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MEASURE OF DAMAGES FOR THE BREACH OF THE COVENANTS OF QUIET ENJOYMENT AND WARRANTY

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THE current activity in real estate gives impetus to the importance of the remedy afforded a covenantee for the breach of the covenants of quiet enjoyment and warranty. While the subject has received only casual attention from the law courts, being infrequently litigated, it is likely, however, that the lawyer, because of this increased activity, will be called upon more often to answer the questions arising from the breach of these covenants.

Briefly, a covenant of quiet enjoyment may be defined as an agreement that the grantee will not be evicted by a title paramount or by any act of the grantor, while the covenant of warranty is one whereby the grantor agrees to execute any instrument necessary for the interest of the grantee, and to defend the premises. Both covenants, then, are assurances to the purchaser and his assigns against loss of title and possession. They are usually treated as synonymous since the concurrence of the same circumstances is necessary to constitute a breach.[1] The covenants relate to the possession of the subject matter of a conveyance rather than to the state of the title. The modern covenant of warranty is the outgrowth of the old common law warranty and is now merely a personal covenant, a breach of which entitles the covenantee to the recovery of damages. The early common law did not recognize personal covenants; however, the feoffment was usually attended with a warranty which was a common law form of covenant of title.[2] The remedy upon the warranty developed

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[1]6 Sutherland, Damages, (4th Ed.); Hayden v. Patterson, 39 Colo. 15, 88 Pac. 437 (1906).

[2]In assisses, the tenant could bring a writ of warrantia chartae against the warrantor to compel him to assist with a good plea or defense, or else render damages. If there was a recovery against the tenant the judgment simultaneously was good against the warrantor to recover other lands of equal value. 3 Blackstone 300. Until the statutes of Merton, Marlbridge, and Gloucester (52 Henll, c. 16, A. D. 1267) damages were not recoverable for real actions. (See reading of Coke on these statutes, 2 Institute.) The warranty which usually attended with a feoffment was in its nature a covenant real, that is, compensation for its breach was awarded, not in damages, but in kind. The judgment was against the warrantor for the recovery of other lands of equal value to those of which the warrantee had been deprived. The determination of the value, however, was always that of the land at the time the warranty was made and not the enhanced value at the time of the eviction.

into what is known as a mixed action wherein the warrantee recovered land in so far as the warrantor could render other land of equal value, and damages to make up the deficiency. This stringent rule was soon to find disfavor, and the warranty became recognized as a personal covenant for the breach of which an action for damages may be maintained as often as there is an eviction from any part of the land warranted.

The question of when the cause of action arises is aided in Colorado by statutory enactment which provides that nc right of action on the covenant may be had after possession is given until the party menacing possession shall have commenced legal proceedings and the grantor after notice shall have refused or failed to defend.[3] The covenant is not broken by a tortious disturbance nor by an eviction by a stranger because it is beyond the control of the grantor and the grantee may have his remedy against the wrongdoer. Cases hold that a paramount title amounts to an eviction, but in Colorado under the statute referred to an eviction alone is insufficient. The covenantee cannot surrender possession to the holder of the paraount title before suit is brought.[4]

In Tierney v. Whiting,[5] the plaintiff sued for breach of the covenant claiming eviction by paramount title. The defendant pleaded that the plaintiff was never lawfully evicted. The plaintiff had derived title by the sale of the administrator of the estate of the owner. The defendant, as the owner's widow, had possession. The court held that the statute requiring the commencement of legal proceedings as a condition

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[3]Colo. Comp. Laws (1921), Sec. 4887. Damages for which the warrantor is liable may be diminished by any profit which the warrantee has recovered from the person bringing the eviction action. A restoration after eviction does not defeat the right to bring the action but may go in mitigation of the damages.

It is an ancient maxim of law that no title is completely good unless the right of possession be joined with the right to the property, which right is denominated a double right and when to this double right the actual possession is also united then there is, and then only, a complete legal title. 2 Blackstone 191. When none of the parties have been in actual possession the covenant is broken at a time not later than when the grantee is obliged to buy an outstanding title decreed to be in another. Hayden v. Patterson, 39 Colo. 15, 88 Pac. 47 (1906).

Ernst v. St. Clair, 71 Colo. 353, 206 Pac. 799 (1922), held that notice to the warrantor was a condition precedent to the bringing of the action by the warrantee. See also Hurd v. Smith, 5 Colo. 233 (1880).

[4]Seyfried v. Knoblauch, 44 Colo. 86, 96 Pac. 993 (1908); 2 Colo. 620 (1875).

[5]2 Colo. 620 (1875).

precedent, did not apply when the grantee has not obtained possession nor when the holder of the adverse title has possession prior to and since the deed was executed. The paramount title must be shown to exist before or at the time the defendant made his covenant and the burden of proof is upon the plaintiff to show the party by whom he was evicted had the better title.[6]

Before discussing the damage action as a recourse for the breach, it is well to consider other rights of which the grantee may avail himself. Colorado, like many of the other states, has put upon its statute books an act for the registration of land titles. By the operation of this law a grantee may register his title by making application to the district court of the county wherein the land is situated, the effect of which is to quiet title in the grantee.[7] The covenantee may then avail himself of this safeguard. An action to quiet title after a breach, while adequate, would, under some circumstances, defeat the right to complete compensation to which the covenantee is entitled. This is so because the action is limited to the determination of title and not to the recovery of damages. When there has been a breach of the covenant the main inquiry is, of course, what is an adequate compensation to the party injured? Hence, it is of greater importance to ascertain the germane rules by which the amount of damages is to be determined.

Perhaps the earliest case on the subject in this country set forth what is known as the New York Rule, established in the early case of Staats v. Ten Eyck.[8] The defendant's testator had owned certain lots which came by mesne conveyances to C, the grantee of the plaintiff. C, being evicted, recovered against the plaintiff, who then sued the defendant on

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[6]When the covenantee has extinguished the paramount title he will be limited to the amount paid by him for that purpose including incidental expense and a reasonable compensation for his trouble, but in no event will it exceed in all the limit of damages for a total breach. See also Stone v. Rozisk, 88 Colo. 399, 297 Pac. 999 (1931).

[7]Colo. Comp. Laws (1921), Sec. 4924-5025.

[8]3 Cainess 111 (N. Y.), 2 Am. Dec. 254.

the covenants of seisin and quiet enjoyment.[9] The principal question determined in the case was whether the measure of damages was the value of the property at the time of the eviction, or at the time of the conveyance. The court applied the common law rule that the recovery would be measured by the value of the land at the time the warranty was made. The general rule for the measure of damages when there is a total breach of the covenant includes the value of the premises at the time of the conveyance determined by the consideration paid; interest to the time of the trial; mesne profits; and costs and expenses incurred in defense of the title.[10]

While most jurisdictions, including Colorado, have adopted this general rule the covenant is regarded in some New England states as intended to indemnify the covenantee for any loss suffered by him, and as consequently to entitle him to damages to the extent of the value of the land at the time of the eviction.[11] The adopted rule very definitely does not allow recovery for an enhanced value of the land.

Upon this point there is opportunity for a change in the law. Inasmuch as the rule of Hadley v. Baxendale applies so that the compensation must equal the injury, there are circumstances under which the enhanced value may be a proper inquiry. When the enhanced value is by reason of natural development, there should be no quarrel with the present rule. When the covenantee in good faith at his own expense makes improvements which he cannot remove, it is contrary to the fundamental concept of the law of damages to refuse recovery for the improvements. An analagous situation where a

[9]In Colorado the covenant runs with the land and inures to the benefit of all subsequent purchasers and incumbrancers. Com. Laws (1921), Sec. 4886. The covenantee cannot release the covenant to an assignee and the assignee still has the right of action against th original covenantor. The measure of damages for breach of the covenant in a suit brought by a remote grantee is the consideration paid by the warrantee to his immediate grantor with interest but not to exceed the amount of consideration given for the original conveyance by the original grantee. Although the original grantee may sue all the previous covenantors simultaneously he is entitled to but one satisfaction. A several judgment may be recovered but each is limited to the consideration received by each grantor from the subsequent grantee. This rule gives compensation for loss and that is all any evicted grantee can reasonably expect. Taylor v. Wallace, 20 Colo. 211, 37 Pac. 963 (1894).

[10]Tibbets v. Terril, 44 Colo. 86, 96 Pac. 993 (1908); Jones v. Hayden, 3 C. A. 303 (1893); for collection of cases see 4 Sutherland, Damages (2nd Ed.), pp. 2097-2098; Staats v. Ten Eyck (N. Y.), 3 Cainess 111.

[11]Gore v. Braxier, 3 Mass. 523, 3 Am. Dec. 182.

person claiming under a tax title makes improvements on the land, Colorado has consistently held that recovery could be had for improvements made in good faith.[12]

Two of the more important specific elements of damage are attorney's fees and interest. The general rule with reference to the former is that unless the contract provides therefor or contemplates them they are not recoverable, but if the plaintiff in good faith prosecutes or defends a previous action, then attorney's fees will be granted.[13] In allowing interest the modern trend is for the courts to recognize that no good reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages. Interest, therefore, is a proper element of damages to be made in view of the demands of justice rather than through the application of an arbitrary rule of law. Interest is generally computed to the time of the trial upon the amount of the consideration paid.[14]

The law involved in this discussion is of a peculiarly technical nature; however, the authorities cited are offered to the general practitioner as an indices to the governing authorities upon the general title.

[12]Knowles v. Martin, 20 Colo. 393, 38 Pac. 467 (1894); Central Realty Co. v. Frost, 76 Colo. 413, 232 Pac. 111 (1924).
[13]21 A. L. R. 332.
[14]Sedgwick on Damages (8th Ed.), Par. 299, 300, 312, 315.

DID YOU KNOW THAT—

A Tennessee law makes it necessary for the driver of an automobile to give ten days' notice that he is going to drive on any road—by tacking notices alongside said road?

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It is illegal to carry a cane in Texas?

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The town of Glen Cove, N. Y., imposes a fine of $10 on any person caught digging more than 24 sand worms at one time?

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A statute in Kansas requires that every able-bodied citizen between the ages of 21 and 60 shall kill grasshoppers one day each year?

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A law of the town of Nottingham, Me., provides that hogs must be allowed to roam loose between March 1 and October 20?

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A North Carolina law makes it illegal to sing out of tune?