1925. *Present:* Jayewardene A.J. and Akbar A.J.

WIMALASURENDRA *v.* DIAS.

122, 122A—D. C. Galle, 21,775.

Administrator—Sale of property with leave of Court—Warranty—Liability of administrator.

Where property was sold by the defendant as administrator of an estate, with leave of Court and on conditions of sale approved by Court, and where after the sale was confirmed, the defendant executed a deed in favour of the plaintiff containing an express clause by which he covenanted to warrant and defend title, although the conditions of sale had no reference to such a covenant.

Held, that the estate was not bound by the act of the defendant and that the defendant was personally liable on the covenant.

PLAINTIFF was the purchaser of a land belonging to the estate of one Peter Weerawickrama Gunawardene, which was sold by the defendant, as administrator with the leave of Court and on conditions of sale approved by Court. The conditions of sale as approved by Court contained no reference to a special covenant to warrant and defend, but the administrator after the sale was confirmed executed a deed containing the warranty clause. Plaintiff, being unable to get possession, instituted eviction proceedings against the disputant calling on defendant to warrant and defend, but this case proved abortive. Subsequently plaintiff instituted this action against defendant as administrator claiming damages for the breach of the covenant to warrant and defend contained in the deed. The District Judge dismissed the action against the defendant as administrator, but gave judgment against him in his personal capacity.

Drieberg, K.C. (with him *Chas. de Silva* and *Jansz*), for plaintiff, appellant.—Apart from the special insertion of the warranty clause the contract of sale is incomplete as no vacant possession has been granted, and the estate is therefore liable. The sale is only complete after "vacant possession" is granted, and once this has been done the seller must warrant and defend against eviction, *Jamis v. Suppa Umma.*[1]

[AKBAR A.J.—In *James v. Suppa Umma* (*supra*), there is an implied warranty which is not the case here.]

The administrator, having warranted and defended, his liability is analogous to that of an executor *de son tort*.

[1] *17 N. L. R. 33.*

Counsel cited *Perera v. Amaris Appu*,[1] *Francisco v. Peresenty*,[2] *Krause v. Pathumma*.[3]

H. V. Perera, for defendant, respondent.—The action is against the defendant as administrator, and the judgment has gone against him personally, or in other words, judgment has gone against one who was no defendant. The defendant is prejudiced, as other issues might have arisen.

Drieberg, K.C., in reply.—

November 27, 1925. AKBAR A.J.—

This is an action brought by the plaintiff against the defendant as administrator of the estate of one Peter Weerawickrama Gunawardene. The plaintiff was the purchaser of a land belonging to the estate of the deceased, which was sold by the defendant as administrator with the leave of the Court, and on conditions of sale approved by the Court.

Although an administrator is not bound in law to warrant and defend title and such a covenant cannot be implied (see *Francisco v. Peresenty* (*supra*)), and although the conditions of sale as settled by the Court contained no reference to a special covenant to warrant and defend, the administrator after the sale was confirmed by Court executed a deed in favour of the plaintiff containing an express clause by which he covenanted to warrant and defend title. Plaintiff not being able to get possession of the property instituted eviction proceedings against the person who was disputing his title, and called on the defendant to warrant and defend. The defendant took an active part in these proceedings and was added as a co-plaintiff in the eviction action. He filed a statement, and otherwise helped the plaintiff in this case, which ultimately went up in appeal, and there the present plaintiff lost his case. The net result of this litigation was that although the defendant in the eviction case only claimed 9/100 shares of the land, the plaintiff did not get possession of the land and he had to pay the full costs of the abortive trial and appeal; moreover he found himself saddled with a land which other claimants were likely to claim and for the whole of which he had paid full consideration.

The present action is brought by the plaintiff against the defendant as administrator and the claim is for damages for the breach of the special covenant to warrant and defend contained in the deed of sale. The District Judge has dismissed the claim against the defendant in his capacity as administrator, but has given judgment against him in his personal capacity for Rs. 967, but without costs.

[1] *1 S. C. C. 54.*

[2] *2 S. C. C. 1.*

[3] *5 N. L. R. 162.*

1925.

AKBAR A.J.

Wimalasurendra v. Dias

There are two cross appeals in this case, one by the defendant (122) and the other by the plaintiff (122A).

Mr. Drieberg, for the plaintiff, argues that the District Judge was wrong in rejecting his claim against the estate. No doubt the estate has benefited by the payment of the full consideration by the plaintiff, but the law is clear on the point that an administrator is not bound to warrant and defend, and that such a covenant cannot be implied. Under our law an administrator has no power to sell immovable property without the leave of Court (see *Krause v. Pathumma* (*supra*), and the practice has sprung up whereby even the conditions of sale have to be approved by the Court, and the sale confirmed by Court. All this was done in this case. But, as I have already said, the conditions of sale as approved by the Court contained no reference to an express warranty clause, and even when the sale was confirmed by the Court, no mention was made of any such clause. And yet, the administrator who is a proctor practising in Galle, when he signed the deed of conveyance set his signature to a document containing an express warranty clause. I do not think that an administrator can bind the estate by such an onerous covenant without getting the express consent of the Court for the insertion of such a clause, and I think the District Judge was therefore right in refusing to allow a decree in this case, which will have the effect of binding the estate of the deceased. The Testamentary Court had allowed the sale, settled the conditions of sale, and finally confirmed the sale. The plaintiff made no attempt to ask for relief from the Testamentary Court when he found that he had bought a land burdened with the germs of litigation, probably because he knew that the express covenant had not the *imprimatur* of the Court, but instead he rushed on to litigation and even to carry the case to the Court of Appeal with the active connivance and approval of the defendant. In these circumstances it seems to be inequitable to allow the estate to be charged with the payment of all the damages and costs incurred by the plaintiff, as the result of the futile sale and the subsequent unsuccessful litigation.

Mr. Drieberg next argued that he was entitled to claim damages against the estate not on the footing of the special covenant, but on the ordinary obligation which always arises in a contract of sale of land, namely, the necessity of giving vacant possession to the purchaser.

The short answer that one can give to this contention is that the claim in the lower Court was not framed on this footing but on the special covenant. Then there is the further question whether in sales by an administrator, the administrator not being bound to warrant and defend title, the covenant to give vacant possession must not be expressly given, and that with the leave of Court, I cannot see why the two covenants should be treated from two

different standpoints; nor do I think that the *dictum* of Wood Renton J. reported in *17 N. L. R. p. 33* applies to the case of sales by administrators.

To turn now to the appeal by the defendant against the judgment of the District Court wherein he has been personally condemned to pay damages. I think that the District Judge has on the whole done substantial justice in this case. It is true that the defendant was sued in his capacity as administrator, but he was sued on a special covenant which he had directly undertaken without the leave of the Court. He had further endorsed this special contract by taking part in the eviction proceedings and by doing everything possible to make the plaintiff believe that he had embarked on a right course of action. Although there was no issue of estoppel framed in this case, I do not think it will be equitable to allow the defendant to succeed on such a technical point as Mr. Perera urged, namely, that this client was noticed to warrant and defend, and was subsequently sued in this case in his capacity as administrator. I do not think the notice can be so construed, nor do I think that the mere fact that he was described as administrator in this action has so far prejudiced him as to entitle him to win on this appeal. The defendant had full notice of the fact that he was sued on the covenant and for damages which the plaintiff had incurred with his knowledge and acquiescence. After all the question must turn on the consideration whether the defendant has suffered any prejudice by the course taken by the plaintiff. The whole trouble has arisen owing to the wrong conduct of the defendant in agreeing to the express covenant to warrant and defend without the leave of the Court. His liability seems therefore to be analogous to that of an executor *de son tort*, and it seems fair that he should be held liable even by reconstituting the action as the District Judge has done in his judgment without putting the parties to further expense. Indeed if the technical objection raised by Mr. Perera is carried home to its logical conclusion, Mr. Perera would appear not to have any standing at all to appear in this appeal in the absence of a fresh proxy given by the defendant in his personal capacity.

Whatever inconvenience the defendant may have suffered by the reconstitution, as the District Judge calls it in his judgment, as I said, I do not think the defendant has suffered any material prejudice and the District Judge has very properly taken this into account in not awarding the plaintiff any costs.

I think, the proper order to make in this case will be to dismiss both appeals, but without any order as to the costs of the appeals.

JAYEWARDENE A.J.—I agree.

Appeals dismissed.