1913. *July* 15, 22. DE VILLIERS, J.P.

Purchase and Sale.—Vacua possessio.—*Duties of Seller and Buyer.—Claim by third party.—Security against eviction.—Payment by instalments.—Divisible contract.*

S sold to A certain premises and a business, including a bioscope, billiard and tea rooms, and appurtenances. Payment was to be by instalments on failure to pay which S was to have the right after notice to re-enter.

A had failed to make due payment, and in an application for re-instatement claimed to be entitled to refuse further payments pending grant of clear title to certain of the goods valued at £39 (a fraction of the whole contract) or security against eviction.

It was alleged that one X had claimed these goods, the claim being a notice by X that the goods had been sold to S under a hire-purchase agreement, and were still the property of the seller. No letter of demand was produced, and there was no proof of claim to the goods.

Held, granting the application, that no dispute had arisen as to the ownership of the goods in question, but assuming it had and that security should have been found by S, that the contract was divisible, and that respondent's duty was to have paid the balance of the price as it became due less the value of the goods in dispute.

Application for an order reinstating applicant in the possession of certain premises and assets.

The petition alleged that on the 4th April, 1913, applicant had granted to the respondent a lease of certain premises situate on Stands 28 and 29, Mayfair, Johannesburg, on which was carried on the business of a bioscope, billiard-room and tea-room, at the same time entering into an agreement with him for the sale of the aforesaid business, fixtures, and goodwill for the price and upon the terms and conditions contained in a memorandum of agreement; that the respondent had paid part of the purchase price agreed upon, but refused to pay the remaining instalments, and that in terms of section 6 of the agreement of sale (set out below) the sale had been cancelled by applicant, and with it the lease had been determined under section 12 of the lease. The applicant therefore claimed to be entitled to an immediate resumption of possession of the premises and of all the assets sold to the respondent, without being required to account for any rent or instalments of the purchase price received by him.

Section 6 of the agreement of sale read as follows:—

"Should any one of the instalments of the purchase price hereby agreed to be paid remain unpaid for longer than one calendar month

after same shall have fallen due the whole of the said purchase price or any such balance thereof as may remain unpaid at any time shall become immediately due and payable, and if upon demand in writing by the vendor his agents or assigns such complete payment of the said balance shall not be made within one week thereafter the vendor shall be at liberty to re-enter and resume possession of the said business and of the incidentals thereto as per inventory without being subjected to any claim for compensation by the purchaser his agents or assigns and free from any liability in respect of such payments as may already have been made by the purchaser and all such payments shall be forfeited as damages to the vendor without prejudice to any action he may or shall have for any further damages he may have suffered by reason of the purchaser's failure or neglect. . . . ."

The applicant further alleged that the respondent was unlawfully detaining certain 7241 feet of cinematograph film, which was purchased by the applicant and delivered to him at the premises in question on or about the 23rd June, 1913. He therefore claimed an order directing the respondent

(*a*) Forthwith to hand over to him possession of the premises in question.

(*b*) Forthwith to hand over to him the assets set forth in clause 2 of their agreement of sale of the 4th April, 1913.

(*c*) Forthwith to return to the applicant the quantity of film alleged to be detained by the respondent.

The defence raised by the respondent on the affidavits was threefold:—

(1) The applicant had failed to effect delivery to the respondent of the whole of the premises leased.

(2) The applicant had not given the respondent *vacua possessio* of 239 chairs and one transformer, part of the bioscope assets sold, as the Universal Film Syndicate had given notice that the goods in question had been delivered by them to the applicant under a hire-purchase agreement and were still their property. The respondent claimed that he was entitled to refuse to pay any more instalments until the applicant granted him a clear title to the goods or furnished security against eviction.

(3) The respondent denied detaining the film and did not claim it.

L. Greenberg, for the applicant: An attack on a portion of the agreement is not an attack on the whole of it, see *Tarry & Co.* v.

Roach (3 H.C.G. 155). A mere idle statement by a third person is not sufficient to derogate from *vacua possessio,* see Van Leeuwen's *Roman-Dutch Law* (Kotze's Translation, Vol. II. p. 143). There must be an actual attack, such as the issue of a summons. Our sale is in itself a guarantee, and there is no need for us to step in until the title which we have given is actually attacked.

R. F. MacWilliam, for the respondent: Applicant is endeavouring to force us to fight any action he may have against the Film Syndicate. As to *vacua possessio* see *Theron and Du Plessis* v. *Schoombie* (14 S.C. 192 at p. 198); Moyle's *Contract of Sale in the Civil Law* (p. 18).

Greenberg, in reply: The Court has power to grant this order on motion, see *Store Bros.* v. *Rivera* (1908, T.S. 119).

Cur. adv. vult.

Postea (July 22nd).

DE VILLIERS, J.P.: His Lordship, after setting out the issues, proceeded:

As the first defence was not relied upon by counsel in argument, it can hardly be considered a point of any substance; the third is disposed of by the respondent's admission of the applicant's right to the film. As regards the second point, it is not clear that any definite claim has been advanced by any third party to the goods sold by the applicant to the respondent. No letter of demand has been received by the respondent, or, if received, has been put in; and the only action by the alleged claimant, the Film Syndicate, is for the money and not for the goods. Moreover Gassner, the manager of the Film Syndicate, although he makes an affidavit, does not state that the Syndicate lays claim to the goods.

According to our law a vendor is bound, as it is expressed, *praestare emptori rem habere licere.* This implies that he must deliver the thing sold to the purchaser, and must give him what is known in law as *vacua possessio.* According to *Voet* (19, 1, 10) the vendor is considered to deliver *vacua possessio* when he delivers the thing so that it cannot be taken away by someone else, and so that the possessor will prevail in an action about it (D. 19, 1, 2, 11). But the vendor is not bound in every case to transfer the ownership of the thing sold to the purchaser, for a vendor who sells a thing of which he in good faith thinks he is the owner, although he is not, does not bind himself to transfer the ownership

of it. Now the authorities are all agreed that the vendor is bound to give good security if before the full payment of the purchase price a dispute arises with a third person about the property sold, but they are not all agreed as to the stage in the dispute when this must be done. Grotius 3, 14, 7 (Schorer's note 352); Van Leeuwen (Kotze's Translation Vol. II, p. 143) and others hold that a purchaser is entitled to demand sureties from the vendor the moment an extra-judicial demand has been sent by a third person claiming the property, while other authorities, according to Schorer, hold that sureties cannot be demanded from the vendor before the action has actually been instituted.

It is unnecessary to decide in the present case at which particular point of time this right accrues to the purchaser, for even assuming in his favour that the view of Grotius is the correct one, and that the chairs and transformer have actually been claimed by the Universal Film Syndicate I am of opinion that the respondent must fail. For it has not been suggested that any other portion of the property sold is in dispute. The only articles in dispute are the chairs and the transformer, the value of which the purchaser himself put at £39. It is idle for him now to contend that the contract is one and indivisible in the face of the nature of the articles about which the alleged dispute is, and his own valuations put upon them. At most the applicant could only be called upon to give security to the value of £39 (D. 21, 2, 1). It was therefore the duty of the respondent to pay at all events the rest of the purchase price as it became due less this amount. As the respondent failed to do this the applicant was entitled under his contract to cancel the agreement.

The order applied for must therefore be granted with costs.

Applicant's Attorneys: *Marks & Holland;* Respondent's Attorney: *L. W. Ritch.*

[Reported by *F. B. Adler,* Esq., Advocate.]