April 1928

Observations on Covenants for Title

James W. Simonton

West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Property Law and Real Estate Commons

Recommended Citation


Available at: https://researchrepository.wvu.edu/wvlr/vol34/iss3/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
OBSERVATIONS ON COVENANTS FOR TITLE

JAMES W. SIMONTON*

Under the feudal system, the usual method of conveying a present freehold estate in land was by feoffment. Such a feoffment was usually attended by an implied warranty. This warranty is said to have arisen from the obligation of the feudal lord to protect the holding of his tenant and was in the nature of a "covenant real" in that for its breach, the courts awarded to the warrantee a judgment against the original warrantor, or his heirs, for lands of equal value to those which the warrantee had lost. References to such warranties are to be found in some of the older Virginia cases, though often not very intelligible. In 1536 the Statute of Uses was passed, and following this there came into use methods of conveying real estate which operated under this statute, and conveyance by feoffment and by the other old common law conveyances with attendant implied warranties fell into disuse. It soon became settled law that in conveyances under the Statute of Uses, no covenants are implied, hence if the title of the grantor proved defective, the grantee or his assigns in absence of fraud or deceit would have no remedy against the grantor. There accordingly grew up the habit of inserting personal covenants in conveyances, for the purpose of giving the grantee or his assigns, a remedy against the grantor in case of defect in or failure of the title. These covenants, doubtless, were at first expressed in various ways, but eventually there were developed five reasonably definite covenants, which were frequently used, and which came to be known as covenants for title. Even today one may seemingly invent new covenants for title if he chooses. The five covenants are the covenants of (1) seisin, (2) right to convey, (3) against incumbrances, (4) for further assurance,

* Professor of Law, West Virginia University.
1 WILLIAMS, REAL PROPERTY, (29d ed.) 39, 647; RAWLE, COVENANTS FOR TITLE, (5th ed.) §§ 2 and 3.
2 RAWLE, COVENANTS FOR TITLE (6th ed.) § 2; REEVES, REAL PROPERTY, § 1149; TIFFANY, REAL PROPERTY (2d ed.) § 1876.
3 Threlkeld v. Fitzhugh, 2 Leigh. 451 (1830); Stout v. Jackson, 2 Rand. 132 (1823).
4 15 C. J. § 1212.
5 RAWLE, COVENANTS FOR TITLE (5th ed.) § 13.
(5) for quiet enjoyment. On this side of the Atlantic a sixth covenant, the modern covenant of warranty was developed, which in scope and effect was similar to the covenant of quiet enjoyment and practically superseded it. These covenants are the ones still commonly used, and their construction and effect have been fairly well settled. Sometimes all six are inserted in a deed though as to scope and effect there is little difference between the first two and the last two. If the second, third, fourth and sixth be used in a deed the grantee and his assigns will get about all the protection that our none too perfect law permits. Perhaps there is no way in which he can have complete protection.

The rule that one conveying land by deed is liable only if he makes express covenants, arose during the sixteenth century, and has persisted to the present. The law of sales of personal property started on the same road, but being less bound by the rigidity which has always characterized real estate law, a more modern doctrine came into being in the law of sales. Where one sells a chattel as owner the law implies that he warrants the title to the chattel, and if title proves bad, the purchaser may recover for breach of the implied warranty. The seller represented he had the right to sell the chattel and the buyer paid his money with the expectation of getting the ownership of the chattel. This reasonable expectation is recognized by the law. Where the vendor represents he has the right to convey real estate in fee and the buyer pays his money, he too ought to have his reasonable expectation that he is to have good

---

6 2 Lomax's Digest, 263; Reeves, Real Property, § 1148.
8 These covenants for title may be either general or special. They are said to be general when they extend to claims of all persons whomsoever; they are said to be special when restricted to the acts of grantor and those claiming under him. But as a matter of fact it would seem a covenant would be special if it was not general, but covered any part of the ground covered by a general covenant and that the term "limited" would be a better term than the term "special." Thus in Miller v. Bayless, 104 Mo. 630, 95 S. W. 482 (1906) where the grantor warranted against all claims of himself or of those under whom he claimed the covenant was properly held not to be general though much broader than most special covenants.
9 At the most the damages will be limited by the amount of the compensation the covenantor received. In general he will be held only to the extent of this sum plus interest and costs.
10 "If I take the horse of another man, and sell him, and the owner takes him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse; and caveat emptor." Nov's Maxims, c. 42.
12 "The possession of the vendor of chattels is equivalent to an affirmation of title. And in such case the vendor is to be held to an implied warranty; though nothing be said on the subject between the parties." Byrnside v. Burdett, 15 W. Va. 702 at 718.
OBSERVATIONS ON COVENANTS FOR TITLE

259

title recognized by the law and a remedy against the seller if the title be defective. Since land is immovable, it is reasonable that the sellers' warranty of title protect the assigns of the grantee as well as the grantee himself. Yet the vendor is not liable at all except to the extent he has bound himself by express covenant.13 If he is able to get the money of some trusting person and give in return a deed to property with defective title he can say he is entirely within the law. Doubtless any proposition to change the law of conveyancing so as to confirm with the moral principles back of the modern law of sales, would meet with vigorous protests from many practitioners, yet their chief argument would be that what has been the law for five hundred years is sacred. Few of said practitioners would consent to go about their daily affairs in the dress of fifty years ago, though they have been known to defend a rule of law as far removed from the customs and ways of thinking of our times as are the customs and modes of thought of the time of the Tudors and Stuarts in which such rule of law had its origin. The modern thing would be a statute providing for the implication of full covenants in every deed purporting to convey as owner, a freehold for value, unless the grantor should by express language impose limitations, thus throwing on the vendor the burden of expressing limitations on the covenants which his grantees in all fairness have a reasonable right to expect.

It is not the purpose of this paper to urge the enactment of such a statute, but to point out the fact that the custom in this state is to convey with covenant of warranty only,14

---

13 A covenant of quiet enjoyment is usually implied in every lease where there are no express covenants for title Tiffany, Real Property, 125-6. Also on assignment of a lease there is authority that the warranty implied on sale of chattels protects the assignee, Tiffany, Landlord and Tenant, 966-6. 14 How this custom of giving a deed with only general warranty started one cannot say. Rawle, Covenants for Title, 31, says that formerly in England where one was conveying his own title in fee the purchaser had a right only to a covenant against the seller's own acts. Perhaps the courts in Virginia believed they were liberal in extending this to a general warranty instead of a special one. There is little authority to the effect that if a contract to convey land is silent the vendor is entitled to a deed with general warranty only. In 2 Lomax's Digest 262 it is stated that the Virginia courts are uncertain but that the practice was to convey with general warranty. In II Minor's Inst. 725 it is stated that in Virginia the vendor usually enters into covenants of general warranty, citing Rucker v. Lowther, 6 Leigh 289 (1835), which case seems to sustain the statement. And in Tavenner v. Barrett, 21 W. Va. 656 at 661 (1893) the court said, "The undisputed law is that a general rule upon an agreement for the sale of land the vendor, though nothing be said in the contract on the subject, is considered as contracting for a general warranty." But in these cases the whole argument seems to have been that the vendor was not required to give this much and doubtless the courts believed they were being liberal. According to modern ideas more than a general warranty ought to be required in such a case for one who claims the right to convey land as owner and collect the price ought to be held liable if his represented title proves defective.
and that the lawyer who is satisfied with this has failed to provide his client with the protection which the law permits. To the lay mind doubtless the "general warrantee deed" has a mysterious and reassuring sound—and is a magic thing designed to protect the buyer from all evils. We can only speculate as to how the custom of giving only a covenant of warranty, instead of full covenants happened to be established, but it is submitted that the lawyer representing the vendee ought to see that his client has more protection than the general warranty gives. As stated above the use of the covenants of seisin, against incumbrances and for further assurance in addition to that of warranty is essential to give the measure of protection which the law permits. The grantor, having gotten the money for the land, if title fails ought to make good to the grantee or his assigns the harm suffered. As the law stands the full extent of such liability is not imposed on the grantor even though he makes all of the ordinary covenants for title. How far the law goes is briefly stated below.

The covenant of right to convey is broader than the covenant of seisin, because the grantor may have power to convey land of which he is not seised, yet for all practical purposes in this state the covenant of seisin is sufficient, for powers to appoint are rare, and even if the grantor has not the seisin but has power to convey the land in fee, there would be no more than a technical breach of the covenant of seisin. Hence the covenant of seisin alone will be discussed hereafter, and no further reference will be made to the covenant of right to convey.

The covenant of seisin is broken at once, if at all, and if broken, it becomes a chose in action on which the covenantee may bring suit immediately, and upon which the statute of limitations begins to run. If the covenant is broken and the covenantee conveys the land without suing on the covenant, the grantee acquires no right to enforce it because the deed does not purport to assign this chose in action. It is said that a broken covenant does not run with the land. After the covenantee has conveyed the

15 See RAWLE, COVENANTS FOR TITLE (5th ed.) 82-84.

16 From the form of the language the covenant seems broken at once. It has been so regarded generally except for certain attempts to make it into a covenant running with the land. In Virginia and presumably in West Virginia the covenant is a covenant to preserve and broken at once. See Kinzie v. Rich's Ex'r., 105 W. Va. 709, 42 S. E. 872 (1903); Building Light & Water Co. v. Fray, 96 Va. 559, 26 S. E. 58 (1903).
land, he cannot recover substantial damages on this chose in action unless he is able to sue and recover as an assignee. The covenant of seisin is valuable, in that it enables the covenantee to bring suit at once, without waiting for a disturbance of possession or an ouster. If the land at the time of the conveyance is in possession of one having paramount title, the covenantee may recover as damages the amount of the consideration, plus interest and costs. The covenant of warranty has been extended by the doctrine of constructive eviction, so as to enable the covenantee to recover the same amount of damages on it in such a case, so in this sort of case the covenant of seisin gives no remedy—beyond what the covenantee could have under a covenant of warranty. If possession of the land pass but the covenantor had no title, suit may be started at once on the covenant of seisin, but in this case the covenantee ought to surrender the possession of the land and having done so should recover the consideration paid with interest and costs. Here the covenant of seisin would give an advantage the covenantee would not have under the covenant of warranty, for under the latter there would be no breach until ouster under paramount title. Should the covenantee convey the land before starting suit then, as pointed out above, he could recover only nominal damages unless possibly where he conveyed with covenants and his grantee recovered from him, in which case he might recover indemnity from the covenantor. In such case he might sue on the covenant of seisin, and, if his grantee had been ousted from possession he could also sue on the covenant of warranty. If the covenantor had no title and the land was vacant, it would seem that this would not constitute a breach of the covenant of warranty since there would be no ouster, though the covenantee would be free to take possession if he chose. The covenant of warranty would be broken only in case he took possession and was then ousted. But if there were a covenant of seisin the cove-

17 Rawle, Covenants for Title (6th ed.) 336-7.
18 Rex v. Creel, 22 W. Va. 373 (1883); McConaughy & Co. v. Bennett's Executors, 50 W. Va. 172 (1901); Daley v. Wilson, 42 W. Va. 767 (1890); Smith v. Parsons, 33 W. Va. 644, 11 S. E. 68 (1890).
19 It has been held that after the covenantee has recovered the purchase money title is considered as vested in the covenantor; Porter v. Hill, 9 Mass. 36 (1812); Stinson v. Summer, 9 Mass. 150 (1812). Such title must vest by operation, or such title or possession as the covenantor had. But it would seem the covenantee could tender a reconveyance at the time of the suit. See Rawle, Covenants for Title (6th ed.) 263.
nantee could have immediate recovery of the consideration on proof paramount title was outstanding. Here again the covenant of seisin would give the covenantee an advantage he would not have under a general warranty.

The covenant against incumbrances, like the covenant of seisin, is a covenant in presenti and broken as soon as made, for either the land is then incumbered or it is not, and if it is incumbered, then there is breach of the covenant.20 Some incumbrances such as trust deeds may constitute breach of the covenant of seisin as well as of the covenant against incumbrances, but the existence of many incumbrances such as profits, easements, inchoate dower rights, do not constitute a breach of the covenant of seisin.21 Hence the covenant against incumbrances and the covenant of seisin supplement each other, though some kinds of outstanding incumbrances may constitute a breach of both covenants. If there be an incumbrance in the form of a lien for a sum of money, the covenantee may sue at once, but can recover nominal damages only or wait until the money is due and remove the incumbrance by payment and then recover his damages.22 If the incumbrance is in the form of a profit or an easement, he may sue at once and recover as damages the amount such incumbrance lessens the value of the land,23 for such incumbrances cannot usually be removed at all, and of course no action will lie on the covenant of warranty because of an incumbrance unless it is enforced so that there is ouster or at least a disturbance of possession. An inchoate dower right also cannot be removed by payment and hence is held to fall within the same rule.24 If the dower right vests and is then enforced, this constitutes a breach of the covenant of warranty and

20 Marbury v. Thornton, 82 Va. 702, 1 S. E. 909 (1886); Smith v. White, 71 W. Va. 620, 78 S. E. 378 (1913).
21 Rawle, Covenants for Title (5th ed.) 72-75. The meaning of the term "incumbrance" is by no means clear. It certainly does cover a very broad range however. But it is also clear that very many of these incumbrances do not affect the technical seisin.
22 It may be noted that sometimes instead of covenancing the premises are "free from all incumbrances" there is a covenant for quiet enjoyment "free and clear of all incumbrances." Where the following a covenant for quiet enjoyment it is regarded as a covenant in futuro and runs with the land. See the effect of this in c. 72, § 47 of the W. Va. Code.
23 Since the covenant is broken at once suit may be maintained but the courts have refused to permit the plaintiff to recover more than nominal damages until he has removed the incumbrance, though he may start suit and remove the incumbrances at any time before trial and judgment. See 16 C. J. 1322-8.
24 Whisler v. Hicks, 6 Blackf. (Ind.) 100 (1839); Harrington v. Murphy, 16 Mass. 299 (1872); Walker v. Deavor, 79 Mo. 664 (1883).
there is a remedy on that covenant, and there is also a remedy on the covenant against incumbrances, but if the suit on the latter covenant is delayed over ten years from the making of the covenant, then this right to sue will be barred by the statute of limitations.\(^{25}\) If the covenantee conveys the land as if unincumbered, before bringing suit, then he can recover only nominal damages for breach of this covenant unless his grantee is able to hold him on covenants and does so. It is to be noted that the covenant against incumbrances is even more valuable than the covenant of seisin in giving rights not enjoyed under a general warranty. The existence of an incumbrance is not a breach of the covenant of warranty but there must be a disturbance of possession or an ouster, and in case of a mere disturbance of possession under an easement, there is doubt as to what damages if any can be recovered under the general warranty.\(^{26}\) There are cases both in Virginia and in West Virginia which illustrate the danger of using only the general warranty and great advantage the covenant of seisin and the covenant against incumbrance may give the covenantee.\(^{27}\)

The full covenants for title are so adapted as to give to the covenantee and his assigns a remedy on some one of the covenants in nearly every case where a remedy is needed. Some covenants run with the land and some do not, but there is usually at least one available to sue upon if title proves defective. Since it has been said that the intent of the parties is that all covenants for title be for the benefit of both the covenantee and his assigns, some courts have tried to make the covenant of seisin and the covenant against incumbrances run with the land in order to effectu-

---


\(^{26}\) The rule there must be an eviction under paramount title to constitute a breach of the covenant of warranty is too narrow, and courts have been compelled to extend the meaning of the term eviction in order to reach a reasonable result. The whole doctrine of "constructive eviction" has grown up because the rule did not fit the cases. A disturbance of possession under a valid easement is certainly not an eviction yet it has been held so by many courts and if we are to cling to this old rule, these courts have acted properly. See 15 C. J. 1292 for cases. Probably this difficulty would have been partially avoided had the covenant of quiet enjoyment been retained in general use instead of the covenant of warranty.

\(^{27}\) In Smith v. White, 71 W. Va. 623 (1913), the plaintiff fortunately had a covenant against incumbrances in addition to that of warranty and was able to recover on the former, but in Cummings v. Hamrick, 74 W. Va. 405, 82 S. E. 44 (1914), the covenantee, though there were outstanding incumbrances, was compelled to pay the price and was unable to have a set off because there had been no disturbance of possession. In Savage v. Cauthorn, 109 Va. 694 (1909), and Jones v. Richmond, 88 Va. 231, 13 S. E. 414 (1891), the respective covenantees unfortunately had only general warranties. In the latter the covenantee had actually paid $500 toward the removal of incumbrances but could not recover on the covenant because there had been no ouster.
ate this supposed intent of the parties. But this at once raises the question as to whether, if these covenants run with the land, they can still be considered as broken at once, or whether they become covenants which are broken only by ouster under paramount title or its equivalent. If the latter view is taken then what has happened is that the covenant of seisin and that against incumbrances are in substance made into a covenant of general warranty. If they are considered as broken at once and at the same time as running with the land then one soon becomes involved in difficulties and inconsistencies. Since the general warranty is almost always used in this state there would be no advantage to the covenantee in making the two covenants into another covenant of warranty. Their present advantage, if any, is that they give immediate remedies in cases where there is none on the general warranty. Making these covenants run with the land would inject more uncertainty and complication into the law as to covenants for title.

The covenant for further assurance runs with the land and it is the only one of the covenants for title which is specifically enforceable in equity. By this covenant the grantor binds himself on demand by the grantee or his assigns to make any other necessary conveyance or assurance which will aid in perfecting the title of the covenantee or his assigns. There is a breach only where the additional conveyance is demanded and refused. This covenant though once of much importance in England, never has had great importance in this state. Conveyances today are seldom so defective that another conveyance is required, and if so, there is usually another remedy. However, the covenant may prove of value in some cases. For example, if the grantor had no title when he conveyed, and later acquired good title, the grantee or his assignee could, under a covenant for further assurance demand a new deed and if re-

---

28 The doctrine started with the case of Kingdon v. Nothle, 1 M. & S. 355 (1813), 4 M. & S. 53 (1815) where the English court held the covenant of seisin broken at once but that it was a technical continuing breach and that the assignee of the covenantee could sue when they had suffered substantial damages. Later in Spoor v. Green, L. R. 9 Ex., 39 (1874) it was held the statute of limitations ran from the time of the making of the covenant. The result is somewhat wierd. In Missouri it had been held the covenant runs with the land and no suit can be maintained till substantial damages have been incurred, and the same is held as to the covenant against incumbrances. But this merely makes another covenant of warranty out of the covenant of seisin and against incumbrances.

29 RAWLE, COVENANTS FOR TITLE (6th ed.) 129.
fused could file bill for specific performance. The recording of the new deed would prevent conveyance by the grantor to a purchaser for value without notice or the acquisition of a lien by a creditor, which under the recording act, would take priority over the first deed. Merely starting the suit for specific performance would enable the covenantee to protect himself by recording a *lis pendens* notice. But the omission of this covenant from the conveyance in this state is usually a matter of no great moment, yet a careful lawyer will insert it.

The covenant of warranty has come to be the principal covenant for title in this country, and it is usually the only covenant found in deeds in this state. Where it is the only covenant, how complete is the protection it gives to the covenantee and his assigns? It has probably come to be the law in this state that where the seller contracts to convey land in fee simple without mention of covenants, he is impliedly bound to convey by a deed with general warranty and no more. At least this seems to be well settled custom. It is certain the covenant does give a considerable degree of protection but it is also certain it does not give all the protection which the law permits to the covenantee and his assigns. Like the covenant for further assurance, this covenant runs with the land. It is capable of more than one breach, though of course a total eviction from the land by one with paramount title constitutes final breach of the covenant. It is usually said that this covenant is broken only by an ouster by one having paramount title and that the action accrues to the one holding the land at that time. But it has been held to be broken by a disturbance of the possession which does not amount to an ouster. Such disturbance may occur under an easement or a profit. But whether full damages can be recovered after a mere disturbance of possession is not clear. Certainly the cove-

---

10 "The covenant of warranty is almost universally the only covenant resorted to under our system of conveyancing," Staples, J., in Burtners v. Keran, 24 Gratt. 42 at 64 (1873).
21 See n. 14, supra.
22 The effectiveness of the covenant has been hampered by certain technical rules chief among which is the rule that to constitute a breach there must be an eviction. Courts have invented constructive eviction and have in the case of disturbance of possession under easements found evictions where none actually happened but the rule still occasionally proves potent enough to prevent a result. For examples, see the cases cited in n. 27, supra. Another technical rule is that there must be some interest in land passed with which the covenant may run. The limitations brought about by this are discussed hereafter in this paper.
23 See n. 25, supra.
nant against incumbrances would be more effective in such a case. The covenant of general warranty proved ineffectual on one Virginia case in which the covenantee had actually contributed $500 towards paying off a valid incumbrance, because of the technical rule that there is no breach of the covenant of warranty until there has been an ouster. Yet the courts did extend this rule where the possession and the title were both outstanding at the time the covenant was made, so that the covenantee found the true owners in possession under paramount title. Here the courts held there was a "constructive eviction" resulting in a total breach of the covenant and therefore the covenantee could sue at once. In such a case if the covenantee did not try to take possession but at once conveyed for value to another, presumably the chose in action would not pass and by the conveyance and the assignee could have no remedy. This situation will be discussed later in the paper. It may be said that if possession of the land or if some other sort of defective title passes by the conveyance then this covenant is not broken at once, and it will thereafter be broken only by a disturbance of possession or by an ouster by one having a paramount right. It follows that the covenantee or his assignee must adopt a policy of watchful waiting. He can do nothing until the paramount owner has chosen to enforce his right. The covenant of seisin and the covenant against incumbrances would be of great value here if there were actually an outstanding paramount right, but since they do not run they would be useless to an assignee of the covenantee unless some means is found of giving the assignee the benefit of the chose in action, but as will be pointed out hereafter the courts could quite easily do this.

One sort of situation arises where none of the covenants for title as usually construed, give a remedy. Suppose A deeds vacant land to which he has no title, for value, to B

34 See Jones v. Richmond, 88 Va. 231, 13 S. E. 414 (1901).
35 Rex v. Creed, 22 W. Va. 373 (1888); Smith v. Parsons, 33 W. Va. 644, 11 S. E. 68 (1890); McConaughy & Co. v. Bennett's Exrs., 60 W. Va. 172, 40 S. E. 640 (1901); Isleay v. Wilson, 42 W. Va. 757, 26 S. E. 561 (1906); Butcher v. Peterson, 26 W. Va. 447, 26 S. E. 561 (1895).
36 Since the breach of the covenant is final and complete on delivery of the deed containing it, it would logically follow that nothing would pass by conveyance by the covenantee, unless the courts would hold the conveyance had the effect of an assignment of the chose in action. As stated later in connection with the covenant of seisin the writer believes this should be done because the covenantee, having no land to pass, ought to be held to pass all the interest he has, namely the chose in action.
37 Unless in some cases he is able to file a bill to remove cloud in title—but this would seem very bad legal tactics. It would be very costly and he would have to suffer defeat before he could maintain action for breach of the covenant of warranty.
with covenants of seisin and of warranty, for a consideration of $1000. Here B could sue on the covenant of seisin at once but presumably not on the covenant of warranty since there is not even a constructive eviction. If B without discovering the state of the title and without taking possession conveys for a consideration of $1000 to C, the latter has no remedy on A's covenant of seisin. Furthermore, he can have none on A's covenant of warranty because it is a covenant which is said to run with the land, and, it is reasoned, unless some estate or interest in the land passes from B to C, there is nothing to carry to covenant. It is generally held in this country that possession is a sufficient estate or interest in land to carry covenants running with the land, but in the case under consideration there is no actual possession, and the constructive possession is in the one who has valid legal title. The phrase "running with the land" is used only as a formula or solving phrase by the courts. No distinction can be made in reason between a case where we say an estate passes, and one in which we say no estate passes. The plain intent of the parties is to protect the covenantee and his assigns in all cases, if the title proves defective, yet protection is denied here merely because we say there is nothing with which the covenant can run. Furthermore, in so far as the covenant of warranty is concerned, the technical rule that there is no breach until there has been an ouster would prevent a cause of action arising here even though we could get around the difficulty that there is no interest in land passes with which the covenant can run. The result is we hold A liable if he has not been too bad and had at least possession of the land to convey, but if he has neither possession nor any fragment of the title and has conveyed with covenant of warranty only, then A is safe though he has the $1000 paid by B, which in all fairness C ought to have. A is unjustly enriched

\[\text{Footnotes:}
\]

38 In England it was even held that a wrongful possession was not sufficient. See Andrew v. Pierce, 1 Bos. & P. N. R. 168 (1805). But many courts in this country have held a possession, even though wrongful, is a sufficient estate with which the covenant may run. The leading case is Bedloe's Ex'tr v. Wadsworth, 21 Wend. 120 (1839). See Dickinson v. Hoopes, 8 Gratt. 353 (1852) in accord.

39 Lawyers tend to regard title to land as an entity or as a thing and think of this thing or some part of it actually passing from covenantor to covenantee and from covenantee to his assignee, and the covenant as in some way attached to this thing. The thing is imaginary.

40 The fact that the covenantor had not even a wrongful possession and totally lacked title is all the more reason why he ought to be held liable on his covenant.

41 The technical rule requiring an eviction has hampered the granting of relief in some classes of cases. See n. 32, supra.
at the expense of C but he is legally enriched, though morally little can be urged in his favor. But had B taken possession of the vacant land the day before he conveyed to C, then presumably C would have a remedy on the covenant of warranty if ousted from the possession by paramount title, though when A conveyed to B the latter had no remedy and could have none unless he first took possession and was then ousted. Had C taken possession after he got his deed from B he clearly would be without remedy. The difficulty in reaching a just result lies in the phrase "running with the land." Courts and lawyers are prone to treat title as a thing, as an entity, whereas it is nothing but a person's fact relations toward the land or the thing. Being a bundle of rights, powers and privileges title is entirely intangible and one may not be able to guess in the case above, whether A had some one or more of these rights, powers and privileges which a covenant may run, until a court of last resort passes on the matter. Then for the first time we can certainly say the covenant of warranty can or cannot run to C. The notion of a covenant running with the land probably came from transactions such as leases where there was a tenure relation between the grantor and the grantee and the idea was carried over into fee simple conveyances where such relation was wholly lacking since no tenure relation existed. Here the notion arose that it was the interest in the land passing by the conveyance which carried the covenant, a wholly artificial rule, the sole virtue of which is that it permits the assignee to have the benefit of the covenant in most of the situations which arise. Title to land is merely the relation of one toward land. If he bears certain fact relations toward certain land we say he has fee simple title, and by deed he may transfer these fact relations to another. If he has no such fact relation to the land, his effort to transfer to another fails, yet by his fee simple deed he purports to transfer such a fact-relationship as will constitute title in fee. The running of the covenant to the benefit of assigns is made to depend not on intent of the parties or on what the covenantor purport ed to be able to do, but on the accident of whether or not

---

42 Why should not the covenant pass to the assignee with the deed to him? Why is it essential the deed have at least a slight effect as to transferring title? When analyzed the phrase "running with the land" seems to have little to it.
he had at least a fragment of the fact-relations toward the
land which he represented he had, mere possession, though
wrongful, or any other fragment being sufficient. The
mere fact that C gets no shred of title\textsuperscript{43} ought not to deprive
him of his remedy on the covenant made expressly for his
benefit at the time he most needs a remedy. C ought to
have the benefit of the covenant and this should dispose the
courts to stretch artificial rules which bind the matter in
wherever they can see a clear way to do so. If the courts
cling to the orthodox idea of covenants running with the
land, as they probably will, there is little to be hoped for
from the covenant of warranty so far as C is concerned. It
is true that some courts have held in such a case, that A is
estopped by his deed to deny an estate in the land passed
to B and from him to C, when sued by C for breach of the
covenant of warranty.\textsuperscript{44} The difficulty with this is that C
must allege in his declaration and prove at the trial the
very facts A would be estopped to deny. It is hard to see
how A can be estopped when all he has to do is point to
C's own pleadings and proof. There is the further difficulty
that unless C enters on the land, and is evicted by para-
mount title he will be unable to prove a breach of the cove-
nant at all. This seems a very undesirable method of hand-
ling such a case. Some courts have given C relief where
A's deed contained a covenant of seisin. This covenant be-
ing broken became a chose in action. Since choses in ac-
tion are assignable it is held that by his deed to C, B as-
signed to C this chose in action.\textsuperscript{45} The difficulty here is that
the deed purports to be a conveyance of land and not an
assignment of a personal chose in action, yet there are
some analogies in our law. For example, there are the
various applications of the principle that the mortgage is
incident to the debt, and the benefit of it passes on assign-
ment of the debt though such assignment does not mention
the mortgage. A still better analogy has to do with pledges
If A pledges a chattel to B to secure a debt of $500, and B
wrongfully sells the chattel to C for full value, C believ-
ing B is the owner, C gets no title as against A, but he does

\textsuperscript{43} Yet if B is able to get possession in some manner before grant the "running
with the land" requirement would be met, but not if C succeeded in getting possession
after he got his deed.

\textsuperscript{44} Solberg v. Robinson, 34 S. D. 85, 147 N. W. 87 (1914).

\textsuperscript{45} Schofield v. Iowa Homestead Co., 33 Ia. 317 (1871); Allen v. Kennedy, 91 Mo.
324, 2 S. W. 148 (1886); Kimball v. Bryant, 26 Minn. 495 (1879).
get the right to the $500 debt which A owes B, and to secure which the article was pledged, this being the only interest B had in respect to this chattel.\textsuperscript{46} So in the case of the land, one may reason that all that B had in respect to the land was the right to recover the price from A, and since he tried to convey the land to C in fee, this conveyance ought to be held to pass to C the only interest B had, namely, this chose in action, and therefore C as assignee of B may enforce it against A. Note that B cannot enforce this right himself for more than nominal damages, after he has conveyed to C for a consideration of $1000, so why should C not have it? Such a rule should work well in this state where the statute of limitations on such a chose in action is ten years.\textsuperscript{47} C might well be expected to discover the state of affairs within that time.

In conclusion one may say that in this state, though it seems the custom to give a deed with a general warranty only, and it seems to be the law that if the contract for the sale of land is silent on the subject, the purchaser is entitled to a deed with general warranty only, this fails to give the purchaser the protection he ought to have and that which may be had under the law. Where the contract is silent on the subject it would be only fair and proper to require the seller to give a deed with full covenants, but it seems the established law of the state is otherwise. But the attorney for the buyer when his services are sought in time, ought to see to it that the contract calls for a deed with full covenants, and that his client gets a deed which contains at least the covenant of seisin and against incumbrances, in addition to the general warranty. Otherwise his client may lose because of his attorney's negligence or ignorance, as the case may be. Even with these covenants there may arise at least one or two situations where the covenant of seisin and against incumbrances will fail to give a remedy unless the court when a case arises will hold that a deed given by the covenantee to an assignee for value amounts to an assignment of existing causes of action for breach of covenants for title. That the court may quite properly argue this has been argued above and with a long period of limi-

\begin{footnotes}
\item \textsuperscript{46} Talty v. Trust Co., 93 U. S. 521 (1876); Donald v. Suckling, L. R. 1 Q. B. 585 (1866); Williams v. Ashe, 111 Cal. 180, 43 Pac. 595 (1895); Bradley v. Parks, 83 Ill. 169 (1876).
\item \textsuperscript{47} W. VA. CODE, ch. 104, § 6.
\end{footnotes}
tations such as we have, the assignee would have a reason-
able opportunity to discover the state of the title and start
suit. If the covenant or his assignee failed to discover the
right within ten years certainly they are not entitled to
much sympathy. This would, in substance, have the effect
of making these covenants run with the land when this
seems desirable.48

It is submitted that the bar of the state ought to be more
careful to see buyers are protected by more extensive cove-
nants than are usually found in deeds in this state.

48 In the proposed revised code the Revisors have inserted a section which makes
the covenant of seisin and against incumbrances run with the land. In the note it is
stated there is a conflict of authority on the point in the various states which is cer-
tainly true. But whether the new section is advisable in West Virginia is certainly
arguable. The covenant of warranty is in practically every deed that contains any cove-
nant at all so there is always one great covenant which will run with the land. As
shown above the other two covenants are valuable because they may enable the cove-
nantee to bring matters to a head and sue at once for the price paid the covenantor.
The new section would raise the question as to whether the two covenants in question
would be broken at once and at the same time run with the land, or whether they are
broken only when substantial damages are suffered. If the latter view is taken then
they lose their chief value. If the former view is taken there would still be a doubt as
to whether the covenantee on discovering he has merely possession and no title (for
e.g., for example) could bring suit at once. Besides the doctrine of a technical breach which is
a breach but still continues until substantial damages are suffered is a troublesome and
somewhat wierd conception. On the whole since the law in this state is as is and
since the customs of conveyancing are as they are, it would be better to omit the sec-
tion making these two covenants run with the land.