

that the vendee was engaging, not to put up any building, but "a detached dwelling house;" and if that is so, although the words are more like a condition, there is a covenant.

Nor does the well-known rule *expressio unius est exclusio alterius*, or as it is otherwise stated *expressum facit cessare tacitum* prevent this from operating as a covenant.

This maxim "is not of universal application. It depends upon the intention of the parties, as it can be discovered upon the face of the instrument or upon the transaction." *Saunders v. Evans* (1861), 8 H. L. Ca. 721, at p. 729, per Lord Campbell. "The maxim, '*Expressio unius exclusio alterius*,' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits." *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400, at p. 406, per Wills, J.: "I agree with what is said below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master, to follow in the construction of statutes and documents.

The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied leads to inconsistency or injustice," S. C. in appeal, I. R. 21 Q. B. D. 52, at p. 65, per Lopes, L.J.

Finally, the maxim has never been applied to a case in which a covenant would have been held to have been created by the words which it is desired to exclude the effect of and their covenants in the usual and regular form have been superadded. A covenant in the form of a condition is just as much *expressum* as one in the regular form of a covenant; and the whole of a deed must be given effect to wherever possible.

That the plaintiff who bought from the owners after the deed under which the defendant claims, can take advantage of this covenant is decided by *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Formby v. Barker*, [1903] 2 Ch., at p. 551, and cases cited. This is not indeed contested, and I do not pursue the subject.

I am of opinion the judgment below should be reversed with costs of motion and appeal.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in the result.