vendor derives title, but only to a limited class of such persons, in other words, the purchaser is protected against acts done by the vendor or by some person through whom he derives title otherwise than by purchase ; and, secondly, (this is the point with which we are concerned) in order to succeed in the action, the plaintiff must allege and prove a breach of the covenant. The question of onus was directly raised in the case, and ROMER J. held that it lay upon the plaintiff ; the point was fully considered by the Judges of the Court of Appeal and they concurred with his decision. In *Howard* v. *Maitland*(1), though the point was not expressly decided, this is assumed to be the law. The evidence in this case is, as I have said, inconclusive, but the onus being upon the plaintiff, I must hold that he has failed to discharge it.

In the result, the second appeal fails and is dismissed with costs.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Bardswell.

IN RE RAMALINGAM PILLAI (ACCUSED), PETITIONER.* 1934, March 8.

Criminal Procedure Code (Act V of 1898), sec. 350—Transfer of Magistrate trying case—Successor ordering a de novo trial and directing issue of summonses to witnesses—Transfer of case thereon to original Magistrate—Further hearing if must be de novo.

Where, after a trial was nearly completed, the Magistrate hearing the case was transferred, and his successor ordered a

(1) (1882) 11 Q.B. 695.

* Criminal Miscellaneous Petition No. 258 of 1934.

RAMALINGAM PILLAI, *In re.*

de novo trial and directed summonses to issue to the prosecution witnesses,

held, that the succeeding Magistrate had taken cognizance of the case and that whoever heard the case thereafter, even if it was the Magistrate who originally held the trial, must hear the case *de novo*. That there had been no fresh examination of witnesses by the succeeding Magistrate makes no difference.

Sardar Khan Sahib v. *Athanlla*, (1924) 47 M.L.J. 926, and *Sriranga Chettiar* v. *Subramania Asari*, A.I.R. 1927 Mad. 81, followed.

Aynam Muthuriyan, *In re*, (1928) 1 Mad. Crl. C. 74, dissented from.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the transfer of Calendar Case No. Nil of 1934 from the file of the Court of the Sub-Magistrate of Panruti (Calendar Case No. 707 of 1933 on the file of the Court of the Stationary Second Class Magistrate of Vridhachalam), to the file of the Court of the Stationary Second Class Magistrate of Vridhachalam.

K. S. Jayarama Ayyar and *G. Gopalaswami* for petitioner.

Parakat Govinda Menon for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

ORDER.

Calendar Case No. 707 of 1933 on the file of the Stationary Sub-Magistrate of Vridhachalam was heard by one officer and nearly completed when that officer was transferred to Panruti. On the new Magistrate taking charge, the accused asked for the case to be tried *de novo*, and the new Magistrate issued summonses to the prosecution witnesses. After this the complainant applied to

the District Magistrate for the transfer of the case to the Sub-Magistrate, Panruti, who had heard most of the evidence. This transfer has been ordered by the District Magistrate whose opinion was that the new Magistrate of Vridhachalam had not taken cognizance of the case and that it was open to the original Magistrate after his transfer to Panruti and on the case being transferred to him there to continue the case from the stage at which he had left it. It is against this order of the District Magistrate that this petition has been brought by the accused in the case.

The view of the District Magistrate that cognizance had not been taken of the case by the new Magistrate appears to be wrong. In precisely similar circumstances it has been held by WALLACE J. in *Sriranga Chettiar* v. *Subramania Asari*(1) that the succeeding Magistrate had taken cognizance of the case before it had been ordered to be transferred to the file of the other Magistrate by whom the enquiry had been begun and that therefore the latter Magistrate had no jurisdiction to proceed with the case. In a similar case it was held by MADHAVAN NAIR J. in *Sardar Khan Sahib* v. *Athanlla*(2) that the grant of a *de novo* trial by the successor of the Magistrate had the effect of wiping out the prior proceedings and hence even the old Magistrate could not proceed with the trial from the point where he had left it. These decisions have been considered by DEVADOSS J. in *Aynam Muthuriyan, In re*(3) and he has differed from them with reference to the decision in *Queen-Empress* v. *Sri*

(1) A.I.R. 1927 Mad. 81. (2) (1924) 47 M.L.J. 926.
(3) (1928) 1 Mad. Crl. C. 74.

RAMALINGAM PILLAI, *In re.*

Ahobalamatam Jeer(1). That case, however, apart from the fact that section 350, Criminal Procedure Code, has now been amended, does not apply as it was not one in which the succeeding Magistrate had allowed a *de novo* enquiry and ordered fresh summonses to be issued. DEVADOSS J. appears to take the view at page 78 that, by ordering a *de novo* enquiry and directing summons to issue, the succeeding Magistrate had not taken cognizance of the case. From that view I must respectfully dissent. I agree with the decisions of WALLACE and MADHAVAN NAIR JJ. that the succeeding Magistrate had taken cognizance of the case and that whoever is to hear the case, in such circumstances, must hear it *de novo*. That there had been no fresh examination of witnesses by the succeeding Magistrate makes no difference. It is, therefore, not better on the balance of convenience that the case should be further heard by the Magistrate who began the enquiry. It is more convenient for the Magistrate who has local jurisdiction to hear it and so his is the Court which should properly deal with it. In these circumstances the petition is allowed, the order of the District Magistrate is set aside and the case is directed to be heard by the new Sub-Magistrate of Vridhachalam.

K.W.R.

(1) (1898) I.L.R. 22 Mad. 47.