

1891

Covenants for Title

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T H E S I S.

C O V E N A N T S F O R T I T L E ;

W I T H S P E C I A L R E F E R E N C E T O N E W Y O R K .

-By-

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1891.

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COVENANTS FOR TITLE.

Real and Personal Covenants.

A covenant is either real or personal. It is real when a man binds himself to pass a real thing, as lands or tenements ; or where it runs with the land, so that one who has the land has the covenant or holds the land subject to the covenant. Thus all covenants real, are those "which have for their object something annexed to, or inherent in, or connected with the land, or other real property." A covenant is personal when it attaches to the person and some person in particular shall be benefitted by, or charged with it.

The essential difference between a real and personal covenant is, that a real covenant runs with the land, and extends to all who claim under the grantee, and it is also trans-

ferred to a purchaser. Therefore, where a covenant real is entered into by a grantee or lessee, it will not only bind such grantee or lessee, but also his assignee ; and the grantor or lessor, or his heir may at any time bring an action on such covenant. (2 Greenleaf's Cruise R. P. 756.) It is not so with a personal covenant ; the real covenant may bind an unnamed assignee, but the personal covenant does not run with the land, and is binding only upon the covenantor and his personal representatives, and in favor of the covenantee.

American and English Rule.

The covenants for title are five in number, viz : covenant for quiet enjoyment ; against incumbrances ; that the grantor will warrant and defend the title ; the covenant for seisin, and that the grantor has a good right to convey. The

covenant for further assurance is still used in England, but it is practically unknown to the American conveyancer. In England all of these covenants are held to run with the land.

(Rawl. Cov., 4 ed. 324.) The greater part of the United States, however, do not follow this rule. In a general way it may be said, that the covenants of warranty and of quiet enjoyment are real, run with the land and are binding upon subsequent assignees ; the covenants of seisin, of right to convey, and against incumbrances, are personal, do not run with the land and are not binding upon subsequent assignees.

(III Wash. R. P. 448 ; 4 Kent's Com. 471.) The exceptions to this rule will be given under the separate discussion of each covenant.

The Covenant of Warranty.

The operation and effect of this covenant was known long before the introduction of deeds as a mode of transferring real property and authenticating the sale or transfer of lands. It was an incident of tenure, created without express contract. Under the feudal system, when the lord or grantor conveyed land to his vassal it was a mutual benefit act ; the vassal to render homage to his lord, and the lord to protect and defend him in the occupancy of his fief. Warranty and homage were reciprocal. Before the age of written instruments of conveyance, the mere granting of a fief bound the giver to warranty ; when written instruments of conveyance were first introduced, the word "dedi" implied warranty, and it was not necessary to state therein the word "warranty" to obtain the benefit of this covenant.

To the statutes de bigamis (1276) and quia emptores may be directly traced the introduction of express warranties into deeds. The statute quia emptores prohibited the subinjunction of fee simple estates and provided that they should be holden of the lord or original donor only ; thus there was no tenure between the lord and the grantee of his grantee ; and by the terms of the statute de bigamis, which says, "where is contained 'dedi et concessi', to be holden of the chief lord of the fee or of others, and not of feoffors or any of their heirs, reserving no service, without homage or the aforesaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffer during his own life, by force of his own gift, shall be bound to warranty", the second grantee was unprotected by the covenant of warranty, which before had been implied, the statute having abolished the tenure on which it

depended. This made necessary the introduction of express warranties to protect the interests of the subsequent grantees.

Rights of the class represented by the ancient warranty, and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question how an assignee could sue upon a contract to which he was not a party. But an heir could sue upon a warranty of his ancestor, because for that purpose he was, under the statute of descent, in the same place as his ancestor. And the conception was gradually extended in a qualified way to assigns when they were mentioned in the deed. It is hard to say just when this breach was closed, as we remember that the burden of an ordinary warranty in fee did not fall upon a devisee, although it

might upon an heir as representing the person of his ancestor.

This covenant is the most important one in the United States. By the Laws of New York, 1890, Ch. 475, Sec. 1, "A covenant that the grantor 'will forever warrant the title' to the said premises shall be construed as meaning that the grantor and his heirs, or successors, the premises granted, and every part and parcel thereof, with the appurtenances, unto the grantee, his heirs, successors and assigns, against the grantor and his heirs or successors, and against all and every person or persons whomsoever lawfully claiming or to claim the same shall and will warrant and forever defend." It is settled beyond a doubt that this covenant runs with the land.

(Mitchell v. Warner, 5 Conn. 497 ; Brady v. Spurck, 27 Ill.

478 ; Blackwell v. Atkinson, 14 Cal. 470 ; Wead v. Larkin,

54 Ill. 487 ; Whitney v. Duismore, 6 Cush. 124 ; King v. Kerr,

5 Ohio, 155 ; Suydam v. Jones, 10 Wend. 180 ; Ruideskoff v. Farmers' Loan and Trust Co., 58 Barb. 36.)

This covenant is broken only by eviction. (Miller v. Watson, 5 Cow. 195 ; Kent v. Welch, 7 Johns. 258.) Eviction is either actual or constructive. It is actual when a grantee is dispossessed by process of law. It is constructive when he yields possession to a title which is actually paramount. As long as he remains in possession, there is neither ; and in order to maintain an action for breach of a covenant of warranty, one or the other must be shown. (Mead v. Stackpole, 40 Hun, 473. See limitation of this rule in Justice Swayne's opinion, post.) The evidence must clearly establish one or the other. (Gardner v. McCarthy, 3 Hill, 330 ; VanderKarr v. VanderKarr, 11 Johns. 122 ; Emerson v. Proprietors, etc., 1 Mass. 464.) It was at one time held

that to constitute an eviction, "there must be a disturbance of the premises by legal process." Such is not now the rule. Possession, without a struggle to maintain it, may be surrendered to one having a paramount title, with the same rights to resort to the grantor's covenants of warranty that would have been brought about by an eviction under process of law. (Greenvault v. Davis, 4 Hill, 643-645-646 ; Cowdrey v. Coit, 44 N. Y. 392.) As where the grantor has no title to the land embraced within the lines of the description, the grantee may recover for the deficiency in an action upon the covenant of warranty. (Robinson v. Robinson, 19 Weekly Digest, 188.) If the public have an easement only in land, as the right to use it as a highway, and the grantor should convey such land by deed, and should have contained in the deed a covenant of warranty, the existence of the easement would not

amount to a breach of that covenant. (III Wash. R. P., 4 ed., 460 ; Whitbeck v. Cook, 15 Johns. 483 ; Jackson v. Hathaway, 15 Johns. 447.) It must be deemed the settled doctrine in this State that the fact that a part of land conveyed with a covenant of warranty was at the time of the conveyance a highway, and used as such, is not a breach of this covenant. This is so, for the reason that the grantee must be presumed to have known of the existence of a public easement and purchased upon a consideration in reference to the situation in that respect. (Hymes v. Esty, 116 N. Y. 501 ; Huyck v. Andrews, 113 N. Y. 85.) Pennsylvania is in harmony with this doctrine. (Wilson v. Cochran, 46 Penn. St. 229.)

Covenant for Quiet Enjoyment.

In one of the early cases (Howell v. Richards, 11 East. 634), this covenant is described as "special and particular in its terms as well as general." By the Laws of New York, 1890, Ch. 475, Sec. 1, "A covenant that the grantee 'shall quietly enjoy the said premises' shall be construed as meaning that such grantee, his heirs, successors and assigns, shall and may, at all times thereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the grantor, his heirs, successors or assigns, or any person or persons lawfully claiming or to claim the same." The English and American cases are uniform in holding that this covenant runs with the land. (Campbell v. Lewis, 3 Barn.

& Ald. 392 ; Logan v. Moulder, 1 Ark. 313 ; S. C. 33 Am. Dec. 338 ; Biddoe v. Wadsworth, 21 Wend. 120 ; Limited by 65 N. Y. 587 ; Hunt v. Amidon, 4 Hill, 354.)

There has been considerable controversy among the cases as to the kind of eviction necessary to support an action for a breach of this covenant. In Platt on Covenants, it is said : "To qualify a party to support an action on a covenant for quiet enjoyment, some positive act of molestation or some act amounting to a prohibition of enjoyment must be shown." But the court, in Shattuck v. Lamb (65 N. Y. 500), says : "It is not to be understood that an ouster or expulsion must take place in order to found a suit ; it is enough that the quiet enjoyment of the covenantee be invaded or prevented. As where at the time of the execution of the deed the premises are in the possession of a third person, holding under a para-

mount title, and the grantee in consequence is defeated in legal proceedings to obtain possession, and is kept out of possession, this is a breach of the covenant of quiet enjoyment. It is not necessary that the grantee should make himself a trespasser and be ousted, in order to support an action on this covenant. (Shattuck v. Lamb, *supra* ; Park v. Bates, 12 Vt. 381 ; Duval v. Craig, 2 Wheat. 621.) As where a person takes a deed with a covenant for the quiet enjoyment of land, with a house thereon, and it turns out that a third person has title to the house, which he removes, it would be a breach of this covenant. (Funk v. Creswell, 5 Iowa, 88 ; Mott v. Palmer, 1 N. Y. 564 ; Scriver v. Smith, 100 N. Y. 471)

In Noonan v. Smith, 2 Black, (U. S.), Mr. Justice Swayne says : "In all cases where there is adverse possession by virtue of a paramount title, such possession is regarded as e-

viction and involves a breach of the covenant of warranty or of quiet enjoyment." This is the rule given in Shattuck v. Lamb (supra), which overrules many of the early New York decisions that hold actual eviction necessary. Where premises are conveyed with a covenant of quiet enjoyment, and there is at the time of such conveyance an outstanding title to an easement, which materially impairs the value of the premises and interferes with the use and possession of some portion thereof, the covenant of quiet enjoyment is broken, although there is no technical physical ouster. In this case a land owner below the land which was conveyed, by virtue of a paramount title in the nature of an easement, raised the height of a dam upon his land, thereby flooding the land that was conveyed ; this was held an eviction.

In the case of Green v. Collin (86 N. Y. 246), there was

an artificial easement in question,- an incorporeal hereditament,- and it was held that because it did not belong to the grantor it did not pass as appurtenant to the land granted, was not conveyed by the deed, and hence was not within the scope of the covenant for quiet enjoyment. It has sometimes been supposed that there was a conflict between the cases of Green v. Collin (supra) and Adams v. Conover (87 N. Y. 422.). The distinction between the two cases is clear ; in the one case the grantee got all that was covered by his deed, and there was no breach of the covenant of warranty or of quiet enjoyment. In the other case (Adams v. Conover) the grantee did not get all that was covered by his deed, and there was a breach of covenant. (Scriver v. Smith, supra.)

The three cases just above cited are the leading New York cases construing this covenant, and their authority is

unquestioned.

Covenant against Incumbrances.

This covenant is of great importance. It gives to a grantee protection from an incumbrance upon the land at the time of its conveyance. By the Laws of New York, 1890, Ch. 475, Sec. 1, it is provided as follows : "A covenant 'that the said premises are free from incumbrances' shall be construed as meaning that such premises are free, clear, discharged and unincumbered of and from all former and other gifts, grants, titles, charges, estates, judgments, taxes, assessments, liens and incumbrances of any nature or kind whatsoever." It is further provided, in the same section, that : "A covenant that the grantor 'has not done or suffered anything whereby the said premises have been incumbered in any way whatsoever'

shall be construed as meaning that the grantor has not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or incumbered in any manner or way whatsoever."

It would seem that this last covenant is in the nature of a strict covenant against incumbrances, and still is of the character of a covenant of further assurance. From a strict construction of the language used, it is evident that it would run with the land. The act is a recent one and has never been construed by the courts. With but few exceptions, the strict covenant against incumbrances is held to be personal, and broken at once if at all. (Mitchell v. Warner, 5 Conn. 497 ; Wyman v. Ballard, 12 Mass. 304 ; Heath v. Whidden,

24 Me. 383 ; Moore v. Merrill, 17 N. H. 75 ; Potter v. Taylor, 6 Vt. 75.) But in Ohio this covenant is held to run with the land. (Foote v. Burnet, 10 Ohio, 333.) And in Iowa the same has been held. (Knadler v. Sharp, 36 Iowa, 232.) The court, in Foote v. Burnet (supra), says : "If the first grantee continues in possession of the land while his title remains undisturbed, and he conveys to a subsequent grantee, in whose time an outstanding incumbrance is enforced against the land, justice requires that this subsequent grantee should have the benefit of the covenant against incumbrances to indemnify himself." The only case cited in support of this theory is Backus v. McCoy, (3 Ohio, 211.).

The reasoning of the Ohio court is tenable and the opinion one of merit. And if it were not for the precedent, it might be contended for in this State with success, when we

remember that all the covenants in a deed are made to the grantee and his assigns, and the only reason ever given why the covenant against incumbrances does not run with the land, or at least why it does not pass to the assigns of the grantee when he conveys, is that such a covenant is broken as soon as made, and therefore the right to recover on it is only a chese in action, which at common law was not assignable. A covenants against incumbrances to B and his assigns ; B conveys and assigns to C all that he received from A, yet C gets no right to recover on the covenant against incumbrances, because choses in action are not assignable. This reasoning cannot apply in New York and in those States where choses in action are assignable. In applying this rule there, a patent fallacy appears in the premises,-- the restriction against assigning choses in action is removed, and there is no valid

reason why the rights under this covenant will not pass to a subsequent grantee.

The rights under this covenant are the most often disputed where there is an unusual tax assessed on the land conveyed. If the tax is assessed immediately after the conveyance it is not a breach of this covenant. (Huyck v. Andrews, 113 N. Y. 81.) Even if the covenantor knew of its existence. (Barney v. Delaney, 40 Fed. 97.) But no tax is a lien until the amount thereof is ascertained or determined ; this is the best test. (Lathers v. Keogh, 109 N. Y. 583 ; Harper v. Downey, 113 N. Y. 644.) A late case (McLaughlin v. Miller, 125 N. Y. ; S. C. 26 N. E. 1104), is an apparent exception to this rule. In that case the legislature authorized a street improvement, and directed the assessors to assess a certain portion of the amount each year "equally upon the lands fronting

on the avenue." No notice to the property owners was required. In an action by the grantee against the grantor in a deed of land abutting on the avenue, for breach of a covenant that the land was free from all charges and assessments, it appeared that the plaintiff had paid a sum for such improvement, inserted in the assessment rolls prior to the execution of the deed, but it was not shown that the assessment was made by the board of assessors, or that notice was given the property owners before it was made. And it was held that the assessment was not a charge on the land ; and that payment of such assessments for previous years by the grantor did not estop him, as against his grantee, to deny that the subsequent assessment was a charge on the land. The test principle on which to support an action is : "the interest complained of must be valid."

Covenant of Seisin.

This covenant is one in which the grantee covenants that he is seized of the very estate which he purports to convey. In New York this covenant is construed by statute (Laws of New York, 1890, Ch. 475, Sec. 1), as follows : "A covenant that the grantor 'is seized of the said premises (described) in fee simple, and has good right to convey the same' shall be construed as meaning that such grantor at the time of the execution and delivery of the conveyance is lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby conveyed, with the tenements, hereditaments and appurtenances thereto belonging, and has good right, full power and lawful authority to grant and convey the same by the said conveyance."

The general and better rule is that such a covenant is

broken at once if at all. Therefore it is personal and does not run with the land. (Bingham v. Weiderwax, 1 N. Y. 508 ; McCarthy v. Leggett, 3 Hill, 134 ; Hamilton v. Wilson, 4 Johns. 72 ; Brady v. Spurck, 27 Ill. 478 ; Stewart v. Drake, 9 N. J. L. 139.) But a few States hold it a covenant that runs with the land, (Scotfield v. Iowa Homestead Co., 32 Iowa, 317 ; Backus v. McCoy, 3 Ohio, 211) and in Maine, by statute, it runs with the land.

The covenant of seisin extends only to a title existing in a third person and which might defeat the estate granted. (Fitch v. Baldwin, 17 Johns. 161 ; Horrigan v. Rice (Minn.) 38 N. W. 765.) There is a conflict of authority as to the nature of the seisin which would meet the requirements of this covenant. Some States hold the mere possession of the land by the covenantor is sufficient, even though he is a disseisin-

or. (Marston v. Hobbs, 2 Mass. 439 ; Backus v. McCoy, 3 Ohio, 211 ; Wilson v. Widenham, 51 Me. 566.)

In Devoe v. Sunderland (17 Ohio, 52), the court says :

"Whether the covenant of seisin was personal or real depended upon the fact whether the grantor was in possession or not at the time of the conveyance ; if the grantor was in actual possession, it attached and ran with the land, and was not broken until eviction by title paramount ; but if he was not in actual possession, either in law or in fact, the covenant was "in praesenti" and personal, and no one could maintain an action for its breach but the grantee. But this doctrine is not looked upon with favor, and the States generally adopt the rule that a covenant for seisin is a covenant that the grantor has a good and legal title, and that it is broken immediately if the covenantor has no title. (Mitchell v. Hazen,

4 Conn. 497 ; Hamilton v. Wilson, 4 Johns. 72 ; McCarthy v. Legget, supra ; Bingham v. Weiderwax, 1 N. Y. 509 ; Camp v. Douglass, 10 Iowa, 586 ; Wilson v. Cochran, 46 Penn. St. 229.)

Covenant of Right to Convey.

This covenant is in the nature of a covenant for seisin. It is broken, if at all, immediately on the execution of the deed ; it is personal, and does not run with the land. (Brickford v. Page, 2 Mass. 455 ; Fowler v. Poling, 2 Barb.) The covenant is of minor importance, but the general rules given as applicable to the covenant of seisin will apply to this covenant. The case of Scantlin v. Allison (12 Kans. 85), is a good illustration of this covenant. In that case, certain persons attempted to sell and convey a piece of land, and covenanted that they had good and lawful authority to sell

the same, when in fact they had authority to sell and convey only four undivided fifths. The covenant was broken as soon as the deed was delivered.

Covenant for Further Assurance.

This covenant is rarely used in this State, the only reported case being that of Colby v. Osgood (29 Barb. 339.) It was there held to run with the land. It is interpreted in New York by statute. (See Laws of New York, 1890, Ch. 475, Sec. 1.)
