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COVENANTS FOR TITLE RUNNING WITH THE LAND.

(CONCLUDED.)

II. OF THE PRACTICAL RULES WHICH REGULATE COVENANTS FOR TITLE IN RUNNING WITH THE LAND.—(*Continued.*)

2. Of the rights and remedies of the respective parties on a breach of covenants for title running with the land.

It is customary in this country for every grantor to covenant anew for the title to land, so that a series of covenants comes into the hands of the last grantor, with a right of action on any or all of them, which have been made since the occurrence of the defect which occasioned the breach. It is therefore reasonable that intermediate covenantors who have covenanted, relying on the validity of *prior* covenants, should in some way be protected. With a view to this, it was formerly understood that the mere prospective liability of any intermediate covenantor, was of itself sufficient to authorize him, when a breach happened for which he might be sued, to proceed at once against any prior covenantor who was also liable for the same breach. But the effect of this would be, that as soon as a breach happened, not only the last

grantee, but every intermediate one, might proceed against any and all covenantors before themselves, or they might all proceed against the first covenantor; and as one suit would not bar another, the same party might be subject to pay damages to several different parties for a single breach of the same covenant. The decision in *Kane vs. Sanger*, 14 Johns. 89, was apparently designed to obviate this difficulty. It was there held that a grantee, by taking covenants from his immediate grantor, thereby divested himself of all right of action on prior covenants, these remaining exclusively for the benefit of intermediate covenanting grantors. This rule would manifestly subvert the whole theory of covenants running with the land, when subsequent transfers were accompanied with covenants; detaining the covenants in the hands of the first covenantor and remitting every grantee to his own covenantor. The case of *Booth vs. Starr*, 1 Conn. 244, first exposed the unsoundness of the law of *Kane vs. Sanger*, and established certain principles which afford a satisfactory disposition of the whole matter. They are,

1st. That the owner at the time of breach, whether he has or has not taken covenants from his own grantor, may sue the first covenantor, and any or all intermediate ones.

2d. That an intermediate covenantor does not retain the right of action against prior covenantors, merely because of a prospective liability on his own covenants.

3d. That an intermediate covenantor is entitled to sue on prior covenants, when he has been subjected to injury on account of his own covenants.

These conclusions were afterwards adopted in *Withy vs. Mumford*, 5 Cowen 137, overruling *Kane vs. Sanger*, and they have since been enforced in numerous decisions in different states: 12 N. H. 413; 1 Aiken 239; 3 Cush. 222; 10 Wend. 180; 2 Penn. 507; 1 Dev. & Bat. 94; 1 Hawks 410; 5 Monroe 357; 10 Geo. 311; 1 Fairf. 91; 13 Basle S. C. 283; 36 Maine 170. As to the precise principle of the last of the above rules, some of the authorities intimate that when a covenantor becomes himself a grantor and covenantor, he still holds the former covenants for some pur-

pases; while others regard the covenant as extinguished so far as he is concerned, and afterwards revived by payment. In *Markland vs. Crump*, 1 Dev. & Bat. 94, this matter is illustrated by the analogy of negotiable commercial paper. The holder of a negotiable note is at liberty to sue, not only his immediate endorser, but any whose names appear upon the paper; but no endorser can sue those prior to himself until he has taken up the note from the last holder and holds it for his own use.

So, the covenants for title are considered as temporarily lodged with the last grantee, he being the one most interested in enforcing them. An intermediate grantor who conveys with covenants, stands in a position like that of an endorser; and when he has satisfied his own covenants, thereby "*takes up*," as it were, the covenants for his own use. Nor is it necessary for this purpose that he shall *regain* the estate to which the covenants are incident. For, although, when the covenants are once effectually broken, they cease to run with the land, to protect future owners, they still subsist, detached from the land, for the sole purpose of being satisfied for the indemnity of the parties entitled to it.

As an intermediate covenantor cannot sue until he has been himself damnified, he may be left without any indemnity by the neglect or refusal of the last grantee to proceed against any one, until the original covenantor becomes insolvent. It would seem to be just that an intermediate covenantor, suspecting that he should lose his indemnity in case the last grantee elects to proceed against him, should have the privilege of tendering the amount that might be realized, from his own covenants, and then resorting at once for his indemnity, to the prior covenantors. But for this, there is at present no authority. This topic has suggested several questions respecting *damages*, which appear never to have been adjudicated. Where the measure of damages is the value of the land at the time of eviction, there can be no difficulty; it would be immaterial to the last grantee whether he recovered from his immediate grantor or a more remote one, since the amount recovered would be the same in either case.

But in most of the states the measure of damages is the value

of the land at the time of the sale, or the consideration-money with interest. The last grantee would therefore naturally sue on a breach of a covenant running with the land, a later or more remote covenantor, according as the land has increased or diminished in value. Intermediate covenantors would not recover over the exact sums they had been compelled to pay; but in this there is no hardship, since each one pays only the consideration he received when he sold the land. It is held that a full recovery against any one covenantor, is a bar to any future recovery: 9 Ohio 595. But suppose A., B., C., and D. are successive grantors of land, who receive for it respectively \$4000, \$6000, \$8000, and \$10,000. If now E., the last grantee, succeeds in actually recovering from D. \$7000, and proceeds against C. for farther damages; what amount can be recovered from C.? So far as he is concerned, the measure of damages is only \$8000, of which 7000 has been already recovered. Must he pay \$3000, or only \$1000? Or, if all the grantors are sued simultaneously, as may be done, (9 Ohio 595; 12 N. H. 413; 1 Aiken 239), what is then the true measure of damages? Or again, if D. pays \$7000, and C. \$3000, what can they respectively recover over from A.? Can he who sues first obtain full payment, leaving the others unprovided for? It must be clear that no grantee can recover more than the largest sum which any one covenantor would be liable to pay, from all the covenantors together; and it would seem reasonable that when several have paid, there should be a pro rata distribution of the indemnity, which can be recovered over as among sureties.

Again, suppose an estate has depreciated in value so that the consideration-money has become less at each successive transfer, and the last grantee, doubting the solvency of the first covenantor, or for any cause, elects to sue a later covenantor from whom he recovers in full; is this covenantor who has paid, so fully invested with the rights of the last grantee, that he may recover from the first covenantor *the whole consideration* received by him, or only indemnity *for what* he has actually paid?

The latter rule would probably be the better one. A covenantor who has once satisfied his own covenants, is fully discharged from

any farther liability on them; it therefore becomes later covenantors, before paying on their covenants, to see to it that there has been no recovery from those on whom they depend for indemnity. A curious case, illustrative of this, occurred recently (1859) in Ohio. In *Wilson vs. Taylor's Ex'rs.*, 9 Ohio 595, there had been several conveyances, all with warranty. The last grantee having been evicted, brought simultaneous actions against all the prior grantors, and recovered judgment against them all. The first grantor satisfied the judgment against him, and afterwards the second grantor did likewise; whereupon the executors of the second grantor brought this action against the first grantor for indemnity. The court decided that although the last grantee could have his several simultaneous actions (see 5 Ohio 155; 10 Ohio 317), he could have but one *satisfaction*; and when he had collected the amount of the judgment against the first grantor, his claim under all the covenants was extinguished; that the farther enforcement of them was wrongful; and that therefore the second grantor should have resorted to a court of equity to restrain the collection of the judgment against him; or having paid it, should sue to recover back the money, but could not fall back for it on the first grantor.

3. Of the division of the remedy, on covenants for title which run with the land.

The ownership of the land to which covenants are incident, does not of course remain in all cases undivided. Mr. Preston (3 Preston's Abstracts 57, 58,) was of the opinion that when property is divided by sales, the purchaser loses the benefit of the former covenants. "Thus," he says, "when a man sells two farms to A., covenanting with him, his heirs and assigns, and one of the farms is sold by A. to B., B. can never sue on the covenants, as this would subject the covenantor to several suits." Sir Edward Sugden (*Sugden on Vendors* 508) has controverted this doctrine; and it seems to be both in conflict with authority and contrary to principle. For,

First. It is not certain that the covenantor will be subjected to more than one suit. If A. sells land to B., who sells it again, one

half to C., the other to D., in the event of a breach of the covenants, both C. and D. *may elect* to proceed against B., who will then recover over against A. in a single suit. But if A. was not primarily liable to C. and D., then according to previous discussion, he would not be liable to indemnify B., which is *absurd*.

Second. The very nature of the covenants implies that there *may be* several actions on them. There may be several interruptions from *distinct causes* of the quiet enjoyment, for each of which a separate action will lie; or the covenant of warranty may be broken by successive evictions from portions of the land, under distinct claims, for each of which an action may be had for damages *pro tanto*.

Third. Future subdivisions may fairly be presumed to be contemplated, when the covenants are entered into.

Fourth. The ancient warranty for which the covenants for title were substituted, was apportionable. Co. Litt. 309*.

In *Dougherty vs. Dewall's Heirs*, 9 B. Mon. 57, it was held that a remote grantee of only a part of the land may maintain an action in his own name against the first grantor, for his proportion of the covenant remedy. To the same effect is the decision in *Astor vs. Miller*, 2 Paige 68. In *Dickinson vs. Hoome's Adm'r.*, 8 Grattan 406, the same rule is adopted. It is said that "as covenants that run with the land are assignable because the land itself is assignable, so also it would seem that the covenants are apportionable, because the land itself is apportionable."

Other cases have recognised this doctrine, which may now be regarded as a settled rule of law. It is uncertain how far the same rule applies, when, not the land itself, but the *estate* in the whole land is divided, as when one has a life estate, and another the remainder in land. There is no doubt but that all the partial owners *may* join in a *common action* on the covenants to secure their respective rights. 3 M. & S. 409. But this is not always practicable. It is understood to be the doctrine of the English courts, that any partial owner of an estate may separately recover for the special damage to his interest in the land arising from a breach of the covenants (Dart's Vendors 366; 9 Jarman's Con-

veyancing 404; 2 Simons 343; 2 B. & Ad. 105; 1 M. & S. 355; 4 Id. 53; Rawle on Coven. 343); just as a lessee and a reversioner of land may sue separately for the injury to their respective rights from a trespass to the land. The current of American authority, so far as the question has arisen, is in an opposite direction. In *St. Clair vs. Williams*, 7 Ohio, 2d part 111, and also in *Tapscott vs. Williams*, 10 Ohio 442, the distinction is taken between a division of the land and a division of the estate, and while it is said that each party may sue separately, in the former case, it is held to be otherwise in the latter case. These same views are entertained in the later case of *McClare vs. Gamble*, 27 Penn. St. 288. The reasons for the distinction are not perfectly obvious, and the rule is open, to a great extent, to the same objections, in Mr. Preston's view, in case of a division of the land itself. However the rule may be ultimately settled, there are certainly some advantages in permitting separate actions, which may be sufficient to counterbalance any supposed inconvenience to the covenantor. In *White vs. Whitney*, 3 Met. 87 (before referred to), C. J. SHAW says, in substance, that if two parties own distinct interests in an estate derived from a common grantor, the one as a mortgagee, the other as a purchaser of the equity of redemption, both parties will be entitled to the benefit of the common grantor's covenants according to their respective interests. It is suggested, however, that in case suit were to be brought, before either foreclosure or redemption, there might arise some question as to the method of proceeding.

4. Of the release of covenants, and the effect thereof.

This branch of the subject includes two principles so well established as to require only a distinct statement of them. One is, that any owner of land may discharge the covenants that run with it, so that such discharge shall be binding upon himself and his estate. 40 Me. 293; 13 N. H. 467; 33 Miss. 117; 1 Basle S. C. 405; 4 Cush. 504; 19 Wend. 334. The other is, that one who parts with his interest in land, is thereby divested of all power, afterwards, to release covenants running with it, so as to affect

subsequent owners. 29 Me. 527; 12 N. H. 413; 30 Me. 346; 13 Missouri 271; Cro. Car. 503; 13 Iredell (Law) 193.

Two highly important inquiries remain, which have received little or no consideration from legal writers. The first is, To what extent does the release by one while owner of the land, of covenants still unbroken, intercept the rights of subsequent owners? It is sometimes stated that a release by the owner of land totally nullifies the covenants for all purposes, and as to all parties; and a dictum in *Middleman vs. Goodale*, 1 Cro. Car. 503, is cited to that effect. We conceive, however, that this statement is open to considerable qualification. The question has usually been incidentally presented in cases where an owner of land has sought to make a covenantor competent to testify in support of the title, by releasing him from his covenant liabilities; and the objection has been urged, that as the covenants run with the land, the covenantor still remains liable to future owners, and is therefore still incompetent as a witness. This view seems to have met with favor in *Abby vs. Goodrich*, 3 Day 433, though the decision was on other grounds. In the later case of *Clarke vs. Johnson*, 5 Day 373, the whole court seems to have been of the opinion that the covenantor would remain liable to future owners, after a release by the owner for the time being; still, a majority of the court held that it was sufficient that the witness was disinterested when offered, notwithstanding some contingent future interest; but BALDWIN, J., regarded this continuing liability an insuperable obstacle to the competency of the witness. In *Ford vs. Wadsworth*, 19 Wend. 334, under similar circumstances, the court held the released covenantor to be a competent witness. The court, COWEN, J., concedes the continuing liability to future owners, and considers this an argument rather *for* than against his competency. For, "supposing him to testify with this view, he would be influenced to terminate his eventual liability by favoring the plaintiff." The same decision was made in *Cunningham vs. Knight*, 1 Basle's S. C. 399, on the same grounds. The question came up in the same form in *Field vs. Snell*. 4 Cush. 504. Here the release was under seal, and was recorded in the registry of deeds. The court, DEWEY, J., under

these circumstances, considered it unnecessary to decide whether the covenantor would remain responsible to future owners, because if he did *not*, he was certainly a competent witness, and if he did remain responsible, then, *a fortiori*, as according to the above cases, was he competent. The case of *Littlefield vs. Getchell*, 32 Me. 320, decides that the released covenantor is a competent witness, and without any discussion, or citation of authorities, assumes that a continuing liability to future owners would be an obstacle, declares that this does not exist, and farther asserts, that the registry of deeds is not designed to be used to record releases of covenants. These are the principal cases on this subject. None seems to have arisen between a subsequent purchaser and a party released in order to testify; and the statutes of many of the states allowing interested parties to testify, render this particular class of cases somewhat less important. We apprehend the law in relation to the release of covenants, to be substantially as follows. An owner of the land *may totally* discharge covenants running with it. For it would be absurd to say that a party who has once become a *covenantor* can never terminate his liability by an arrangement with those interested in the covenants.

If therefore a covenantor, desiring to relieve himself from any contingent liability on his covenants, obtains, for a valuable consideration, a release of the covenants from the owner of the land, we have no doubt that this would avail against a subsequent purchaser. For, as is said by DEWEY, J., in *Field vs. Snell*, "all that the second grantee takes is the right to all covenants running with the land, that have not been legally discharged, or become *choses in action* in the name and right of some previous grantee." But as covenants for title are a valuable part of an estate, the release seems so far to partake of the nature of a conveyance of a portion of the estate, that the publicity of record *ought* to be required for the protection of purchasers. But when a release is not for the sake of any benefit to the covenantor, but for some collateral purpose, as to qualify him as a witness and there is no intention or design to do anything beyond that specific purpose, especially when, as is usual, no consideration is paid, and the

design of the release is as well, or even better accomplished by restricting the operation of the release to that specific design, we feel confident that the courts will sustain the claims of subsequent owners to the benefit of the covenants, especially when there is no notice of the release.

Our second inquiry concerns the effect of a release of the original covenantor on the rights of intermediate covenantors.

Suppose A. sells land to B., B. sells to C., and C. to D., all with warranty, and D. releases A. Can I afterwards maintain an action against B. or C., for a defect in the title at the time of A.'s conveyance which has caused a breach of the covenants? or does the release of A. bar any action for such a cause? It may be urged that the respective covenantor's covenants are independent of each other, and therefore a release of one can not affect another.

But the right of resort for indemnity to A., by B. and C., in case they are compelled by D. to satisfy their own covenants, seems to be entirely destroyed, since it was founded solely on the immediate liability of A. to D. If the release was for a valuable consideration, we think there is little doubt that it would be held to be a full satisfaction, at least against the party granting the release for any future breach for which the released party would have been liable. And in any case, it would seem very analogous to the rule which exonerates sureties when the creditor abandons securities from the principal debtor, to hold that the release of a remote grantor is a *relinquishment* of all right of action, for defects existing at the time of such grantor's conveyance. The court intimates in *Cunningham vs. Knight*, 1 Basle S. C. 399, that this would be the case, but there is no further authority on the question.

5. Of the effect of equities between the original covenanting parties.

Chief Justice LUMPKIN, in delivering the opinion of the court in the case of *Martin vs. Gordon*, 24 Geo. 537, which concerned covenants for titles, says, "The result of a careful examination of authorities establishes that subsequent purchasers are affected by equities between previous parties." None of the cases, how-

ever, are given which were subjected to the "*careful examination*," and the context makes it very evident that the learned judge had in mind an entirely different class of cases than those relating to *prior equities*. Besides, McDONALD, J., dissented from this opinion in a forcible discussion of the question, and fully confirmed his views by authorities. It appears to be fully settled by many adjudications, especially those in *Alexander vs. Schreiber*, 13 Missouri 271; *Suydam vs. Jones*, 10 Wend. 180; *Kellogg vs. Wood*, 4 Paige 578; and *Brown vs. Staples*, 28 Me. 497, that a subsequent purchaser without notice is wholly exempt from any equitable agreements between the original parties not to enforce the covenants, or in any way to modify or restrict their effect. And it is even questionable whether he is affected by mere notice of an equity which does not appear on the instrument containing the covenants, without something to indicate an intention or expectation on his part to be bound by the equity.

III. WHICH OF THE COVENANTS FOR TITLE RUN WITH THE LAND.

Having completed the general survey of the principles and rules that regulate covenants for title in running with the land, it remains to consider to what particular covenants for title these principles and rules are applicable.

The covenants some or all of which are ordinarily inserted in conveyances of land, are as follows—1. For seisin. 2. For right to convey. 3. Against incumbrances. 4. For quiet enjoyment. 5. For farther assurance (most common in England). 6. Of warranty (especially in this country). All of these, in theory, run with the land until broken. In England and some of the states, they do all, *in fact*, run with the land; but in many of the states, only the covenants for *quiet enjoyment* and of warranty have practically this capacity; the others, which are commonly called covenants *in presenti*, that is, covenants for the present existence of certain facts, are said to suffer an instantaneous breach, by the non-existence of those facts, and thus to become disabled to run with the land. The following discussion will be confined mainly to the disputed covenants, and as the same considerations are generally alike appli-

cable to them all, it will save repetition, to consider them all included, except when otherwise stated.

The English rule was first settled in the two cases of *Kingdon vs. Nottle*, 1 Maule and Selw. 355; 4 Ed. 53. In the first of these cases, the plaintiff declared as executrix, on a breach of the covenant for seisin, entered into with the plaintiff's testator; but it being shown that the only breach accruing in the testator's lifetime was the mere non-existence of seisin in the covenantor, from which the estate had sustained no real injury prior to the testator's death, judgment was rendered for the defendant. But when the plaintiff afterwards declared as devisee of the covenantee, and proved a substantial injury to the estate, caused by the defect of title since the death of the covenantee, and the objection was raised, that there had been an instantaneous breach, and consequently a personal right of action in the covenantee in his lifetime, which could not be assigned, it was held that although, "according to the letter, there was a breach in the testator's lifetime," yet "according to the spirit, the substantial breach is in the time of the devisee." And it is said that "so long as the defendant has not a good title, there is a continuing breach, as of a covenant to do a thing *toties quoties*, as the exigency of the case may require.

It must not be inferred, as some dicta in the cases might indicate, that covenants will run with the land even after they are once totally broken. This idea is positively negated by later cases. 2 C., M. & R. 588; 12 M. & W. 718; 7 Com. B. 310. The English rule has been enforced in Indiana (5 Blackf. 232; 5 Ind. 393; 17 Ind. 674), Ohio (3 Ohio 216; 10 Id. 327; 17 Id. 60), and Missouri (23 Missouri 162; Id. 179).

In Maine, where the contrary doctrine had become established by precedent (Rev. St. of Me. 1841, ch. 115), the English rule was adopted by statute. But a majority of the states still adhere to the doctrine of an instantaneous breach, and a consequent right of action which arrests the covenants from running with the land. In Massachusetts, the English rule seems to have been, formerly, practically applied to the covenant against incumbrances (9 Mass. 143; 10 Id. 313; 17 Id. 588); but the opposite rule now applies

to this equally with the covenants for seisin and right to convey. 8 Pick. 549; 13 Id. 327; 22 Id. 494; 3 Met. 394; 6 Cush. 128; 6 Gray 424.

It is proper to remark here, that it is held that the covenant against incumbrances may be made to run with the land by joining it with a covenant for quiet enjoyment; the grantor covenanting that the grantee and his assigns "shall quietly enjoy, *and that free from all incumbrances.*" Gilbert's Eq. Reps. 7, notes; 16 Me. 281; 17 Ohio 74; 2 Spears 652; 8 Johns. 153; 9 Rich. (Law) 377; 3 Zab. 273.

The American rule was adopted in New York in the case of *Greenly vs. Wilcox*, 2 Johns. 1, prior to the English decisions in *Kingdon vs. Nottle*, but against a strong and elaborate dissenting opinion by Mr. Justice LIVINGSTON. Although this decision has since been followed in several cases, it is doubtful, for reasons which we shall shortly notice, whether it is now the law of that state. There are many authorities in the different states for the American rule which our limits forbid reviewing (1 Aiken 233; 2 Vt. 327; 5 Conn. 497; 6 Id. 249; 2 Mass. 455; 16 Pick. 68; 22 Id. 490; 3 Met. 390; 4 Johns. 72; 6 Cowen 123; 21 Wend. 120; 1 Pennington 407; 5 Halst. 20; 7 Id. 261; 3 Zab. 270; 3 Dev. 30; 3 Id. 200, and many other cases); the grounds of them all are naturally, substantially the same. Before noticing them more in detail, we would offer three general considerations, which seem entitled to considerable weight.

First. The covenants for title were introduced for a most useful purpose.

It is the office of judicial tribunals to shape them by practical rules, but suited to effect that purpose. One of the most valuable features of these covenants is their capacity to run with the land, and the only objections which can prevent them from so doing are purely technical, as is conceded by those who often reluctantly feel compelled to admit the validity of these objections. 4 Kent. 557. We do not claim that the rules which govern covenants for title should have no regard to technicalities, but it would seem that the law having recognised these as the instrumentalities for effecting

certain valuable and beneficial results, must exempt them from mere technical hindrances, *so far as is necessary to enable them to accomplish these results.*

Second. It was manifestly the original expectation that all the covenants would run with the land. The phraseology of them would seem to be conclusive evidence of this. But this opinion is most strongly confirmed, when it is considered that they were substituted for the ancient warranty, which was pre-eminently a covenant real, and ran with the land. It was never designed that the modern covenants should dispense with any valuable feature of the old method of securing titles, but only that they should omit cumbersome and objectionable qualities, and afford a more sure and satisfactory remedy. If it had been anticipated that the important covenants of seisin, right to convey, and against incumbrances, were to be beneficial only to the immediate covenantee, it is doubtful whether they would ever have been introduced; at least, their value would never have been so highly estimated.

Third. Whatever merit the American rule may possess, it is certain that the rule itself owes its prevalence, to a very great extent, to a misconception of two early cases. *Lewis vs. Ridge*, Cro. Eliz. 863, and *Lacy vs. Levington*, 2 Levinz 26, 1 Ventris 175; which have often been regarded as conclusive in favor of the American rule, were not considered in conflict with *Kingdon vs. Nottle*. And Mr. Rawle has in a very satisfactory manner shown that they do not support the position for which their authority is relied upon, and that they both decide "no more than that after a total breach, the covenant becomes a chose in action, and therefore incapable of transmission or descent." Rawle on Coven. 348.

We proceed to examine briefly the several specific grounds on which the different rules are advocated, and also the objections to them. The general ground of the American rule has been already stated; the particular forms in which this ground is developed in the different cases are chiefly these:—

1. That if the covenantor is not seised, or has no right to convey, no land passes as an estate or substratum to support the covenants.

2. That the covenants are in terms *in presenti*, and not a security against future injuries.

3. That the non-existence of the facts covenanted for, is a breach for which there can be but a single right of action; that the *immediate covenantee has that right*, and therefore the assignee *cannot have it*. The grounds on which the English rule is urged are,

1. That the non-existence of the facts covenanted for is, at most, only a nominal breach, and that the right to recover damages belongs only to him who suffers actual injury, even though he is an assignee. 2. That although there is an immediate breach, this breach is continuing until actual loss results from it.

The first ground for the American rule does not apply to the covenant against incumbrances, but it applies with the same force to the covenant for quiet enjoyment and of warranty, and has been already sufficiently disposed of. Ante 207, *et seq.*

The second ground seems entitled to very little weight. The fact that the covenants are expressed in the present tense does not make them any the less prospective in substance. On this point, the views of LIVINGSTON, J., in *Greenly vs. Wilcox*, 2 Johnson 46, already alluded to (ante 198) deserve consideration. He then founded the ability of the covenant for seisin to run with the land, on the words of the contract, by which the covenants passed to every grantee *ad infinitum*. As has been shown, words descriptive of future owners cannot of themselves impart to covenants a capacity to run with the land; but they may assist to interpret the nature of the covenant, and thus remove technical difficulties. Taken as a whole, the covenants in question are an engagement to indemnify any one who suffers by a breach of them.

The chief difficulty arises on the third ground of the American rule, which is directly opposed to the first ground of the English rule. According to the *former*, there is an immediate right of action in the covenantee, so complete, that an assignee can maintain no action, although he suffers an actual injury. It would seem to follow from the latter, that there can never be a recovery of substantial damages, until some injury occurs beyond the simple non-existence of the facts covenanted for.

It is manifest that either rule must occasion many cases of hardship. Ordinarily, when the title to an estate is discovered to be invalid, this puts a stop to any farther alienation of it; but frequently a defect lies concealed and unknown, until at length it causes a loss to one who may be removed by many intermediate conveyances from the original grantee. If in such a case the original deed did not contain the covenants admitted to run with the land, or if the breach could not be included under those covenants, the last grantee would be left wholly without remedy against the first grantor. This hardship is much more aggravated when each grantor covenants only against his own acts. A most cogent argument against the American rule, is, that if the right of action becomes instantaneously complete, as soon as the covenants are made, it must follow that the statute of limitations begins forthwith to run against the claim, which may thereby be extinguished long before its very existence is known. On the other hand, if a mere nominal or technical breach, as it is called, confers no right of action, a purchaser who finds the title to the land to be worthless on account of some latent defect which has caused, as yet, no active injury, is compelled to stand by, and forego securing indemnity until the covenantor may become irresponsible; and if, as some of the authorities intimate, the covenantee may, on such a breach, recover *nominal* damages, this is certainly a very inadequate compensation for a worthless title. It is too obvious to need argument that the equitable rule on this subject would be one which would, first, give a right of immediate action for the recovery of plenary damages to the covenantee, as soon as the want of title is detected, without awaiting farther injury (this recovery amounting to a rescission of the contract of sale), (Rawle on Covenants, p. 75, *et seq.* and cases cited); and, second, vest the whole right of action in the assignee, in case the defect is not discovered, or if no suit has been brought prior to the assignment. The problem consists in reconciling the two parts of the rule, although the obstacle is only technical, so that the *covenantee*, or the *assignee*, MAY have the right of action for the same breach. Lord ELLENBOROUGH, in *Kingdon vs. Nottle*, gave the assignee the right of action through

the idea of a continuing breach. It must be admitted that this idea of a continuing breach is open to objection, and we conceive that the unsatisfactory nature of this reason has sometimes occasioned the rejection of the rule which it was designed to support. We would suggest whether the following view, though new, and probably not entirely unobjectionable, is not more satisfactory. The non-existence of the facts covenanted for, may of itself become a serious injury to the estate (as, by preventing its sale), and ought without anything more, to be a good foundation for an action on the covenants, if the covenantor choose so to regard it.

But, if the covenantor remains ignorant of the defect until the land is assigned; or if, knowing it, he elects not to treat it as a breach of the covenants (perhaps expecting that the defect will be removed before causing any positive injury), and under these circumstances assigns the land, it is reasonable to consider the assignee as fully invested with all right in the covenants, as the covenantor was before assignment. Stated more briefly, our view is, that a technical breach may become a substantial one, by being treated as such. And this view seems to have analogies in the law, for example, as the owner of the land may in many cases *elect* to treat one who wrongfully enters it, either as a trespasser, or a tenant at sufferance, or, as in many cases it is optional with one party to a contract, to treat it as broken, or as remaining in force. But whether this or any other view is sufficient to surmount all technical scruples, it is certain that the rule proposed (which is the English rule slightly modified) is the only adequate one for the protection of purchasers; and if courts cannot consistently adopt it, it is a proper subject for legislative action. The matter is regulated in Maine, by statute, substantially on this basis.

Since the fundamental reason for the American rule, is the non-assignability of choses in action, it would seem that where this doctrine does not exist, the rule itself must be abandoned, and a conveyance of the land treated as an assignment of all rights of action on the covenants. There is an intimation to this effect by the court in *Redwine vs. Brown*, 10 Geo. 311, and in New York, the very recent case of *Calby vs. Osgood*, 29 Barb. 339, under the