DEEDS - COVENANT OF WARRANTY LIMITED BY EXCEPTIONS IN ANOTHER COVENANT

Seward R. Stroud

University of Michigan Law School

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Deeds — Covenant of Warranty Limited by Exceptions in Another Covenant — A mortgaged land to B and thereafter executed a second mortgage on the same land to C. In the second mortgage, A covenanted that “they are seized of good and perfect title . . . in fee simple and that the title so conveyed is clear, free and unincumbered except . . . (the Hixton Bank mortgage) [mortgage to B] and that they will forever warrant and defend the same . . . against all claims whatsoever.” The first mortgage to B was foreclosed, and B purchased at the foreclosure sale. B sold the land to A, no collusion appearing. A had borrowed the purchase price from plaintiff bank, which now seeks to foreclose its mortgage. C intervenes, basing his claim on the theory that, due to a breach of the covenant of warranty, the after-acquired title of A, which he got after foreclosure of B’s mortgage, inured to the benefit of C. Held, the exception of the first mortgage of B in the mortgage to C qualified the covenant of warranty by A, so there was no warranty whereby the after-acquired title could inure to the benefit of C. Federal Farm Mortgage Corp. v. Larson, 227 Wis. 221, 278 N. W. 421 (1938).

It is generally agreed that an exception or limitation in a covenant against incumbrances will not affect the scope of a covenant of warranty 1 in a deed or mortgage. 2 Courts have been quite reluctant to find the covenant of warranty

1 A covenant of warranty is recognized as having an effect similar to the covenant of quiet enjoyment. Rawle, Covenants for Title 148 (1887).

limited by exceptions. In a Massachusetts case with a similar fact situation it was held that an exception annexed to the covenant against incumbrances and separated from the covenant of warranty by a semicolon did not limit the covenant of warranty. The similarity to the principal case is to be noted. In that case the covenant read as follows: "I... do covenant... I am lawfully seized in fee simple of the aforesaid premises; that they are free from all incumbrances, except a certain mortgage given by me to the Boston Five Cents Savings Bank... that I have good right to sell and convey... and that I will... warrant and defend the same... forever, against the lawful claims and demands of all persons, except the right of drainage and the easement aforesaid." The court in the principal case concluded that the clause which excepted the first mortgage of the Hixton Bank was a direct qualification of the covenant of warranty.

Koenig, 80 Minn. 483, 83 N. W. 399 (1900); Smith v. Gaub, 19 N. D. 337, 123 N. W. 827 (1909); Sommers v. Wagner, 21 N. D. 531, 131 N. W. 797 (1911); Baird v. Chamberlain, 60 N. D. 784, 236 N. W. 724 (1931). Cf. Bricker v. Bricker, 11 Ohio St. 240 (1860), which bases its decision on 2 Sugden, Vendors, 6th Am. ed., 527 (1843), to the effect that where exceptions are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants although they are distinct. However, the covenant against incumbrances, which is breached as of the time of the conveyance or mortgage if there is an incumbrance, has not the same object as a covenant of warranty which is breached only by an eviction.

In Smith v. Gaub, 19 N. D. 337, 123 N. W. 827 (1909), the exception of a mortgage from the covenant against incumbrances immediately followed the covenant against incumbrances and was separated from the covenant by a comma. It was held the exception did not limit the covenant of warranty. The court said there was no presumption that the exception of one covenant should apply to another of different import. In Baird v. Chamberlain, 60 N. D. 784, 236 N. W. 724 (1931), the covenant against incumbrances and the covenant of warranty were followed by a period. The next sentence read, "Subject to a first mortgage of $2,000." It was held this sentence did not limit the scope or effect of the covenants. There is some authority to the effect that the covenants are limited by the granting clause of the deed. See Koch v. Hustis, 113 Wis. 604, 89 N. W. 838 (1902); Jackson v. Hoffman, 9 Cow. (N. Y. S. Ct.) 271 (1828). But see Ayer v. Philadelphia & B. Face Brick Co., 157 Mass. 57, 31 N. E. 717 (1892), 159 Mass. 84, 34 N. E. 177 (1893). Also where a second mortgagee assumes a prior mortgage in taking the second mortgage the covenants are so limited. Brown v. Staples, 28 Me. 497 (1848); Liveley v. Rice, 150 Mass. 171, 22 N. E. 888 (1889).

The court, after stating the general rule that if a grantor who warrants his title has not title at the time of conveyance or mortgage but thereafter procures it, the after-acquired title operates to the benefit of the grantee, said, "But the rule should not be applied where, as in the instant case, a mortgagor who has clear title except as
There is obvious difficulty in harmonizing this conclusion with that of the Massachusetts case as well as with the general proposition first stated. The distinction, tenuous at best, must be based on the absence of punctuation between the covenants. The decision would seem to dictate that all exceptions, regardless of which covenant they succeeded, qualify other covenants contained in the unseparated sentence though the covenants therein contained are of different import.

_Seward R. Stroud_

to a prior mortgage has expressly excepted that mortgage in his covenant of warranty." Principal case, 221 Wis. at 225.