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REAL PROPERTY-RELATION OF THE COVENANTS FOR TITLE AND THE DOCTRINES OF ESTOPPEL BY DEED

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REAL PROPERTY—RELATION OF THE COVENANTS FOR TITLE AND THE DOCTRINES OF ESTOPPEL BY DEED—The doctrine of estoppel by deed is familiar to all students of real property law. So, too, are the principles of law relating to covenants for title made by a grantor in connection with a conveyance of land. It is the purpose of this comment to discuss the relation between the two areas of law, with particular reference to two problems: (1) what effect does the estoppel doctrine have upon the recovery of damages by the grantee where there has been a breach of the covenant of seisin; and (2) conversely, what effect does recovery of substantial damages by the grantee have upon the estoppel doctrine.

By way of introduction to the problem, it may be observed that the majority of our courts regard the covenant of seisin as a covenant for title whereby the covenantor assures the covenantee that he is lawfully seised and possessed of the estate which he purports to convey.[1] Thus, unlike covenants which operate *in futuro*, such as the covenant of warranty, there is no requirement of an eviction to establish a cause of action for breach of the covenant of seisin. The covenant operates *in praesenti*, and where the covenantor does not own all or some part of that which he purports to convey, the covenant is broken as soon as it is made.[2] Generally the damages awarded for breach of the covenant of seisin are measured by the value of the outstanding title at the time the covenant was made. This, in turn, is generally measured by the full consideration paid for the conveyance where there is a complete failure of title, and a proportionate part of the consideration where the title has failed as to part of the premises.[3]

Also by way of introduction, it should be noted that when a grantor purports to convey, by warranty deed, land which he does not own, and later acquires title to that land, most American courts not only hold that the grantor is estopped to assert that ownership against his grantee, but go further and hold that such after-acquired title immediately and automatically passes to the grantee.[4] The after-acquired title thus in-

[1] Reese v. Smith, 12 Mo. 344 (1849); 61 A.L.R. 10 (1929).

[2] Morrison v. Underwood, 20 N.H. 369 (1850); Myer v. Thompson, 183 N.C. 543, 112 S.E. 328 (1922); 61 A.L.R. 10 (1929); MAUPIN, MARKETABLE TITLE TO REAL ESTATE, 3d ed., 289 (1921).

[3] Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893); Baxter v. Bradbury, 20 Me. 260 (1841); Rombough v. Koons, 6 Wash. 558, 34 P. 135 (1893).

[4] SEDGWICK & WAIT, TRIAL OF TITLE TO LAND, 2d ed., 714 (1886); Baxter v. Bradbury, 20 Me. 260 at 263 (1841).

ures to the grantee by reason of the earlier conveyance. However, a few courts, notably Pennsylvania, hold that the grantee has the benefit of an after-acquired title only by estoppel as against the grantor, his heirs, and a subsequent grantee with notice. Under the latter view, the interest of the grantee is in the nature of an equitable right. The legal title does not automatically and completely pass to the grantee, but remains in the grantor, at least until the grantee goes into equity and compels the grantor to convey it.[5]

With that brief statement of the principles governing the covenant of seisin and those concerning the doctrine of estoppel by deed, we come now to the situation were the two areas of property law are closely related and where their interaction has produced unique problems in measuring damages for breach of the covenant of seisin. To make the problem specific, we may take the following case: assume that a vendor, *V*, has executed and delivered to a purchaser, *P*, a deed to Blackacre sufficient to invoke the estoppel doctrine, which deed contains a covenant of seisin. Assume that *V* does not in fact own Blackacre. At this point, under the majority view, there is a complete breach of the covenant of seisin and the purchaser has a fully matured cause of action, which in most cases will yield him damages in the full amount of his consideration. But assume further that sometime after the conveyance *V* acquires the title to Blackacre, which may inure to the benefit of *P* under the estoppel doctrine. In any action by *P* to recover damages, the question which now confronts the court is whether those substantial damages may still be recovered for breach of the covenant of seisin, or whether the after-acquired title will reduce the damages to a nominal amount. An analysis of the cases indicates that no categorical answer can be given. The courts are prone to draw distinctions based upon (1) whether *P* has, and continues to have, undisturbed possession; and (2) whether *V* acquired the title before or after *P* brought his action to recover damages for breach of the covenant of seisin. Part I of this comment treats of those cases where *P* has taken and retained possession, while Part II deals with those cases in which *P* has been unable to obtain possession or has been evicted.

[5] SEDGWICK & WAIT, TRIAL OF TITLE TO LAND, 2d ed., 714 (1886); Jordan v. Chambers, 226 Pa. 573, 75 A. 956 (1910); cf. Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893).

I

Damages Where Plaintiff Has Taken and Retained Possession

Starting with the assumption that *V* did not own Blackacre when he purported to convey to *P*, but acquired the title sometime thereafter, assume further that *P* was nevertheless able to take immediate possession of the property and has retained that possession down to the time the court is called upon to assess the damages *P* can recover in an action for breach of the covenant of seisin. If *P* brings such an action, can he, under such circumstances, still recover substantial damages? While *P*'s continued possession may alone be considered sufficient to reduce his damages for breach of the covenant of seisin to a nominal amount, the answer a particular court reaches may also turn upon two other factors: (1) whether *V* has acquired the title to Blackacre before or after *P* brings his action on the covenant of seisin; and (2) whether the court follows the majority view or the Pennsylvania view of the doctrine of estoppel by deed.

Before proceeding, it is worth while to note again that when *V* purports to convey Blackacre, though in fact he does not own it, the majority of our courts will hold that the covenant of seisin is immediately broken, and that *P* then and there has a fully matured cause of action. Although one court has held to the contrary,[6] neither the fact that *P* acquires possession, nor the fact that *V* thereafter purchases the outstanding title (which may inure to *P*'s benefit) should extinguish the cause of action for breach of the covenant. The most that these factors should do is affect the measure of damages.

A. *Measure of damages where the purchaser has had continuous possession and the vendor has purchased the outstanding title before the purchaser brings his action on the covenant of seisin.* Although most courts at least acknowledge the general rule that the damage recoverable for breach of the covenant of seisin is the value of the outstanding title at the time the covenant was made, many courts also somewhat inconsistently state that the damage recoverable should be measured by the actual injury suffered.[7] Accordingly, these latter courts, when called upon to render an actual decision, will hold that if the purchaser takes and retains possession of the land he cannot

[6] This misconception was corrected on appeal. See M'Carty v. Leggett, 3 Hill (N.Y.) 134 (1842).

[7] Morrison v. Underwood, 20 N.H. 369 (1850); Myer v. Thompson, 183 N.C. 543, 112 S.E. 328 (1922); 61 A.L.R. 10 (1929).

recover more than nominal damages for the breach of the covenant of seisin.[8] Missouri seems to have gone one step farther and to have held that if the purchaser could have taken possession (though it seems he would have no right to that possession because of the outstanding title) he cannot recover more than nominal damages whether or not he actually entered into possession.[9] On the other hand, some courts apply the general damage rule even though the purchaser has had continuous possession, and hold that he may still recover substantial damages.[10] In the latter jurisdictions, recovery is apt to be framed in such a way that judgment for the consideration paid, plus its satisfaction, will operate by way of estoppel or otherwise to return the title to the vendor.[11]

However, when a case arises like that under consideration, where both an estoppel by deed and continuous possession by the purchaser are involved, all courts appear to measure the damages by the actual injury suffered. Thus, it may be stated as a general rule that the damages for breach of the covenant of seisin may be reduced to a nominal amount where the purchaser has taken and retained possession, if the outstanding title or incumbrance which may inure to the purchaser's benefit under the doctrine of estoppel by deed is acquired by the vendor before any decisive action is taken by the purchaser in regard to his claim for breach.[12]

Although textwriters have both commended and condemned this rule, it is almost universally followed. Rawle condemns the result and instead would allow the covenantee the option of retaining the title (and recovering only nominal damages for breach of the covenant of seisin) or of taking substantial damages (and apparently relinquishing all claim to the title).[13] These views are submitted, however, to give effect to his conception of the doctrine of estoppel by deed, which coincides with that of the Pennsylvania court, that is, that the after-acquired title does not automatically pass to the purchaser, but remains

[8] Morrison v. Underwood, 20 N.H. 369 (1850); Alger-Sullivan Lumber Co. v. Union Trust Co., 218 Ala. 448 at 451, 118 S. 760 (1928); 61 A.L.R. 10 (1929); MAUPIN, MARKETABLE TITLE TO REAL ESTATE, 3d ed., 292 (1921); cf. Noonan v. Ilsley, 21 Wis. 140 (1886).

[9] 61 A.L.R. 10 (1929).

[10] 61 A.L.R. 10 (1929); RAWLE, COVENANTS FOR TITLE, 5th ed., 248 et seq. (1887).

[11] 61 A.L.R. 10 (1929); also see Part III of this comment.

[12] Baxter v. Bradbury, 20 Me. 260 (1841); Myer v. Thompson, 183 N.C. 543, 112 S.E. 328 (1922); McLennan v. Prentice, 85 Wis. 427, 55 N.W. 764 (1893); cf. Building Light and Water Co. v. Fray, 96 Va. 559, 32 S.E. 58 (1899); many cases collected in 61 A.L.R. 10 (1929).

[13] RAWLE, COVENANTS FOR TITLE, 5th ed., 251 (1887).

in the vendor until the purchaser goes into equity and compels the vendor to convey it. Maupin, on the other hand, objects to Rawle's position because it gives the purchaser the right to rescind the deed and get his money back in every case where there is a breach of the covenant of seisin whether or not he has suffered any actual damage.[14] Maupin's position is that in those jurisdictions where a purchaser-covenantee who has had undisturbed possession can recover only nominal damages in the normal case, the fact that there is an after-acquired title involved in the particular case should be immaterial, especially if the vendor acquires that title before the purchaser brings his action.[15] That this should be the result in those jurisdictions seems obvious, because, if the outstanding title has been acquired and has inured to such a covenantee's benefit before he has brought his action on the covenant of seisin, by the time he does bring the action he not only has had undisturbed possession but also would appear to have the title for which he bargained. Maupin would have this result reached in all jurisdictions, and his position appears to be supported by the cases because most decisions which have awarded the purchaser more than nominal damages even though the outstanding title was acquired by the vendor prior to the commencement of the action on the covenant of seisin have been cases where the purchaser had been unable to take possession or had been evicted.

Rawle also contends that if substantial damages are given to the covenantee only where he has been evicted, the covenant of seisin becomes practically indistinguishable from the covenant for quiet enjoyment or the covenant of warranty.[16] This, however, would not seem to be so, for eviction in the case of the covenant of seisin, as construed by the majority of our courts, can affect only the measure of damages and not the right of action itself. The covenant is still one operating in praesenti and though only nominal damages may be allowed under certain circumstances, an action will lie, if at all, immediately upon the making of the covenant.[17]

It is submitted that it is a sound result to award only nominal damages to the purchaser of land, who has had continuous possession and has also received the outstanding title through an estoppel by deed

[14] MAUPIN, MARKETABLE TITLE TO REAL ESTATE, 3d ed., 582 et seq. (1921).
[15] Ibid.
[16] RAWLE, COVENANTS FOR TITLE, 5th ed., 251 (1887).
[17] MAUPIN, MARKETABLE TITLE TO REAL ESTATE, 3d ed., 289 (1921); M'Carty v. Leggett, 3 Hill (N.Y.) 134 (1842).

before he has brought his action on the covenant of seisin. This result has been justified on the ground that the purchaser-covenantee cannot have the title and also receive damages equal to the consideration paid, but as will be shown, this would not seem to be the true reason for the result, because he is seldom allowed to keep the title after he has recovered substantial damages. Rather, the justification would seem to be that where the subsequently acquired title inures to such a purchaser's benefit before he has brought an action on the covenant of seisin, he has both the benefits of possession and the title, the totality of that for which he originally bargained and paid his consideration. Thus, though there may be a technical breach of the covenant of seisin entitling the covenantee to at least nominal damages, he has suffered no actual loss entitling him to any more. There is one factor, however, which may slightly alter this conclusion. The Wisconsin court has noted the possibility that the purchaser may be liable to the actual owner of the paramount title for the time he had possession of the property prior to the acquisition of that title by his vendor. Accordingly, while the Wisconsin court may not allow recovery of the consideration paid, it has said it will award the purchaser something more than nominal damages to protect him against this possibility.[18]

B. *Measure of damages where the purchaser has had continuous possession but the vendor does not acquire the outstanding title until after the purchaser has brought his action on the covenant of seisin.* To make the problem clear in this situation we may state another hypothetical case. Assume again that the vendor, *V*, does not own Blackacre when he executes and delivers a warranty deed to the purchaser, *P*, but that *P* has nevertheless taken and retained possession of the property. However, assume now that *P* has commenced his action on the broken covenant of seisin before anything is done by *V* concerning the outstanding title. The question which has bothered the courts in this situation is whether *V* can reduce the amount of recoverable damages to a mere nominal amount by purchasing the outstanding title before the damages are assessed, but after *P* has commenced his action.

Both the courts and the textwriters on the subject are fond of stating that the damages recoverable for a breach of the covenant of seisin cannot be reduced to a mere nominal amount by an acquisition of the outstanding title after the action has been commenced.[19] These state-

[18] Noonan v. Ilsley, 21 Wis. 138 at 145 (1886).

[19] Rombough v. Koons, 6 Wash. 558, 34 P. 135 (1893); Morris v. Phelps, 5 Johns. (N.Y.) 49 (1809); MAUPIN, MARKETABLE TITLE TO REAL ESTATE, 3d ed., 582 et seq. (1921).

ments appear to be based either upon the proposition that the rights of the parties are to be determined as of the time the litigation is started, or upon some vague notion that after he has started his action on the covenant of seisin the purchaser-covenantee cannot "be forced to take" the after-acquired title. The two propositions are really opposite sides of the same coin, but the latter expression emphasizes the fact that the underlying idea is somewhat inconsistent with the majority view of the estoppel doctrine whereby an after-acquired title automatically and completely passes to the grantee when acquired by the grantor. Further, although there may be equity in the proposition that the rights of the parties should be determined as of the time an action is commenced, the decisions show that in this area no such uniform result is reached. Even here, where the vendor acquires the outstanding title after the purchaser-in-possession has started his action on the covenant of seisin, there appear to be as many cases awarding only nominal damages[20] as there are decisions granting susbtantial damages.[21] In those jurisdictions which, as a general rule, award only nominal damages for breach of the covenant of seisin unless there has been an eviction, this result seems to follow as naturally as it did in the case where the vendor acquired the outstanding title before the purchaser-covenantee brought his action. In either case the acquisition of the outstanding title only strengthens the case for nominal damages in those jurisdictions, be-

[20] Baxter v. Bradbury, 20 Me. 260 (1841); Morrison v. Underwood, 20 N.H. 364 (1850); Farmer's Bank of N.C. v. Glenn, 68 N.C. 35 (1873). In Knowles v. Kennedy, 82 Pa. 445 (1876), only nominal damages were awarded where the outstanding title was acquired after the commencement of the suit, but before trial; in King v. Gilson, 32 Ill. 348 (1863), a deed to the grantor was dated before the commencement of the purchaser's action, but delivery of same was not made until after that time; in Reese v. Smith, 12 Mo. 344 (1849), the estoppel doctrine did not apply for technical reasons, but equity compelled the purchaser to take a title acquired by the grantor's administrator, apparently after the commencement of the purchaser's action on the covenant of seisin, and enjoined collection of the law judgment; see also Cornell v. Jackson, 3 Cush. (57 Mass.) 506 (1849), where the statement, ". . . if by any means a party is restored to his land before assessment of damages . . ." (damages will be reduced pro tanto) seems to support this result, though the facts are not clear as to when the outstanding title was acquired; cf. dictum in Noonan v. Ilsley, 21 Wis. 138 at 146 (1886).

[21] No decision was found where a purchaser who had been in possession recovered substantial damages because the outstanding title was acquired after he had commenced his action. Morris v. Phelps, 5 Johns (N.Y.) 49 (1809), may be such a case, though the reported facts are not clear as to whether possession was had. Tucker v. Clarke, 2 Sandf. Ch. (N.Y.) 96 (1844), is another case where the reported facts are not clear on this point. The following cases allowed substantial damages to a purchaser of land which was unoccupied both before and after the purported conveyance, partly on the basis that the outstanding title was not acquired until after the action on the covenant of seisin was commenced: Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893); Rombough v. Koons, 6 Wash. 558, 34 P. 135 (1893); Burton v. Reeds, 20 Ind. 87 (1863), insofar as it is a decision on the covenant of seisin; cf. Bingham v. Weiderwax & Sutherland, 1 Comst. (N.Y.) 509 (1848).

cause not only does the purchaser have the possession, but he appears also to have the title. The fact that the outstanding title is here acquired by the vendor after the purchaser has commenced his action would not seem to alter the fact that the title should pass to the purchaser, at least under the logic of the majority view of the estoppel doctrine. Of course, the court might decide that the vendor "cannot force" the purchaser "to take" the title after he has brought his action.[22] This latter ruling might be more easily rendered by a court which allows the purchaser who has had possession more than nominal damages for breach of the covenant of seisin in a case where no after-acquired title is involved. Such a ruling, however, produces a result consistent only with the Pennsylvania theory of the estoppel doctrine for it gives the purchaser the option for which Rawle contends of (1) taking the title and recovering only nominal damages or (2) not taking the title, but recovering substantial damages. Although no case was found which involved a purchaser who had continuous possession, there are nevertheless decisions which have held that where the land was unoccupied both before and after the purported conveyance, an outstanding title acquired after the purchaser had commenced his action on the covenant of seisin cannot be shown in mitigation of damages. Some of these cases rely heavily upon the Pennsylvania view of the estoppel doctrine;[23] others do not seem aware of the fact that there are two different views. Many do stress the fact that the title was acquired after the purchaser's action was commenced, but some of these cases also seem to rely on a "constructive eviction" of the purchaser.[24] On the other hand, where the purchaser has remained in possession, several cases can be found awarding only nominal damages even though the vendor acquired the title after the action on the covenant of seisin had been commenced.[25]

Recognizing that there may be situations where the rights of the parties should, in justice, be determined as of the time an action is commenced, it is submitted that the decisions awarding only nominal damages in this situation are equally as sound as those reaching the same result where the vendor acquires the outstanding title prior to the

[22] See Baxter v. Bradbury, 20 Me. 260 (1841) where the court dismisses this possibility.

[23] Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893); Rombough v. Koons, 6 Wash. 558, 34 P. 135 (1893).

[24] Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893); Burton v. Reeds, 20 Ind. 87 (1863). Although the facts as reported are not clear, Morris v. Phelps, 5 Johns (N.Y.) 49 (1809), and Tucker v. Clarke, 2 Sandf. Ch. (N.Y.) 96 (1844), may be cases where the purchaser did actually have possession and was not evicted.

[25] See note 20 supra.

time the purchaser brings his action. The same considerations would seem to apply in both situations: the purchaser has had the benefits of undisturbed possession; he has suffered no actual damage; and he should, under the majority view of the estoppel doctrine at least, get the title for which he bargained and paid his consideration. Again, of course, a court may want to take account of a possible liability to a third party for the time the purchaser had possession before the outstanding title was acquired.

C. *Effect of the particular court's view of the doctrine of estoppel by deed.* In either of the hypothetical situations discussed above, that is, whether the outstanding title is acquired by the vendor before or after the purchaser-in-possession has commenced his action on the broken covenant of seisin, it would seem that the difference between the two views of the doctrine of estoppel by deed would have a profound effect on the amount of damages a particular court would award the purchaser. Thus, where the court followed the majority view, it would seem quite likely that only nominal damages would be awarded the purchaser-in-possession, because, under the logic of that view an after-acquired title is held to pass automatically to the covenantee. On the other hand, where the Pennsylvania view is followed, under which the covenantee merely has an equitable right in the after-acquired title until he goes into equity and compels a conveyance of the legal title, it would be much easier for a court to give the purchaser an election to take substantial damages for breach of the covenant of seisin (leaving the title in the vendor) or to demand the conveyance of the legal title (reducing his damages to a nominal amount). However, implicit in the discussion above is the fact that such is not the case. The majority of the cases involving the interaction of the principles governing the doctrine of estoppel by deed and the covenant of seisin do not discuss the theories behind the estoppel doctrine. Illustrative of the lack of attention given to the two differing theories is a decision by the Pennsylvania court,[26] a court generally holding that an after-acquired title does not absolutely pass to the purchaser unless he goes into equity and demands a conveyance. The court held that where the purchaser had not been disturbed in his possession, a title acquired by the vendor even after an action had been commenced by the purchaser on the broken covenant of seisin "inured to the benefit of the grantee, perfecting his title" and allowed only nominal damages. The only explanation

[26] Knowles v. Kennedy, 82 Pa. 445 (1876).

for such a decision in Pennsylvania is that the differing theories are usually overlooked when the estoppel doctrine is involved in problems of this nature.[27]

Thus, by way of summary, it appears that where a vendor who does not own a piece of land purports to convey it by a deed sufficient to invoke the estoppel doctrine, practically all courts will allow the purchaser who has taken and retained possession of the land only nominal damages for breach of a covenant of seisin in the deed, if the vendor acquires the outstanding title prior to the time the purchaser commences his action. Even where the outstanding title is acquired after that time, many courts will still not award more than nominal damages to a purchaser who has not been disturbed in his possession, although under such facts some decisions have indicated a willingness to award substantial damages.

II

Damages Where Plaintiff Has Been Unable To Take Or Retain Possession

We may now examine those cases where the purchaser has either been unable to take possession, or, having taken possession, has been evicted. Assume once again that the vendor, *V*, has executed and delivered to *P*, the purchaser, a deed to Blackacre sufficient to invoke the estoppel doctrine, which deed contains a covenant of seisin, and that *V* does not in fact own Blackacre at that time. But now assume that *P* is unable to take possession, or that he has been evicted, and that thereafter *V* acquired the title to Blackacre. If *P* nows brings an action on the broken covenant of seisin, the problem which has bothered the courts is whether the after-acquired title will mitigate the damages recoverable by *P* as it is so often held to do where he has had undisturbed possession. It is also appropriate to consider at this point the disposition of the title where *P* does recover substantial damages for breach of the covenant of seisin.

A. *Measure of Damages.* All states, including those which as a general rule award only nominal damages for breach of the covenant of seisin to a covenantee who has had undisturbed possession, allow

[27] The case of Rombough v. Koons, 6 Wash. 558, 34 P. 135 (1893), is one case which carefully distinguishes the two theories and the decision emphasizes the theory followed. Two other cases which discuss the two theories are Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893) and Blanchard v. Ellis, 1 Gray (67 Mass.) 195 (1854).

him to recover the consideration paid where he has been unable to take possession or has been evicted.[28] Contrary to the case where the purchaser has been in undisturbed possession, the fact that there is here an after-acquired title which may inure to his benefit does not seem to aid the case for nominal damages. Where the purchaser had the benefits of possession, there is no great injustice in holding that he must keep the after-acquired title and can recover only nominal damages for a technical breach of the covenant of seisin, but where he has been evicted, or has been unable to take possession, such a result would be extremely inequitable. No case or statement in the texts can be found advocating such a view. Further, some of the cases ostensibly resting on some other proposition, for example that the vendor cannot reduce the damages by acquiring the outstanding title after the purchaser has brought his action, have actually involved an eviction of the purchaser.[29]

Where there is an actual eviction, there appear to be no distinctions drawn on the basis of when the outstanding title was acquired; the simple, universal rule is that proof of eviction yields the plaintiff substantial damages. Only in the so-called constructive eviction situation do the cases differ at all. Where the land was unoccupied before the purported conveyance, and the purchaser did not enter into actual possession, a few courts hold that a title acquired by the vendor, at least before the purchaser brings his action, will reduce the damages to a mere nominal amount.[30] But other courts, somewhat more logically, have held that where the vendor purports to convey unoccupied land to which he does not have title, and the purchaser does not take possession, there is such a constructive eviction (or lack of the right to possession) that the purchaser can recover substantial damages.[31] Except for the few cases awarding nominal damages where possession in fact could have been had, the courts award a purchaser who has had no right to possession and has been unable to take possession, or has been evicted, the value of the land at the time of the making of the covenant of seisin, measured by the consideration paid, whether or not the outstanding title is subsequently acquired by the vendor. This result clearly seems justified.

[28] Blanchard v. Ellis, 1 Gray (67 Mass.) 195 (1854); Burton v. Reeds, 20 Ind. 87 (1863); dictum in Knowles v. Kennedy, 85 Pa. 445 (1876); 61 A.L.R. 10 (1929).

[29] For example, see Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893).

[30] See, for example, King v. Gilson, 32 Ill. 348 (1863).

[31] Nichol v. Alexander, 28 Wis. 118 (1871); McInnis v. Lyman, 62 Wis. 191, 22 N.W. 405 (1885); Resser v. Carney, 52 Minn. 397, 54 N.W. 89 (1893).

B. *Disposition of the Title.* If a purchaser-covenantee has been awarded substantial damages for a breach of the covenant of seisin because he has been evicted, or for any other reason, and there is an after-acquired title which may have inured to his benefit under the doctrine of estoppel by deed, it becomes necessary to determine who shall have the title. It is quite generally stated that the purchaser should not be allowed to have the title and also recover the money paid therefor,[32] a position that is sound. Where the Pennsylvania view of the estoppel doctrine is followed, no problem should be involved because if substantial damages have been recovered it would seem that the purchaser has elected to leave the title in the grantor. Nevertheless, as mentioned, in Pennsylvania at least, the problem is left the same as it is in those jurisdictions following the majority view of the estoppel doctrine.[33] Applying the majority view, it would seem that as a matter of dry logic the after-acquired title should vest in the purchaser whether acquired before or after he has been evicted or has commenced his action on the covenant of seisin, and that the mere recovery of substantial damages would not divest him of this title. If this were so, and no relief were granted, it would mean that the vendor would be deprived of his consideration but nevertheless could not regain the land. Clearly, if the purchaser does not voluntarily give the title back to the vendor (and under the circumstances he undoubtedly would not) an action of ejectment brought by the vendor would fail because he could not show a superior right to the land. Such an unmitigated application of the estoppel doctrine would be most inequitable. While only a few cases have directly tackled this problem in a case involving both the covenant of seisin and an after-acquired title, those few have developed various devices to avoid the unfavorable result. The same general problem has arisen in other cases where substantial damages have been awarded for breach of the covenant of seisin and results have been reached (often, no doubt, with an eye to the possibility of a future acquisition of the outstanding title by the vendor) which it is believed could, and would, be applied to the instant problem.

It has been suggested that the mere recovery of substantial damages could itself divest the purchaser of the title and revest it in the vendor.[34] This is fictitious, but it would not seem to be any more so than

[32] Reese v. Smith, 12 Mo. 344 (1849); Baxter v. Bradbury, 20 Me. 260 (1841).

[33] See note 25 supra.

[34] RAWLE, COVENANTS FOR TITLE, 5th ed., 261 (1887); Kincaid v. Brittain, 5 Sneed (37 Tenn.) 119 at 123 (1857); Recohs v. Younglove, 8 Bax. (67 Tenn.) 385 (1875).

the majority view of the doctrine of estoppel by deed, which lies at the root of the whole problem. Rawle has also suggested a stay of execution until the purchaser reconveys the title.[35] Another simple method of avoiding the unfavorable result would be to declare a rescission of the contract when the purchaser recovers substantial damages for breach of the covenant of seisin. But this is not the view usually taken, probably for the reason that most rules of property law grew up with the early common law which did not know of rescission of contracts.[36]

The solution most often adopted holds that recovery of substantial damages, thereby branding the original deed as faulty, will estop the purchaser or those claiming under him from alleging that they acquired any interest in the land by that deed.[37] It is also often stated that a recovery of substantial damages for breach of a covenant of title entitles the vendor to a reconveyance which equity will enforce.[38] Such decisions usually involve situations where the deed passed nothing to the purchaser at the outset and recovery was had on that basis. No particularly difficult problem would seem to be involved, however, in decreeing an estoppel or reconveyance of part of the title where recovery is founded on partial failure of title. Before either of these rules will apply, of course, there must be satisfaction of the damage judgment.[39]

By application of any one of these various doctrines it is possible to avoid the often decried result that the purchaser will have both the land and receive damages equal to the consideration he paid for that land.

III. *Conclusion*

While this unique problem in damages, involving a broken covenant of seisin and the later acquisition of the outstanding title by the

[35] RAWLE, COVENANTS FOR TITLE, 5th ed., 261 (1887).

[36] RAWLE, COVENANTS FOR TITLE, 5th ed., 261 (1887); but see McLennan v. Prentice, 85 Wis. 427 at 436, 55 N.W. 764 (1893).

[37] Proter v. Hill, 9 Mass. 34 (1812); Stinson v. Sumner, 9 Mass. 143 (1812); Blanchard v. Ellis, 1 Gray (67 Mass.) 195 (1854); Packer v. Brown, 15 N.H. 176 at 188 (1844); Bank of Utica v. Mersereau, 3 Barb. Ch. (N.Y.) 528 at 571 (1848); Campbell v. Martin, 89 Vt. 214, 95 A. 494 (1915).

[38] McKinny v. Watts, 10 Ky. (2 A. K. Marsh) 268 (1821); Shorthill v. Ferguson, 47 Iowa 284 (1877). Where the purchaser has been evicted, he may not be able to "reconvey" any title, of course. See Ives v. Niles, 5 Watts (Pa.) 323 at 329 (1836), involving the covenant of warranty.

[39] Foss v. Stickney, 5 Me. 390 (1828).

vendor, which may inure to the benefit of the purchaser, does not often arise, those cases which have dealt with it show the difficulty with which a rational answer is to be found. In seeking a solution which will fit all the possible ramifications of the problem, the courts might consider various factors, including the difference between the majority and Pennsylvania theories of the estoppel doctrine, and the relation between the time when the outstanding title is acquired by the vendor and the time when the purchaser brings his action on the covenant of seisin. But the one major factor, upon which most of the cases seem actually to turn, is that of possession, the element upon which so much of our property law is based. Although generalities concerning so complex a problem cannot be totally accurate, it seems that it may be stated that if the purchaser has had undisturbed possession, and the outstanding title has been acquired by the vendor at any time before the damages are assessed for breach of the covenant of seisin, the purchaser will have a difficult time recovering more than nominal damages, whereas if the purchaser has been evicted or has been unable to attain possession of the property he may be quite sure of recovering the consideration he paid for the property, regardless of when the outstanding title is acquired. It is submitted that making the factor of possession all important is sound. Where the purchaser has had the fruits of undisturbed possession, and also gets the title, whether before or after he brings his action on the covenant of seisin, he has obtained all for which he bargained and paid his consideration. He has had the benefits of possession, the most important of the rights of property; he has the title through an estoppel by deed in most of our states; and except for unusual circumstances, he has suffered no actual injury or damage. Where he has suffered actual damage, for example where he is held accountable for the time he possessed the land while the title was outstanding in a third person or perhaps because he experienced difficulty in reselling, he should be compensated for such injury, but these would appear to be separate problems. Where an after-acquired title is involved in the case, keying the amount of damages recoverable to the actual injury suffered seems preferable to arbitrarily applying the general damage rule to all cases where there happens to be a breach of the covenant of seisin.[40]

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[40] Many of the principles discussed herein in terms of the covenant of seisin are equally appropriate when a covenant against incumbrances is involved.