

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice,
and Mr. Justice Wendt.

1908.
April 1.

VANDERPOORTEN v. SCOTT.

D. C., Colombo, 24,290

Vendor and vendee—Implied warranty of title—Express covenant to warrant and defend title—Exclusion of implied obligation.

Where in a deed of conveyance the vendor expressly covenanted that the premises conveyed were free from encumbrance, and that he would always warrant and defend the same against any persons whomsoever, and where the vendee, who had suffered eviction, brought an action for damages based on such express covenant—

Held, that this express covenant in the deed excluded the obligation implied by law on the part of the vendor to give good title to the vendee, and that the plaintiff must be confined to such express stipulation.

A PPEAL by the plaintiff from a judgment of the District Judge of Colombo.

The facts are fully stated in the judgment of the Chief Justice.

Sampayo, K.C., for the plaintiff, appellant.

A. Driberg, for the defendant, respondent.

Cur. adv. vult.

April 1, 1908. HUTCHINSON C.J.—

This is an appeal by the plaintiff from an order of the District Court disallowing an issue proposed by the plaintiff.

The plaintiff alleged that the defendant had sold him a half share of the lands described in the plaint, and that by the deed of transfer the defendant covenanted with him that the premises thereby conveyed were free from incumbrances, and that the defendant would warrant and defend the same to the plaintiff against any person whomsoever. He then alleged that he had entered into possession of the land and spent money in the improvement and cultivation thereof; that the Government Agent afterwards, under the provisions of the Waste Lands Ordinances, gave the notice required by the Ordinances in respect of the land, and the plaintiff duly made a claim in respect thereof, which claim was in the manner prescribed by the Ordinances inquired into and ultimately referred to the District Court of Kurunegala; that the plaintiff filed his statement of claim, and gave notice to the defendant of the claim made by the Crown, and called upon the defendant to warrant and defend his title; that the defendant failed to do so, and that the Court dismissed the plaintiff's claim and declared the Crown entitled to the land, whereby the plaintiff was evicted from it. The plaintiff accordingly claimed damages.

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The defendant in his answer stated that by the deed of transfer it was agreed that he would warrant and defend the plaintiff's title, and do all such further and other acts, deeds, matters, and things for the further assurance of the plaintiff at the request and cost of the plaintiff. He also alleged that the plaintiff entered into possession of the land more than a year before the execution of the deed of transfer; and he denied that the plaintiff gave him due notice, or called upon him to warrant and defend title to the land as required by law; and he denied that he failed to warrant and defend the plaintiff's title as alleged, and pleaded that it was wholly due to the plaintiff's neglect and default in and about the conducting of the defence that his claim was dismissed; and he asserted that his title to the land was a good and valid one, and that, had the plaintiff used due diligence and skill and given the defendant timely notice of the action, the plaintiff would have been successful in his defence against the Crown. He also pleaded in the alternative that the damages claimed were excessive.

Three issues were framed:—Whether the plaintiff entered into possession under his conveyance, and thereafter spent money in cultivation and improvements before his eviction; whether he gave the defendant sufficient notice to warrant and defend his title in the Kurunegala action; and as to amount of damages. The plaintiff's counsel then submitted the following issue:—"Had the defendant any title to convey to the plaintiff?" The defendant's counsel objected to it; the Judge at first allowed it, but, after the plaintiff's counsel had opened his case, disallowed it, being of opinion that the only essential issue was the second, *i.e.*, whether the defendant had been noticed to warrant and defend the title which he had conveyed to the plaintiff.

The proposed issue does not arise on the pleadings, for the claim as set out in the plaint is for breach of an express covenant contained in a deed, and the plaint does not allege that there was any covenant or agreement, either express or implied, that the defendant had a title, nor does it allege that he had no title.

The plaintiff's counsel contends, however, that where a purchaser of land has been sued and evicted in an action by a person claiming under a title superior to that of the vendor he can sue the vendor for breach of warranty of title, although he had not given his vendor notice of the action, if he can prove that the vendor "had no shadow of title," and in support of that view he referred to *Perera v. Amaris Appu*,¹ *Fernando v. Jayawardena*,² *Van Leeuwen* 4, 19, 10, 11, and *Voet* 21, 2, 22. He says that if this contention is right he will be entitled to succeed if he proves that the defendant had no title, even without proof that he notified the defendant of the Kurunegala action. He has not asked either the District Court or this Court for leave to amend the plaint by alleging that the defendant had no title.

¹ (1878) 1 S. C. C. 54.

² (1896) 2 N. L. R. 309.

But I think that, if we were satisfied that the above contention is right, it would be right to give leave to amend the plaint and to add the proposed issue. Kotze's *Van Leeuwen II.* 143 says: "If such notice be not made in time to the vendor, the purchaser will not have any right to compensation; except where the right of the claimant clearly appears, and that the vendor had no right to the thing sold, and the purchaser takes upon himself to prove this, in which case the vendor will likewise, without any previous notice, be obliged to make compensation." And *Voet 21, 2, 22* is to the same effect. This, however, must refer to the obligations which the law implies in the absence of express stipulations by the parties which appear to exclude those implied by law. In this case the plaint states that there was an express covenant by the vendor that the property is free from incumbrances, and that he will warrant and defend it. Was it intended that, in the absence of fraud, which is not alleged, the rights of the parties should be governed by this covenant alone, or is the vendor also liable on an implied covenant that he had a good title.

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The case of *Perera v. Amaris Appu*¹ contains a general statement as to the rights of a purchaser who has been evicted against the vendor, but nothing on this point. In the case of *Fernando v. Jayawardena*² the only matter decided was a question on the Prescription Ordinance, which the headnote to the report ignores.

In *Silva v. Ossen Saibo*,³ before Burnside C.J. and Lawrie and Withers JJ., the deed of conveyance contained a covenant which the Court held to be limited to the vendor's own acts and to disputes arising therefrom: the plaint recited the deed, and alleged that the plaintiff had been ousted by the Crown, and that the defendant had no title, and contained no allegation of an implied covenant, and on demurrer it was held that this disclosed no cause of action. The Court did not consider whether any covenant might be implied, in addition to the express covenant, because the libel referred only to the latter. The Chief Justice made some disparaging remarks about "this alleged doctrine of implied warranty on every sale," which do not seem relevant to the point which was before the Court.

In the present case neither the deed of transfer nor any copy of it is in evidence; but, assuming that the covenants in it are correctly stated in the plaint, in my opinion no further or other covenant for title can be implied; the vendor must be taken to have intended to rely on the express covenants only. I would therefore dismiss the appeal with costs.

WENDT J.—

The obligation of a vendor upon contract of sale is to give his vendee free and undisturbed possession (*vacua possessio*) of the

¹(1878); 2 S. C. C. 54.

²(1896) 2 N. L. R. 309.

³(1891) 2 C. L. R. 79.

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subject of sale and to guarantee him against "eviction" (dispossession by process of law at the suit of any third party) (see D. C., Badulla, No. 1,336; *Koch 30*; *3 Maasdorp's Institutes 133, 134, 143*). This obligation arises from the bare contract of sale. But just as there might be added to the contract collateral parts such as are enumerated in *Voet 18, 1, 26*, so also may the parties agree by express convention to limit the obligation which the law would otherwise imply (D. C., Badulla, No. 1,336, cited above; *Silva v. Ossen Saibo*). In the present case the defendant did not covenant that he had a good title, but he did expressly covenant that the premises conveyed were free from encumbrance, and that he would always warrant and defend the same to plaintiff against any person or persons whomsoever. On the principle *expressum facit cessare tacitum*, I think that the express covenant excludes recourse to the implied obligation, if it be the case that the law does imply a covenant that the vendor is the true owner.

I agree, therefore, that the learned District Judge rightly shut out the proposed issue, and that the appeal should be dismissed with costs.

Appeal dismissed.

