APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SUBRAMANIA AYYAR (DEFENDANT), APPELLANT,

v.

SAMINATHA AYYAR (PLAINTIFF), RESPONDENT.*

1897. October 15, 22. November 16.

Transfer of Property Act—Act IV of 1882, *s.* 119—*Exchange—Mutual covenants subsequently entered into to support title*—"Expressum facit cessare tacitum."

The plaintiff and defendant effected an exchange of land; subsequently they executed to each other documents of which that executed by the defendant recited the exchange and continued "if any claim or dispute arises I hereby bind "myself to settle it. If I do not so get the dispute settled I hereby bind myself "to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli "of land for lands which go out of your possession." The plaintiff, alleging that he had been ousted from the land conveyed to him, now sued to recover the land which he had given in exchange:

Held, that the operation of Transfer of Property Act, section 119, was excluded by the express covenant in the document quoted above.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 219 of 1896, reversing the decree of C. Venkata Rau Saheb, District Munsif of Mayavaram, in Original Suit No. 191 of 1895.

The plaintiff sued to recover from the defendant together with mesne profits certain land which he had given to the defendant in exchange for other lands in March 1891. The plaintiff alleged that he had been evicted from the lands transferred to him. In June 1891 the defendant had executed to the plaintiff a document called a security bond to the effect stated in the judgment of the High Court. This document comprised a postscript signed by the defendant which was as follows:—"I also bind myself "to the extent of Rs. 350 for expenses towards claims or disputes. "Thus the whole security is for Rs. 4,364-8-6." The plaintiff had similarly executed a security bond in favour of the defendant. The first part of the fourth issue was framed with reference to these documents as follows:—"Whether plaintiff has got cause "of action for the suit in the face of the indemnity bonds that "were passed between the parties." The District Munsif passed a

* Appeal against Order No. 35 of 1897.

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decree dismissing the suit, holding on this issue, that the plaintiff was not entitled to the relief sought by him.

The Subordinate Judge on appeal was of opinion that the instrument of the 7th June would not debar the plaintiff from the right to recover either the lands conveyed by him on the exchange or compensation on proof that he had been ousted. He accordingly made an order remanding the case to be disposed of on its merits. The defendant preferred this second appeal.

Krishnasami Ayyar for appellant.

Ramachandra Rau Saheb and *Rangaramanuja Chariar* for respondent.

JUDGMENT.—On the 1st March 1891 the plaintiff and the defendant executed an instrument of exchange and mutually transferred possession of the respective lands comprised in the instrument. It contains no provision by way of covenant for title, for quiet enjoyment or for re-entry, in case either party be evicted. On the 7th June 1891, however, the parties executed to each other documents styled "security bonds." The bond executed by the defendant to the plaintiff on that date, after reciting the exchange which had taken place, runs: "If any claim or "dispute arises I hereby bind myself to settle it. If I do not so "get (the dispute) settled I hereby bind myself to pay an amount "not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli of "land for lands which go out of your possession. This security "bond shall be sustainable for twelve years from this date." The plaintiff, alleging that he was induced to enter into the transaction of exchange by certain untrue representations of the defendant and that he had been evicted from the lands transferred to him, instituted the present suit praying for the recovery of the lands which he gave in exchange to the defendant. The material allegations in the plaint were traversed by the defendant, and a number of issues were framed. The District Munsif, however, without trying the questions of fact as to which the parties were at issue, dismissed the suit, recording a finding upon the first part of the fourth issue. That part, though not clear and definite, appears to have been understood in the Lower Courts to raise the question whether the right to re-enter which, in the absence of a contract to the contrary, the plaintiff would possess under section 119 of the Transfer of Property Act, was affected by the security bond obtained by the plaintiff from the defendant. The District Munsif

held that that instrument restricted the plaintiff's remedy in case of eviction to compensation at the rate agreed, and, therefore, the claim for the recovery of the land was unsustainable, and dismissed the suit. On appeal the Subordinate Judge was of opinion that the instrument in question modified the plaintiff's right in so far as the amount of compensation was concerned, provided he chose to ask for compensation; but that it did not take away his right to recover the lands themselves, if he elected to claim such restoration. The Subordinate Judge set aside the District Munsif's decree and remanded the suit in order that the other points in dispute may be tried.

The question for determination now is whether the construction put by the Subordinate Judge upon the security bond is right. In supporting that construction the learned vakil for the plaintiff strenuously argued that, on eviction, the plaintiff's right to re-enter upon the lands given by him in exchange must be taken to remain quite unaffected inasmuch as it is not expressly taken away by the security bond. We cannot accede to this contention. The rule applicable in such cases was long ago stated by Chancellor Kent in the following few words:— "An "express covenant will do away the effect of all implied ones: "*Nokes* v. *James*(1); *Hayes* v. *Bickerstaff*(2); *Browning* v. "*Wright*(3)." (*Frost* v. *Raymond*(4)). Of those cited by the Chancellor the language of two of the authorities might be quoted here. Referring to an implied warranty, Butler said:—"The "insertion of any express covenant on the part of the grantor, "would qualify and restrain its force and operation within the "import and effect of that covenant, as the law, when it appears "by express words how far the parties designed the warranty "should extend, will not carry it farther by construction." (Butler's Notes on Coke upon Littleton, page 384*a*., Note 332.) And in *Browning* v. *Wright*(3) Buller, J., observed "The "words 'grant and enfeoff' amount to a general warranty in "law, and have the same force and effect. The covenants, "therefore, which have been introduced in more modern times, "if they have any use besides that of swallowing a quantity

(1) 4 Co. Rep., 80; s.c., 1 Cro. Eliz., 674-5.
(2) Vaugh., 126.
(3) 2 Bos. and Pull. 13; s.c., 5 R.R., 521.
(4) 2 Caines., 188; s.c., 2 American Decisions, 228, at p. 231.

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"of parchment, are intended for the protection of the party "conveying; and are introduced for the purpose of qualifying "the general warranty, which the old common law implied. "This has been clearly settled ever since *Nokes's* case(1)." The same view has been often affirmed since and among these later cases it is sufficient to refer to *Line* v. *Stephenson*(2) and *Dennett* v. *Atherton*(3). In other words, the rule is that inasmuch as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into, even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest. In such a case it is the contract alone that regulates and governs the nature of the party's obligation and the extent of his liability. The reason for this conclusion cannot be better expressed than in the language of Lord Denman, C.J., in *Aspdin* v. *Austin*(4) quoted with approval by the Judicial Committee in *Pallikelagatha Marcar* v. *Sigg*(5). He points out "where parties have "entered into written engagements with expressed stipulations, "it is manifestly not desirable to extend them by any implications; "the presumption is that, having expressed some, they have "expressed all the conditions by which they intend to be bound "under that instrument . . . and it is one thing for the "Court to effectuate the intention of the parties to the extent "to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants "as, upon a full consideration, the Court may deem fitting for "completing the intentions of the parties, but which they, either "purposely or unintentionally, have omitted. The former is but "the application of a rule of construction to that which is "written; the latter adds to the obligations by which the parties "have bound themselves, and is, of course, quite unauthorised, as "well as liable to great practical injustice in the application." It follows, therefore, that even if the security bond were entirely silent with reference to the question of the right to take back

(1) Co. Rep., 80; s.c., 1 Cro. Eliz., 674-5.
(2) 4 Bing. N.C., 678.
(3) L.R., 7 Q.B., 316.
(4) 5 Q.B., N.S., 671, at p. 684.
(5) L.R., 7 I.A., 83.

the land given in exchange by the plaintiff that right was lost when the security bond was taken. But the bond is not quite silent on the point. On the other hand, the instrument by clear inference seems altogether to deprive the plaintiff of the right to recover the land. For the undertaking given by the defendant that he shall pay at Rs. 1-4-0 per kuli for so much of the land as the plaintiff might be evicted from distinctly suggests that the statutory covenant which would have enabled the plaintiff to recover the whole of the land given by him, even if he had been evicted from but a small portion of what he got in exchange was not intended to be enforced. Further, the terms of the bond, read as a whole, seem to lead to the conclusion that they entirely supersede the rights given by sections 119 and 120. The provision that the bond shall be in force only for twelve years unquestionably shows that after the lapse of that period the defendant was to be under no responsibility for the consequences of any defect in his title to the land conveyed by him and this is inconsistent with the contention that the right to recover the land given by section 119, was left intact. Again, the covenant to settle any claim or dispute that might arise, respecting the land transferred by the defendant is much wider than the covenants arising under sections 119 and 120. In short, there is such substantial difference between the express covenants in this case and the covenants implied by law that it would be quite unreasonable to impute to the parties an intention that the latter should have operation to any extent. The Subordinate Judge's construction of the document cannot, therefore, be sustained, and the plaintiff's prayer for the restoration of the lands sued for must fail, if the covenant as to it under section 119 were the only ground on which it was based. As, however, the plaintiff has alleged in support of it other grounds also, which have not been tried, the order remanding the suit for their trial must be upheld notwithstanding our having arrived at a conclusion different from that of the Subordinate Judge as to the effect of the security bond on the plaintiff's alleged right to the possession of the lands sued for.

The costs will, however, abide and follow the result.