1901.

May 13 and 17.

SILVA *v.* LOKU BANDA.

D.C., Kandy, 13,026.

Warranty—" And if any dispute arise, I promise," &c.—Meaning of " and "— Intendment of vendor.

Where defendant sold a land to plaintiff by a deed which, after reciting that the vendor had not done anything whereby the sale might become void, covenanted as follows: " and if any dispute were to arise, I promise that I, &c., shall give the land freed from disputes "—

Held, that the word " and " meant furthermore, and should be construed as if the vendor intended to warrant title, not only in respect of his own acts, but absolutely in regard to any dispute that may arise.

In doubtful cases the intendment must be construed against the vendor.

THIS action arose out of a warranty clause in a deed of sale by which the defendant purported to sell to plaintiff three lands adjoining each other, which the deed declared were " held " and possessed by me (the defendant) uninterruptedly by right of ' inheritance from my deceased father Loku Bandara Mahatmaya ", and it was provided, " and if any dispute were to arise, I promise " that I, or my heirs, administrators, and assigns, shall give the " land freed from disputes ".

The plaint alleged that certain persons being in possession of the lands sold by defendant, the plaintiff sued them in ejectment in action No. 9,334 of the District Court of Kandy, and gave due notice of the action to the present defendant, but that he failed to warrant and defend his title, and the District Court upheld plaintiff's title under the defendant only to an undivided one-ninth of one land and one-sixth of the other two lands, and cast plaintiff in costs, whereby plaintiff paid Rs. 450 as costs.

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Plaintiff prayed for the recovery of Rs. 450 incurred as costs and Rs. 425 as the value of the shares of the lands to which the defendant failed to establish his title; or in the alternative for the rescission of the sale and the recovery of the price he paid to the defendant for the entirety of the lands together with interest.

The District Judge dismissed plaintiff's action in the following judgment:—

" As to the claim for damages, the covenant for title is in effect " the same as in the transfer which formed the subject of dis- " cussion in the Badulla case *De Silva v. Ossen Saibo* reported in " *1 S. C. R. 201.* The words of the covenant [given above] must " be read as a whole, and they contain only a covenant as to the " defendant's own acts. The covenant amounts to this: " I have " ' not done anything to invalidate this transfer. Further, if I " ' have, I agree for myself, my heirs, and administrators, to settle " ' the dispute '. The plaintiff, however, has declared on an " express covenant for title, which is not contained in the transfer. " The action must be dismissed with costs ".

The plaintiff appealed.

Van Langenberg, for appellant.—The main contention in the case was that there was a distinct covenant to warrant and defend title, not only where his own act invalidated it, but the acts of anybody else. The defendant said in his deed in effect: " I have not done anything to invalidate the title. And, that is, furthermore, I promise to warrant ". These words distinguish between his own acts and those of any one else. They mean " furthermore, if there is any other ground by which title is vitiated, I will see you safe through ".

No appearance for respondent.

Cur. adv. vult.

May 17, 1901. BROWNE, A.J.—

In *De Silva v. Ossen Saibo, 1 S. C. R. 201*, the conveyance executed by the defendant in respect whereof he was sued contained the clause:—" I do hereby declare that I did no act whatever previously to invalidate this sale, and do agree to settle all disputes that may arise in respect thereto ".

It is not stated in the report in what language this covenant was expressed. If it were in Sinhalese, it might be possible that there would not be so very much if any difference in respect to the crucial conjunction ' and ' between that covenant and the one here sued upon in defendant's conveyance to the plaintiff

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The latter, corrected by the interpreter of our Courts, is as follows:— "I have not heretofore done anything whereby the sale may become void. Furthermore (in the District Court that word was translated 'and'), if any dispute were to arise, I promise that I, or my heirs, administrators, and assigns, shall give the land freed from disputes."

In the Badulla case it was held that the words first quoted did not contract to warrant and defend the plaintiff's title, but was a covenant for the title limited to the defendant's own acts. For though, said Lawrie, J., if the latter portion stood alone, it would be construed to be a general covenant for title, the clause had to be read as a whole, and as such it contained a limited covenant only. Here, however, I consider that "furthermore" should be regarded as a disjunctive (seeing that in doubt the intendment must be against the vendor), and that the later clause, which in form is more precise than was the Badulla agreement, should be construed to be absolute for every contingency not limited to the covenanter's own acts.

I would therefore set aside the dismissal with costs, and remit the action to the District Court for the plaintiff to tax his bills of costs as suggested by the learned District Judge.

MONCREIFF, J.—I agree.