direct, could have been considered a vital point for decision in the case, because, under our procedure, decisions on points of fact which turn entirely on the credibility of witnesses, as this one did, are not decided on affidavit. If in motion proceedings a vital point, which turns on credibility, has to be decided, the practice invariably is to call those witnesses to give oral evidence, so that the Judge can judge from their demeanour whether to believe one witness or the other. That was not done in this case, and I cannot believe that the Judge would have made a finding of fact hostile to the plaintiff company and based on credibility had Honour not been given an opportunity to give oral evidence. I don't think this statement outlining the facts was intended at all as a finding of fact on a controversial issue. I come to the conclusion, therefore, that the fact that Honour may have made this wrong statement in the beginning of his affidavit played no important part in the judgment at all. The vital points decided in the judgment were that the defendant had no right to sell and that Honour was not a *bona fide* purchaser without notice. I cannot see how the manner in which the plaintiff company conducted the case can be said to be responsible for the fact that these two points were decided against it. I, therefore, consider that this third point raised by Mr. *Charles* is also without substance.

It is not suggested that the full facts were not laid before the Court by the plaintiff company in these proceedings. The defendant was asked whether he could place any further facts before this Court which might have affected the ejectment proceedings, and, in my view, he was unable to do so. It was not suggested that any wrong concessions

in law were made by the plaintiff company in these proceedings. A summary of the manner in which this case was presented by the plaintiff company appears to be: (*a*) The plaintiff company employed an attorney and an advocate to act for it; (*b*) the proceedings it brought were brought in the proper form; (*c*) the pertinent facts were laid before the Court and (*d*) no manifest error in law was made in the presentation of the case to the Court; (*e*) no wrong concessions of fact or law were made. In these circumstances, it seems to me that the plaintiff company must be held to have acted as a reasonable and prudent litigant would act and to have made a *virilis defensio*. To hold otherwise would mean simply that the mere fact that a judgment was given against the purchaser proves in itself that he has not put up a *virilis defensio*. This clearly is absurd, because the whole doctrine of *virilis defensio* only comes into play when a judgment has been shown to be wrong. If it is right, the seller must be bound by it.

I hold, therefore, that the plaintiff did put up a *virilis defensio* in this case, and this means that I have now found proved all the pertinent facts which are set out in paras. 5, 6 and 7 of the plaintiff's declaration, and the next question to be determined is whether, on these facts, the plaintiff would, in law, be entitled to judgment in his main claim, in the absence of any special defence. The question of whether or not these facts disclose a cause of action has already been determined by MURRAY, C.J., in the proceedings on exception, and, as I appreciate the position, this issue is now *res judicata*, as far as this Court is concerned. This fact was conceded by Mr. *Charles*; and it also appears to be the view taken by CLAYDEN, C.J., in the judgment in the application for leave to appeal, because, in concluding his judgment, he makes no reference at all to the fact that the defendant had a further opportunity of raising this point of law again at the trial. The learned Judge refers merely to his right to raise the point of law on appeal. It seems to me, therefore, that the legal issue of whether or not the Brnics were illegal trespassers, and the extent to which that affects the plaintiff's claim in this case, has already been decided in favour of the plaintiff by the judgment in the exception proceedings, and it seems, therefore, clear that, unless the defendant can establish some defence other than a defence which merely traverses the facts of the main claim, the plaintiff must succeed in its main claim for rescission and refund of the purchase price.

I propose now to examine what, for convenience, I may call the special defences raised by the defendant. The first point raised by Mr. *Charles*, as I understand it, is that, while the defendant concedes that he was obliged, in terms of the original contract, to give vacant possession and occupation to the plaintiff, when ownership was registered in the plaintiff's name, he contends that obligation ceased when the plaintiff allowed the Brnics to remain in possession after the date of transfer and until 30th June. Thereafter Mr. *Charles* argues that the defendant could not be said to have breached the agreement until he was put *in mora* and he could not be put *in mora* until after due demand for vacant possession had been made by the plaintiff, and he contends that, in fact, that demand was never made, but that the agreement was

simply unlawfully repudiated, and, as a result, the plaintiff now has no cause of action. Mr. *Charles* relied for this proposition on the case of *Breytenbach* v. *van Wyk*, 1923 A.D. 541 at p. 549. The argument, however, is, in my view, unsound for two reasons. The first reason is that a defendant is *in mora ex re* the moment when he is obliged by the terms of the agreement to fulfil his contract and fails to do so, and without any formal demand for performance being made by the plaintiff. Mr. *Charles*, as I understand, agrees that the defendant would have been *in mora ex re*, had no permission been given to the Brnics to remain, as from the date when transfer was effected into the plaintiff's name. The extension of time which was given to the Brnics was, as I have found, given by the plaintiff solely at the defendant's request. In my opinion, this amounted to nothing more, so far as the parties to this action are concerned, than an agreement between the plaintiff and the defendant that the contractual date for giving the plaintiff possession and occupation was extended from the date of transfer to 30th June, and if such possession and occupation were not given by that date—as was the case—the defendant would have been *in mora ex re* from 1st July, without the need for the plaintiff to make any formal demand upon him. *Breytenbach's* case is not in point, in my view, because in that case no actual date for the delivery of the property had been fixed. The second reason for rejecting this argument is that, on the assumption that a demand was necessary, the plaintiff did make such demand, because in his letters to the defendant he repeatedly made it plain that he wanted the defendant to give him vacant possession in terms of his contract (see letters of 3rd March (exh. 16); 23rd March (exh. 19); 17th April (exh. 24)) and after the conclusion of the ejectment proceedings the plaintiff, before actually suing the defendant, gave the defendant an opportunity to remedy his position, because in his letter of 2nd October, 1959 (exh. 42), he said that he would give the defendant an opportunity to have the sale declared valid before the action was proceeded with. No attempt was made by the defendant to have the sale declared valid, apparently because he was advised against it. It is argued that this letter was written after the sale had been repudiated, and that repudiation could not be withdrawn because the withdrawal would prejudice the defendant as he no longer had time left within which to finance an appeal. I assume without deciding that the letter of 8th September (exh. 38), was a repudiation. Even if this is so it must be observed that the judgment of the High Court in the ejectment proceedings was delivered on 4th September, so that it was open to lodge an appeal against this decision until 4th October. After receiving the letter of 2nd October, therefore, the defendant still had time to offer to finance an appeal. There is no evidence that he made any attempt to do so, although he well knew that the plaintiff would not appeal, because the plaintiff had informed him of this fact in the same letter. Even, therefore, if the plaintiff had, in an earlier letter, indicated that he had repudiated the contract, his letter of 2nd October indicated that he had withdrawn such repudiation, on the condition set out in the letter, and, in the circumstances, I cannot see how the plaintiff could be held to be estopped

from withdrawing his original repudiation, and so give the defendant a further opportunity to perform his contract before suing, which is what he did. The fact that it was still open to appeal after sending the letter, exh. 42, shows that the defendant suffered no prejudice by this late withdrawal of the repudiation, if the earlier letters, which were written by the plaintiff in this case, can be regarded as a definite repudiation, so, if notice was required to be given to the defendant in this matter (and, as I have said, I do not think it was), I am satisfied that the defendant did get all the notice to which he was entitled.

There is some suggestion in the pleadings that, by allowing the Brnics to remain on, the plaintiff waived his right to demand performance of the contract. This, however, was not pressed in argument. I find that there is no substance in this suggestion. The only right the plaintiff waived was a right to demand vacant possession on the date of transfer. I reiterate that the extension of time Brnic was given at the defendant's request amounted, as between the defendant and the plaintiff, to nothing more than an extension of the date from which the plaintiff was entitled to demand vacant possession, the extension being from the date of transfer until June 30.

This concludes what, for convenience, I have called the special defences, all of which I dismiss.

I, therefore, come to the conclusion that the plaintiff succeeds in his main claim on the grounds of a breach of warranty referred to in para. 5 of the declaration, and is entitled to:

1. An order rescinding the said agreement of sale;
2. Repayment of the purchase price of £4,935 4s. 0d.;
4. Costs of suit.

and I order that he be so entitled.

I now turn to examine claim 3—i.e., the claim for damages. Damages for breach of warranty are awarded *ex empto* (*Evans & Plows* v. *Willis & Co.*, 1923 C.P.D. 496), and the basis on which these damages are assessed is such damages as may fairly and reasonably be considered as flowing naturally from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of both parties. The following damages clearly fall under this head:

Transfer costs £164 18s. 4d.
Bank charges £1 4s. 9d.
Survey expenses £10 13s. 0d.
Bond expenses £7 19s. 6d.

The interest which is claimed on the bond is actually claimed at a lower rate than interest *a tempore morae*, the interest rate claimed being 5½ per cent.

The plaintiff is, therefore, clearly entitled to the amount of £608.9s.8d. claimed as interest, and road council tax of £10 is also clearly claimable under this head.

I turn now to the claim for the costs of the eviction proceedings on a party and party basis. I have already found that the plaintiff did put up a *virilis defensio* and legal costs of defending an action for eviction are clearly claimable as damages (see *Scheibe* v. *Heroldt and*

Louw, 5 S. 247 and Mackeurtan *Law of Sale*, 3rd ed. p. 361). I cannot see how the costs of prosecuting an action can be regarded as anything different in principle from the costs of defending one, and I, accordingly, rule that the sum of £123.1s.5d may be recovered.

I now turn to the claim for loss of profits. The first loss of profits claim is on the ground that the plaintiff could have made a profit by speculating in native cattle, and the second, that he could have made a profit from trading in the store. I do not consider that these profits are those which can be considered as flowing naturally from the breach, and, if they were recoverable, I think that they would be recoverable only on the ground that they could reasonably be supposed to have been in the contemplation of both parties. I accept the evidence of defendant in connection with these claims. I thought that the evidence of Honour was vague in this respect. I do not believe that the defendant ever knew that the plaintiff was going to go in for cattle speculation, and I accept his evidence in this respect. I do not believe that he ever knew or could be reasonably expected to know that the plaintiff was going to conduct a store on the property. But even if I am wrong on this, I would still reject this claim for damages, because I do not consider these damages to have been proved.

I will deal first with the claim for profit on the sale of cattle. The buying and selling of native cattle is essentially a speculative business, and, no doubt, experienced speculators, such as Costas Raft could make substantial profits, but the plaintiff company has not satisfied me that it had among its employees any persons who were really skilled in buying native cattle cheap and selling them dear, which is the essence of making a profit out of transactions of this sort. Cases are not unknown in this Court of cattle speculators becoming insolvent. So I find that these damages have not been proved.

I turn now to the claim for loss of profits on the store. No evidence whatsoever has been given as to what profit that store made in the past, and that would be the best evidence of what profit it might be likely to make in the future. The only evidence I have that has any material bearing is that the previous owner went insolvent. The plaintiff company sought to base its claim for profits on this store by comparing the profits made in a neighbouring store forty miles away, known as Nyamonda Store. The conditions under which this store operated are, however, entirely different. It was situated in the middle of a Native Reserve, where there were many prospective customers. Ponty's Store, on the other hand, only had fifteen Native families residing nearer to it than to some other Native store. I find, therefore, that the claim for profits from the running of this store has not been proved. The claims for general dealer's licence fees and for advertising costs in connection with the store fail with the main claim.

In the result, therefore, I find that the plaintiff company has proved damages to the extent of £926.16s.8d., and I accordingly order that it be paid this sum by way of damages.

Plaintiff's Attorneys: *Coghlan & Welsh.* Defendant's Attorneys: *Leo S. Baron & Hewitt.*

EX PARTE MARTIN.

(EASTERN CAPE DIVISION.)

1961. *October* 19. VAN DER RIET, J.

Land.—Transfer.—Partition transfer.—Undivided half share.—Other half share owned by nine co-owners.—Title deed of lost.—Transfer of defined share without production of lost deed.—Granting of.

The applicant was the registered owner of an undivided half-share in a farm, the other half being registered in the name of nine co-owners, the title deed of which was lost. Applicant now applied for an order authorising the Registrar of Deeds (*a*) to register a partition transfer (i) transferring to the applicant a defined portion of the farm in lieu of his undivided half-share, (ii) transferring to the other co-owners the remaining extent, (*b*) to dispense with the production of the lost deed of transfer.

Held, that a rule *nisi* should be issued in terms of the prayers.

Application for an order: (*a*) authorising the Registrar of Deeds to register a partition transfer; (i) transferring to petitioner a certain portion of a farm (ii) transferring to petitioner's co-owners the remaining extent; (*b*) authorising the Registrar of Deeds to dispense with the production of the lost deed of transfer last in the possession of petitioner's co-owners. The petitioner was registered owner of one half share of the farm, the other half share being registered in nine co-owners the title deed to which was lost. The application was for a defined portion of a farm in lieu of petitioner's undivided one half share.

C. Isaacson, Q.C., for the applicant, referred to regs. 68 and 51 (1) (2) of the Deeds Registry regulations; *Ex parte Towson and Another*, 1940 T.P.D. 50; *Ex parte van Oudtschoorn*, 1952 (2) S.A. 310 (T); *Ex parte Britz en 'n Ander*, 1957 (4) S.A. 37; Newall *Deeds Registration* pp. 34, 52.

VAN DER RIET, J.: A rule will be granted in terms of the prayer. In regard to para. (*c*) the Registrar of Deeds suggests that a certain course should be adopted, namely, that authority should be conferred on the Sheriff to apply for a certified copy of the missing title deed in respect of the second portion of the undivided share of the property. Mr. *Isaacson* has referred to two cases, *Ex parte Towson and Another*, 1940 T.P.D. 50 and *Ex parte Britz en 'n Ander*, 1957 (4) S.A. 37 (T), in which the Court dispensed with such a procedure.

In the circumstances the rule will be granted as prayed. Service is to be by one publication in the *East London Dispatch* newspaper and one publication in the *Eastern Province Herald* newspaper and by registered letter upon such persons as have been located and who are interested in the remaining undivided shares of the property. The rule is to be returnable on 16th November, 1961.

Applicant's Attorneys: *Wheeldon, Rushmere & Cole.*